Federal Register

Thursday,
July 1, 2004

Part II

Environmental Protection Agency

40 CFR Part 93

Transportation Conformity Rule Amendments for the New 8-hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards and Miscellaneous Revisions for Existing Areas; Transportation Conformity Rule Amendments: Response to Court Decision and Additional Rule Changes; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 93

[FRL–7774–6]

RIN 2060–AL73; 2060–AI56

Transportation Conformity Rule Amendments for the New 8-hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards and Miscellaneous Revisions for Existing Areas; Transportation Conformity Rule Amendments: Response to Court Decision and Additional Rule Changes

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Today we (EPA) are amending the transportation conformity rule to finalize several provisions that were proposed last year. First, today's final rule includes criteria and procedures for the new 8-hour ozone and fine particulate matter ($PM_{2.5}$) national ambient air quality standards (NAAQS or ''standards''). Transportation conformity is required under Clean Air Act section 176(c) to ensure that federally supported highway and transit project activities are consistent with (''conform to'') the purpose of a state air quality implementation plan (SIP). We are conducting this rulemaking in part to revise the conformity regulation in the context of EPA's broader strategies for implementing the new ozone and $PM_{2.5}$ standards.

The final rule also addresses a March 2, 1999 ruling by the U.S. Court of Appeals for the District of Columbia Circuit (*Environmental Defense Fund* v. *EPA, et al.*, 167 F. 3d 641, D.C. Cir. 1999). This final rule incorporates into the transportation conformity rule the EPA and Department of Transportation (DOT) guidance that has been used in place of certain regulatory provisions of the rule since the court decision.

DOT is EPA's federal partner in implementing the transportation conformity regulation. We have consulted with DOT on the development of this rulemaking, and DOT concurs with this final rule.

EPA notes that a supplemental notice of proposed rulemaking will be published in the near future to request additional comment on options related to $PM_{2.5}$ and PM_{10} hot-spot requirements. EPA is also not finalizing at this time any requirements for addressing $PM_{2.5}$ precursors in transportation conformity determinations for $PM_{2.5}$ nonattainment and maintenance areas. EPA is considering the transportation conformity rule's $PM_{2.5}$ precursor requirements in the context of EPA's broader $PM_{2.5}$ implementation strategy. All of these issues will be addressed in a separate final rule to be issued before $PM_{2.5}$ designations become effective.

EFFECTIVE DATE: August 2, 2004.

ADDRESSES: Materials relevant to this rulemaking for the November 5, 2003 proposal (68 FR 62690) are in Public Docket I.D. No. OAR–2003–0049. Materials relevant to this rulemaking for the June 30, 2003 proposal (68 FR 38974) are in Public Docket I.D. No. OAR–2003–0063. For more information about accessing information from the docket, see Section I.B. of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Meg Patulski, State Measures and Conformity Group, Transportation and Regional Programs Division, U.S. Environmental Protection Agency, 2000 Traverwood Road, Ann Arbor, MI 48105, *patulski.meg@epa.gov*, (734) 214–4842; Rudy Kapichak, State Measures and Conformity Group, Transportation and Regional Programs Division, U.S. Environmental Protection Agency, 2000 Traverwood Road, Ann Arbor, MI 48105, *kapichak.rudolph@epa.gov*, (734) 214–4574; or Laura Berry, State Measures and Conformity Group, Transportation and Regional Programs Division, U.S. Environmental Protection Agency, 2000 Traverwood Road, Ann Arbor, MI 48105, *berry.laura@epa.gov*, (734) 214–4858.

SUPPLEMENTARY INFORMATION:

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

I. General Information
I. Background on the Transportation Conformity Rule
II. Conformity Grace Period and Revocation of the 1-hour Ozone Standard
III. General Changes in Interim Emissions Tests
IV. Regional Conformity Tests in 8-hour Ozone Areas That Do Not Have 1-hour Ozone SIPs
V. Regional Conformity Tests in 8-hour Ozone Areas That Have 1-hour Ozone SIPs
VI. Regional Conformity Tests in $PM_{2.5}$ Areas
VIII. Consideration of Direct $PM_{2.5}$ and $pm_{2.5}$ Precursors in Regional Emissions Analyses
IX. Re-entrained Road Dust in $PM_{2.5}$ Regional Emissions Analyses
X. Construction-Related Fugitive Dust in $PM_{2.5}$ Regional Emissions Analyses
XI. Compliance with $PM_{2.5}$ SIP Control Measures
XII. $PM_{2.5}$ Hot-spot Analyses
XIII. PM_{10} Hot-spot Analyses
XIV. Federal Projects
XV. Using Motor Vehicle Emissions Budgets from Submitted SIPs for Transportation Conformity Determinations
XVI. Non-federal Projects
XVII. Conformity Consequences of Certain SIP Disapprovals
XVIII. Safety Margins
XIX. Streamlining the Frequency of Conformity Determinations
XX. Latest Planning Assumptions
XXI. Horizon Years for Hot-spot Analyses
XXII. Relying on a Previous Regional Emissions Analysis
XXIII. Miscellaneous Revisions
XXIV. Comments Not Related to Rulemaking
XXV. How Does Today's Final Rule Affect Conformity SIPs?
XXVI. Statutory and Executive Order Reviews

I. General Information

A. Regulated Entities

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

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

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

B. How Can I Get Copies of This Document?

1. Docket. EPA has established official public dockets for today's final rule. Materials relevant to this rulemaking for the November 5, 2003 proposal (68 FR 62690) are in Public Docket I.D. No. OAR–2003–0049. Materials relevant to this rulemaking for the June 30, 2003 proposal (68 FR 38974) are in Public Docket I.D. No. OAR–2003–0063. The

official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Air Docket in the EPA Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Ave., NW, Washington, DC. The Docket telephone number is (202) 566–1742. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744. You may have to pay a reasonable fee for copying docket materials.

2. Electronic Access. You may access this **Federal Register** document electronically through EPA's transportation conformity Web site at *http://www.epa.gov/otaq/transp/traqconf.htm*. You may also access this document electronically under the **Federal Register** listings at *http://www.epa.gov/fedrgstr/*.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. 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. Once in the EPA electronic docket system, select ''search,'' then key in the appropriate docket identification number.

II. Background on the Transportation Conformity Rule

A. What Is Transportation Conformity?

Transportation conformity is required under Clean Air Act section 176(c) (42 U.S.C. 7506(c)) to ensure that federally supported highway and transit project activities are consistent with (''conform to'') the purpose of the state air quality implementation plan (SIP). Conformity currently applies under EPA's rules to areas that are designated nonattainment, and those redesignated to attainment after 1990 (''maintenance areas'' with plans developed under Clean Air Act section 175A) for the criteria pollutants: ozone, particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM_{10}), carbon monoxide (CO), and nitrogen dioxide (NO_2). Today's final rule also applies the conformity rule provisions in fine particulate matter ($PM_{2.5}$) areas. Conformity to the purpose of the SIP means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment of the relevant national ambient air quality standards (NAAQS or ''standards''). EPA's transportation conformity rule establishes the criteria and procedures for determining whether transportation activities conform to the SIP.

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

Today's final rule includes provisions from two proposals that were published on June 30, 2003 and November 5, 2003, as described below. EPA has consulted with the Department of Transportation (DOT), our federal partner in implementing the transportation conformity regulation, in developing all aspects of this rulemaking, and DOT concurs with this final rule.

B. What Did EPA Propose on June 30, 2003 and Why?

Today's final rule incorporates existing federal guidance into the conformity regulation consistent with a previous court decision. A decision made on March 2, 1999, by the U.S. Court of Appeals for the District of Columbia Circuit affected several provisions of the August 15, 1997 rulemaking (*Environmental Defense Fund* v. *EPA, et al.*, 167 F. 3d 641, D.C. Cir. 1999; hereinafter referred to as the ''court decision''). Specifically, the court's ruling affected provisions that pertain to five aspects of the conformity rule, including:

(1) Federal approval and funding of transportation projects in areas without a currently conforming transportation plan and transportation improvement program (TIP);

(2) Provisions allowing motor vehicle emissions budgets from submitted SIPs to be used in transportation conformity determinations before the SIP has been approved;

(3) The adoption and approval of non-federal transportation projects in areas without a currently conforming transportation plan and TIP;

(4) The timing of conformity consequences following an EPA disapproval of a control strategy SIP (*e.g.*, reasonable further progress SIPs and attainment demonstrations) without a protective finding; and,

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

In response to the court decision, the EPA and DOT issued guidance [1] to address the provisions directly affected by the court decision. DOT also issued guidance on May 20, 2003, to clarify the conformity requirements as they relate to FHWA/FTA projects that require environmental impact statements.[2] In addition, FTA issued guidance on April 9, 2003, that further clarified which approvals are necessary for transit projects to proceed during a conformity lapse.[3] EPA and DOT consulted on the development of all of the guidance documents that were issued to implement the court decision.

This final rule incorporates all of these guidance documents, as proposed in EPA's June 30, 2003 rulemaking entitled, ''Transportation Conformity Rule Amendments: Response to Court Decision and Additional Rule Changes'' (68 FR 38974). EPA notes that although guidance implementing the court decision will still apply upon the effective date of this final rule, aspects of these guidance documents that are specifically addressed in this rulemaking will be governed by the

[1] May 14, 1999, Memorandum from Gay MacGregor, then-Director of the Regional and State Programs Division of EPA's Office of Transportation and Air Quality, to Regional Air Division Directors, ''Conformity Guidance on Implementation of March 2, 1999, Conformity Court Decision''; January 2, 2002, Memorandum from Mary E. Peters, Administrator, Federal Highway Administration (FHWA), and Jennifer L. Dorn, Administrator, Federal Transit Administration (FTA), to FHWA Division Administrators, Federal Lands Highway Division Engineers, and FTA Regional Administrators, ''Revised Guidance for Implementing the March 1999 Circuit Court Decision Affecting Transportation Conformity''; February 7, 2002, Notice, Issuance of Revised Guidance for Implementing the March 1999 Circuit Court Decision Affecting Transportation Conformity, **Federal Register,** 67 FR 5882.

[2] May 20, 2003, Memorandum from James M. Shrouds, Director, Office of Natural and Human Environment, FHWA, and Susan Borinsky, Director, Office of Human and Natural Environment, FTA, to FHWA Division Administrators, Federal Lands Highway Division Engineers, and FTA Regional Administrators, ''INFORMATION: Clarification of Transportation Conformity Requirements for FHWA/FTA Projects Requiring Environmental Impact Statements.''

[3] April 9, 2003, Memorandum from Jennifer L. Dorn, Administrator, FTA, to Regional Administrators, Regions 1–10, ''INFORMATION: Revised FTA Procedures for a Conformity Lapse.''

federal conformity rules when they become effective. In addition to issues affected by the court, the June 30, 2003 proposal and today's final rule include several amendments to other provisions of the conformity regulations. These amendments are aimed at improving the implementation of the conformity program.

The June 30, 2003 proposal and the comments received on that proposal serve as the basis for related provisions of today's final rule. The public comment period for the proposed rule ended on July 30, 2003. EPA received 25 sets of public comments on the proposed rule from MPOs; state and local transportation and air quality agencies; and, environmental, transportation and construction industry advocacy groups. Today's final rule makes several minor changes to the June 30, 2003 proposed rule in response to these stakeholder comments. The changes from the June 30, 2003 proposal and EPA's rationale for these changes are stated below. EPA has not, however, restated in this final rule background information and our complete rationale for many of the revisions to the conformity rule that are identical to the June 2003 proposal. The reader is referred to the proposal for such discussions. A copy of the proposal can be downloaded from EPA's transportation conformity website listed in Section I.B.2. of today's rulemaking.

C. What Did EPA Propose on November 5, 2003 and Why?

This final rule is also based on the November 5, 2003 proposed rule entitled, ''Transportation Conformity Rule Amendments for the New 8-Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards and Miscellaneous Revisions for Existing Areas'' (68 FR 62690), and the comments received on that proposal. The public comment period for this proposal ended on December 22, 2003. EPA held one public hearing for this proposal on December 4, 2003. EPA received over 110 sets of public comments on the proposed rule from MPOs, state and local transportation and air quality agencies, and environmental and transportation advocacy groups. EPA also received over 11,000 similar comments on the proposal from public citizens from a mass e-mail campaign. Today's final rule promulgates proposed options and rule revisions in response to these stakeholder comments. This preamble explains EPA's rationale for the selection of certain proposed options described in the November 2003 proposal. A copy of the November 2003 proposal can be downloaded from EPA's transportation conformity website listed in Section I.B.2. of today's rulemaking.

EPA's nonattainment area designations for the new 8-hour ozone standard are effective on June 15, 2004 for most areas, and EPA anticipates designating areas for the new $PM_{2.5}$ air quality standard in November or December 2004. EPA is conducting this rulemaking to provide clear guidance and rules for implementing conformity for these standards. Some of the conformity rule revisions in this rulemaking will provide more options and flexibility in demonstrating conformity. Other changes apply to existing 1-hour ozone, CO, PM_{10} and NO_2 nonattainment and maintenance areas.

EPA notes that today's action does not finalize new transportation conformity requirements for $PM_{2.5}$ precursors and $PM_{2.5}$ hot-spot analyses, or make changes to existing PM_{10} hot-spot analysis requirements. EPA is considering requirements for addressing $PM_{2.5}$ precursors in transportation conformity determinations in the context of EPA's broader $PM_{2.5}$ implementation strategy. EPA will soon be publishing a supplemental notice of proposed rulemaking to request additional comment on options related to $PM_{2.5}$ and PM_{10} hot-spot requirements. $PM_{2.5}$ precursors and $PM_{2.5}$/PM_{10} hot-spot analysis requirements will be addressed in a separate final rule to be issued before $PM_{2.5}$ designations become effective. See Sections VIII., XII., and XIII. for further information on these topics.

Other changes to the conformity program could occur in the future through the reauthorization of the Transportation Equity Act for the 21st Century (TEA–21), which authorizes federal surface transportation programs. EPA will continue to monitor the proposed reauthorization proposals for their potential impact on the conformity regulation. If statutory amendments to the conformity program result from TEA–21 reauthorization, EPA would take appropriate action to address such changes in the future.

D. What Parts of the Final Rule Apply to Me?

The following table provides a roadmap for determining whether a specific final rule revision included in this rulemaking would apply in your area. This table illustrates which parts of the final rule are relevant for various pollutants and standards. Please note that Sections V.–VII. provide stand-alone descriptions of the regional emissions tests that will apply in $PM_{2.5}$ areas and 8-hour ozone areas with and without existing 1-hour ozone SIPs. For example, if your area expects only to be designated nonattainment under the $PM_{2.5}$ standard, you should read Section VII. but not Sections V. and VI. (for 8-hour ozone areas). EPA believes that any redundancy between these sections is warranted to assist readers that may not need to read the entire final rule.[4]

Type of area	Issue addressed in final rule	Preamble section	Regulatory section
8-hour ozone	Conformity grace period	III.A.	§ 93.102(d).
	Revocation of 1-hour ozone standard	III.B.	Not applicable.
	General implementation of new standards	III.C.	Not applicable.
	Early Action Compacts	III.D.	Not applicable.
	Baseline year test	IV.B.	§ 93.119(b).
	Build/no-build test (marginal classification and subpart 1 areas[4])	IV.C.	§ 93.119(b)(2); § 93.119(g)(2).
	Regional conformity tests (moderate and above classifications)	IV.D.	§ 93.119(b)(1).
	Regional conformity tests (areas without 1-hour ozone budgets)	V.	§ 93.109(d).
	Regional conformity tests (areas with 1-hour ozone budgets)	VI.	§ 93.109(e).
	Definitions	XIV.A.	§ 93.101.
	Insignificance	XIV.B.	§ 93.109(k); § 93.121(c).

[4] ''Subpart 1 areas'' are areas that are designated nonattainment under subpart 1 of part D of title 1 of the Clean Air Act. EPA also referred to these areas as ''basic'' nonattainment areas in its April 30, 2004 final designations rule for the 8-hour ozone standard (69 FR 23862).

Type of area	Issue addressed in final rule	Preamble section	Regulatory section
	Transportation plan and modeling requirements (moderate and above classifications)	XIV.D.	§ 93.106(b); § 93.122(c).
	Non-federal projects (for isolated rural areas only)	XIV.F.	§ 93.121(b)(1).
$PM_{2.5}$	Applicability	III.A.	§ 93.102(b)(1).
	Conformity grace period	III.A.	§ 93.102(d).
	Baseline year test	IV.B.	§ 93.119(e).
	Build/no-build test	IV.C.	§ 93.119(e); § 93.119(g)(2).
	Regional conformity tests	VII.	§ 93.109(i).
	Precursors in regional analyses	VIII.	No regulatory text being finalized.
	Re-entrained road dust in regional analyses	IX.	§ 93.102(b)(3); § 93.119(f).
	Construction-related fugitive dust in regional analyses	X.	§ 93.122(f).
	Compliance with SIP control measures	XI.	§ 93.117.
	Hot-spots	XII.	No regulatory text being finalized.
	Definitions	XIV.A.	§ 93.101.
	Insignificance	XIV.B.	§ 93.109(k); § 93.121(c).
	Non-federal projects (for isolated rural areas only)	XIV.F.	§ 93.121(b)(1).
1-hour ozone	Revocation of 1-hour ozone standard	III.B.	No proposed regulatory amendments.
	Build/no-build test (marginal and below classifications)	IV.C.	§ 93.119(b)(2); § 93.119(g)(2).
	Regional conformity tests (moderate and above classifications)	IV.D.	§ 93.119(b)(1).
	Definitions	XIV.A.	§ 93.101.
	Insignificance	XIV.B.	§ 93.109(k); § 93.121(c).
	Limited maintenance plans	XIV.C.	§ 93.101; § 93.109(j); § 93.121(c).
	Transportation plan and modeling requirements (moderate and above classifications)	XIV.D.	§ 93.106(b); § 93.122(c).
	Non-federal projects (for isolated rural areas only)	XIV.F.	§ 93.121(b)(1).
	Clarification to use of approved budgets in conformity	XIV.G.	§ 93.109(c).
PM_{10}	Build/no-build test	IV.C.	§ 93.119(d); § 93.119(g)(2).
	Compliance with SIP control measures (Request for information only)	XI.	No proposed regulatory amendments.
	Hot-spots	XIII.	No regulatory text being finalized.
	Clarification to Precursors	XIV.E.	§ 93.102(b)(2); § 93.119(f)(5).
	Definitions	XIV.A.	§ 93.101.
	Insignificance	XIV.B.	§ 93.109(k); § 93.121(c).
	Limited maintenance plans	XIV.C.	§ 93.101; § 93.109(j); § 93.121(c).
	Non-federal projects (for isolated rural areas only)	XIV.F.	§ 93.121(b)(1).
	Clarification to use of approved budgets in conformity	XIV.G.	§ 93.109(g).
CO	Build/no-build test (lower CO classifications)	IV.C.	§ 93.119(c); § 93.119(g)(2).
	Regional conformity tests (higher CO classifications)	IV.D.	§ 93.119(c)(1).
	Definitions	XIV.A.	§ 93.101.
	Insignificance	XIV.B.	§ 93.109(k); § 93.121(c).
	Limited maintenance plans	XIV.C.	§ 93.101; § 93.109(j); § 93.121(c).
	Transportation plan and modeling requirements (moderate and serious classifications)	XIV.D.	§ 93.106(b); § 93.122(c).
	Non-federal projects (for isolated rural areas only)	XIV.F.	§ 93.121(b)(1).
	Clarification to use of approved budgets in conformity	XIV.G.	§ 93.109(f).
NO_2	Build/no-build test	IV.C.	§ 93.119(d); § 93.119(g)(2).
	Definitions	XIV.A.	§ 93.101.
	Insignificance	XIV.B.	§ 93.109(k); § 93.121(c).
	Non-federal projects (for isolated rural areas only)	XIV.F.	§ 93.121(b)(1).
	Clarification to use of approved budgets in conformity	XIV.G.	§ 93.109(h).

E. Does This Final Rule Include the Entire Transportation Conformity Regulation?

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

III. Conformity Grace Period and Revocation of the 1-hour Ozone Standard

A. When Will Conformity Apply for the 8-hour Ozone and $PM_{2.5}$ Standards?

1. Description of Final Rule

Conformity applies one year after the effective date of EPA's initial nonattainment designation for a given pollutant and standard. This one-year conformity grace period is provided by Clean Air Act section 176(c)(6) and § 93.102(d) of the conformity regulation. This final rule adds $PM_{2.5}$ to § 93.102(d) of the conformity rule even though the grace period is already available to all newly designated nonattainment areas as a matter of law.

Since the 1-hour and 8-hour ozone standards are different NAAQS, every area that was designated nonattainment for the 8-hour ozone standard has a one-year grace period before conformity applies for that standard even if the area was previously designated nonattainment for the 1-hour ozone standard. Areas subject to conformity for the 1-hour ozone standard continue to be subject to all applicable Clean Air Act requirements during the 1-year conformity grace period for the 8-hour ozone standard, as described in B. of this section. EPA designated areas for the 8-hour ozone standard on April 15, 2004, and published the final designations rule on April 30, 2004 (69 FR 23858). Designations for most of these 8-hour areas will be effective on June 15, 2004. Therefore, conformity for the 8-hour ozone standard will begin to apply on June 15, 2005 in most areas.

When conformity is done for the 1-hour standard during the grace period for the 8-hour standard, areas should consider whether demonstrating conformity for the 1-hour and 8-hour ozone standards at the same time is possible or advantageous. For example, if a conformity determination is made in September 2004 for a new or revised transportation plan and/or TIP, an area would demonstrate conformity for the 1-hour ozone standard and may choose to address the 8-hour ozone standard at a later date near the end of the one-year grace period, if conformity analyses for the 8-hour standard are not yet completed. In contrast, if a conformity determination is made in January 2005 for a new or revised plan/TIP, an area may be able to complete all the necessary work to demonstrate conformity for both ozone standards at that time. If no new or revised plan/TIP is required during the one-year grace period, conformity could be determined for the 8-hour standard without also making a conformity determination for the 1-hour standard. Whatever the case, a conformity determination for the 8-hour standard must be in place on June 15, 2005 for the plan and TIP, or an area will lapse.

Areas should use the interagency consultation process to determine a schedule for conducting regional emissions analyses and demonstrating conformity for the 1-hour and 8-hour ozone standards during the one-year conformity grace period as appropriate. Areas can rely on similar analyses and other work for conformity determinations for existing and new standards, to the extent that such work meets applicable requirements.

EPA plans to designate areas for $PM_{2.5}$ by November or December of 2004. Similarly, every area that is designated nonattainment for the $PM_{2.5}$ standard will have a one-year grace period from the effective date of designations before conformity applies for that standard. It is important to note that PM_{10} is a different pollutant than $PM_{2.5}$, and today's final rule does not affect the applicability and continued general implementation of conformity in PM_{10} nonattainment and maintenance areas.

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

As described in the November 5, 2003 proposal, if upon the expiration of the one-year grace period, a metropolitan area does not have a transportation plan and TIP that conform to the applicable standard in place, the conformity status of the area ''lapses.'' Likewise, within one year after the effective date of an area's initial nonattainment designation, the existing and planned transportation network for any donut [5] portion of an area (as well as for the metropolitan portion of the area) must demonstrate conformity, or conformity of the metropolitan transportation plan and TIP will lapse, and the entire nonattainment area will be unable to obtain additional non-exempt project funding and approvals at that time. During a conformity lapse funding and approval of transportation projects are restricted and only limited types of projects can proceed (*e.g.*, safety projects, project phases that were approved before the lapse).

The November 2003 proposal also stated that the one-year conformity grace period applies in isolated rural nonattainment areas.[6] However, conformity determinations in isolated rural areas are required only when a non-exempt FHWA/FTA project needs funding or approval. Therefore, once the conformity grace period has expired, a conformity determination will only be required in such areas the next time a non-exempt project needs funding or approval.

For more information on the application of the conformity grace period in metropolitan, donut and isolated rural nonattainment areas, see the November 5, 2003 proposal to this final rule (68 FR 62695–62696). See Section III.C. below for guidance and EPA's responses to comments regarding implementation of the one-year grace period and conformity determinations under the new standards.

2. Rationale and Response to Comments

EPA received a number of comments on the one-year conformity grace period and the transition from the 1-hour ozone standard to the 8-hour ozone standard. Most commenters supported the one-year conformity grace period, with some commenters stating that the grace period makes sense and will provide state and local agencies with the time needed to prepare for conformity under the new standards. Another commenter supported the grace period as a means to prevent having to demonstrate conformity to two ozone standards simultaneously.

[5] As defined in § 93.101 of today's final rule, donut areas are 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). These areas are not isolated rural nonattainment and maintenance areas.

[6] As defined in § 93.101 of today's final rule, isolated rural nonattainment and maintenance areas are areas that do not contain or are not part of any metropolitan planning area as designated under the transportation planning regulations. These areas are not donut areas.

Some commenters, however, believed that the one-year grace period would not allow enough time for some areas to meet the conformity requirements. One of these commenters questioned whether a year would be enough time to implement the interagency consultation process in brand new nonattainment areas or in existing nonattainment and maintenance areas that change in size or complexity. A few other commenters argued that the one-year grace period does not provide adequate time for new MPOs to become familiar with the conformity process or for existing MPOs to complete technical documentation and the public and adoption processes in nonattainment counties that are not within the MPO's jurisdiction (*i.e.*, donut areas).

To address these concerns, a few commenters suggested approaches for lengthening the conformity grace period. One commenter that was concerned about the lack of experience and resource burden on new and rural nonattainment areas requested that the grace period be extended to two years for these areas. Another commenter suggested that EPA provide a longer 60-day effective date for nonattainment designations, effectively giving areas two additional months before the conformity requirements apply.

EPA understands that some areas, including brand new metropolitan areas, donut areas, and complex nonattainment areas (*e.g.*, areas with multiple states and/or multiple MPOs) may have additional challenges in conducting the conformity process. However, the Clean Air Act, as amended on October 27, 2000, specifically provides newly designated nonattainment areas with only a one-year grace period, after which conformity applies as a matter of law under the statute. Therefore, we believe that the statutory language precludes EPA from extending the conformity grace period beyond one year for new nonattainment areas. We emphasize, however, that EPA issued letters to the states effectively notifying areas of their proposed 8-hour ozone nonattainment designation in December 2003 and that states submitted their recommendations for nonattainment areas based on monitored data, well before designations became effective.[7] In addition, state and local agencies of potential nonattainment areas have been involved early on in the 8-hour designation process. These new ozone nonattainment areas have already had additional time ahead of the one-year grace period to begin developing consultation procedures, modeling tools and data collections efforts for implementing the conformity regulation. EPA anticipates that areas designated nonattainment under the $PM_{2.5}$ standard will have similar advance notice of their pending designations, since state recommendations were due February 15, 2004, and many areas already expect that they will be designated nonattainment for $PM_{2.5}$.

The amount of time between the publication and effective dates of an action is established by EPA on a case-by-case basis for each rulemaking. We generally believe that the time needed for states to implement obligations for the NAAQS is fully considered in the statutory or regulatory provision establishing the compliance timeframe and that the effective date of the designations should not be used as a method for adjusting the compliance timeframes. In the context of promulgating the 8-hour ozone designations, EPA determined that it was appropriate to make the designations effective on June 15, 2004, approximately 45 days following the publication date of the designations. EPA will consider the appropriate effective date for $PM_{2.5}$ designations at the time it promulgates those designations.

EPA notes that Section III.C. of today's final rule includes guidance on general and specific questions raised by commenters for implementing the new standards. In addition, EPA will release guidance on specific implementation issues that may arise in some of the different types of new nonattainment areas (*e.g.*, multi-state and/or multiple MPO areas). We will provide this information in response to requests for clarification raised during the public comment period for this rulemaking. Newly designated nonattainment areas should also consult with their respective EPA regional and DOT division offices for additional guidance and assistance in meeting the conformity requirements within the one-year grace period. In addition, EPA and DOT will be conducting training sessions for the new standards conformity rulemaking in the near future that state and local agencies can attend; areas can also take advantage of existing EPA and DOT conformity[8] and emissions modeling[9] training that is currently available.

B. When Does Conformity Stop Applying for the 1-hour Ozone Standard?

1. Description of Final Rule

Conformity for the 1-hour ozone standard will no longer apply in existing 1-hour ozone nonattainment and maintenance areas once that standard and corresponding designations are revoked. Today's final conformity rule and responses to comments with respect to this issue are consistent with EPA's April 30, 2004, 8-hour ozone implementation final rule that revokes the 1-hour standard one year after the effective date of EPA's 8-hour designations (69 FR 23951).

Current 1-hour nonattainment and maintenance areas will continue to ensure that transportation activities conform to the existing 1-hour standard, including any applicable existing adequate or approved 1-hour SIP budgets, until that standard is revoked. When the 1-hour standard is revoked, conformity will no longer apply for either ozone standard in areas that are attaining the 8-hour ozone standard. Section 93.109(c) of today's final rule addresses conformity requirements for the 1-hour ozone standard. See EPA's April 30, 2004, 8-hour implementation final rule for more discussion on the revocation of the 1-hour ozone standard (69 FR 23951).

2. Rationale and Response to Comments

Many commenters supported the revocation of the 1-hour ozone standard at the time conformity applies for the 8-hour ozone standard. Several commenters believed that requiring conformity for both ozone standards at the same time would be overly burdensome and confusing, and would significantly impact state and local resources and the transportation sector. These commenters supported a final rule that focused on attainment of the 8-hour standard, rather than created duplicative conformity requirements for two ozone standards. One commenter also argued that requiring conformity for both ozone standards at the same time could undermine progress to achieve

[7] Information on 8-hour ozone nonattainment designations, including copies of EPA's December 2003 designation letters, can be accessed from EPA's Web site at *http://www.epa.gov/air/oaqps/glo/designations/index.htm.*

[8] The National Transit Institute offers a course entitled, ''Introduction to Transportation/Air Quality Conformity.'' This course was developed by FTA, FHWA and EPA and is designed for federal, state and local agencies involved in the conformity process. In addition, the National Highway Institute offers a course entitled, ''Estimating Regional Mobile Source Emissions.''

[9] EPA and DOT jointly sponsored seven MOBILE6 training courses across the country in 2002. The training materials for these courses are on EPA's MOBILE6 website and can be downloaded at: *http://www.epa.gov/otaq/m6.htm.* Other training materials prepared by EPA are also available on this website.

adequate emission reductions, since new nonattainment areas may have to develop different control strategies for attaining the 8-hour ozone standard. This commenter believed that such a result could leave nonattainment areas extremely vulnerable to litigation. Some commenters stated that EPA's proposal is logical, since the 8-hour ozone standard is presumably a more stringent standard than the 1-hour standard.

However, other commenters believed EPA's proposal to revoke the 1-hour standard is unlawful because they believed it would allow large increases in motor vehicle emissions and thus violate the statutory conformity tests. Other commenters stated that if the 1-hour standard was revoked, areas would no longer have to meet the SIP motor vehicle emissions budgets (''budgets'') established for that standard. These commenters were concerned that 8-hour nonattainment areas that were nonattainment or maintenance for the 1-hour standard would be able to determine conformity using less protective conformity tests, such as the build/no-build test, during the time period before new 8-hour SIP budgets are established. These commenters stated that not using existing 1-hour SIP budgets would lead to emissions increases that would later need to be offset by future controls for the 8-hour standard. Commenters also believed that using 1-hour ozone SIP budgets would support current air quality progress and ensure that attainment of the 8-hour standard is not delayed.

As stated in the final 8-hour implementation rule (69 FR 23951) and corresponding response to comments document, EPA disagrees that revoking the 1-hour standard is unlawful. Congress gave EPA the authority to create and revise the NAAQS. In Clean Air Act section 109(d)(1), Congress directed EPA to review the standards every five years and ''make such revisions in such criteria and standards and promulgate such new standards * * *.'' EPA interprets ''make such revisions in * * * standards'' to mean that EPA has the authority to replace one standard with another. EPA does not believe that Congress intended to have overlapping standards every five years for the same pollutant. If that were the case, states would be required to develop and implement a SIP for each version of the standard. Duplicating these efforts would waste limited resources because the goal of each standard is the same: to protect public health and welfare. EPA promulgated the 8-hour standard in response to the latest data and science regarding ozone, and has determined that the 8-hour ozone standard is more protective of public health and welfare. EPA has made the decision to replace the 1-hour standard with the 8-hour standard, because it may be difficult for states to plan for both standards and because EPA concludes that the 8-hour standard is the more appropriate standard.

Implicit in the authority to revise standards is the authority to revoke a standard. The U.S. Supreme Court's ruling (531 U.S. 547 (2001)) in a challenge against EPA's 1997 8-hour ozone implementation strategy certainly did not state otherwise. EPA needs to be able to revoke standards so that states and areas can move on to implementing the new standard and not have to implement old standards in perpetuity. Finally, since the 8-hour standard is the more stringent of the two standards, EPA believes conforming to that standard will be sufficient, as noted by several commenters.

As stated in the April 30, 2004 final 8-hour implementation rule (69 FR 23969), EPA believes it is sufficient that conformity be determined for one ozone standard at a time. EPA concludes that focusing conformity requirements on one ozone standard at a time will meet Clean Air Act conformity requirements and use limited state and local resources in an efficient manner.

However, EPA agrees that the continued use of existing approved or adequate 1-hour SIP budgets is important for meeting 8-hour conformity requirements before new 8-hour SIPs are established. Section VI. of this final rule provides further information regarding conformity requirements and EPA's rationale for such requirements in 8-hour ozone areas that have existing 1-hour SIP budgets.

One commenter supported EPA's proposal to revoke the 1-hour standard for areas that are found to be in attainment of the new 8-hour standard. Based on air quality data and significant reductions from federal and state measures that will continue to remain in place, this commenter believed that revoking the 1-hour standard in the commenter's specific area would not impact ozone emissions.

However, two other commenters opposed eliminating conformity in 1-hour ozone nonattainment and maintenance areas that were not designated nonattainment for the 8-hour standard. One of these commenters argued that conformity under the 1-hour maintenance plan helped prevent 8-hour violations, and urged EPA to work with these areas to find an acceptable mechanism to allow those areas that wish to retain conformity as a preventative measure. The other commenter believed that all areas that are covered by one of the ozone standards must continue or start to provide for clean air; the conformity process is a mechanism to accomplish this goal.

Conformity cannot apply in 1-hour maintenance areas once the standard is revoked. The Clean Air Act specifically states that conformity applies only in ''a nonattainment area* * *'' and ''an area that was designated as a nonattainment area but that was later redesignated by the Administrator as an attainment area and that is required to develop a maintenance plan under section 7505a of this title* * *'' (42 U.S.C. 7506(5)). Clean Air Act section 176(c)(5) restricts conformity to nonattainment areas and areas that are required to submit maintenance plans under section 175A; in these areas, the Federal government's sovereign immunity is waived so that DOT can be required to make conformity determinations.[10] However, after revocation of the 1-hour standard, the areas previously required to submit section 175A maintenance plans under the statute for the 1-hour standard will no longer be required to do so. Thus, conformity can no longer be required in 1-hour maintenance areas, since the Clean Air Act limits conformity to areas that are required to submit section 175A maintenance plans and no longer waives the Federal government's sovereign immunity for these areas after revocation.

EPA acknowledged in the June 2, 2003 proposed 8-hour implementation rule (68 FR 32818–32825) that our interpretation that conformity would not apply in 1-hour maintenance areas differs from the approach taken in 1997. In 1997, EPA interpreted revoking the 1-hour standard to mean that conformity would not apply for the 1-hour standard in areas that were nonattainment for the 1-hour standard, but that conformity would continue to apply for the 1-hour standard in areas with a maintenance plan. This interpretation led to an unfair and counter-intuitive result: areas that had attained the standard and had made the effort to establish a maintenance plan would have to continue a required

[10] The concept of sovereign immunity specifies that the federal government can only be subjected to regulation to the extent it voluntarily agrees to become subject. With respect to conformity, in the Clean Air Act, Congress has agreed that the federal government should be subject only one year after designation in areas designated nonattainment or previously designated nonattainment and redesignated to attainment subject to a 175A maintenance plan. Thus, sovereign immunity prevents the mandatory application of conformity requirements either prior to a year after designation or after revocation with respect to a given air quality standard.

program, but areas that had not attained would not. EPA reconsidered this result and found it to be unfair and inappropriate. Further, upon reanalyzing Clean Air Act section 176(c)(5), this previous interpretation did not fit with the text of the statute.

As stated in the April 30, 2004 final 8-hour implementation rule (69 FR 23987), EPA has concluded that the better interpretation of the statute is that conformity would not apply in 1-hour maintenance areas once the 1-hour standard is revoked, because maintenance areas are relieved of the obligation under Clean Air Act section 175A (42 U.S.C. 7505a) to have a maintenance plan. Since these areas are no longer required to have a maintenance plan, conformity no longer applies for the 1-hour standard in these areas as a matter of law, and no waiver of sovereign immunity applies to allow imposition of conformity requirements.

It is EPA's conclusion that areas that are in attainment for the 8-hour standard are not subject to conformity because the statute explicitly limits the applicability of conformity to designated nonattainment and maintenance areas for a given pollutant and standard. EPA notes that these areas still have incentive to monitor the growth of emissions from the transportation sector; if these areas violate the 8-hour standard, EPA would designate them nonattainment for the 8-hour standard and conformity would then apply. Although states cannot implement conformity for attainment areas as a matter of federal law, they could still work with their MPOs to estimate regional emissions that would be generated by the planned transportation system to see whether a violation could occur, and to address motor vehicle emissions growth. These type of state activities may be done under state law, when possible, or on a voluntary basis.

One commenter suggested that the 1-hour standard should remain in place until the 8-hour standard is fully implemented and no longer subject to legal challenges to ensure that one of the ozone standards is implemented. The commenter believed that this approach would be particularly important for areas impacted by regional transport. Other commenters stated that the 8-hour ozone standard should be delayed if revocation of the 1-hour standard becomes delayed.

EPA does not believe, however, that the current statutory and regulatory requirements allow us to extend conformity for the 1-hour standard or delay conformity for the 8-hour standard in the event of legal challenges, for example, as this commenter has suggested. In the April 30, 2004 final 8-hour ozone implementation rule, EPA specifically promulgated rules that will revoke the 1-hour standard one year after the effective date of 8-hour designations. Alternatively, Clean Air Act section 176(c)(6) and conformity rule § 93.102(d) require conformity for the 8-hour standard one year after the effective date of ozone nonattainment designations. Therefore, conformity for the 8-hour standard will apply in areas designated nonattainment for that standard on June 15, 2005. As previously stated, EPA has no statutory authority to extend the one-year conformity grace period and delay the conformity requirements in new 8-hour nonattainment areas.

A few commenters recommended that if 8-hour ozone SIP budgets are submitted and found adequate by EPA prior to revocation of the 1-hour standard, they should replace all prior ozone budgets, including those for the 1-hour standard. One commenter supported EPA's proposal to require that 1-hour conformity requirements be met prior to revocation, including adherence to the applicable 1-hour SIP budgets. Another commenter believed that only conformity for the 8-hour standard should apply once designations are made during the one-year grace period, rather than the 1-hour conformity requirements.

EPA addressed this issue of revocation as part of its April 30, 2004 final 8-hour implementation rule. EPA did not propose in its June 2, 2003, 8-hour implementation proposal to revoke the 1-hour standard earlier than one year after designations, since EPA intended to align the revocation of the 1-hour standard with the application of conformity requirements for the 8-hour standard one year after the effective date of 8-hour nonattainment designations. Furthermore, EPA did not expect that areas would be able to submit an 8-hour SIP earlier.

EPA continues to believe that most areas are unlikely to have adequate budgets that address the 8-hour standard before EPA revokes the 1-hour standard. Such budgets cannot stand alone but have to be associated with adopted control measures and demonstrations of either attainment or reasonable further progress, and EPA believes developing these SIPs will take states some time. Once the SIPs are submitted, EPA must find them adequate, a process which EPA intends to complete within 90 days of receiving a SIP in most cases. It is very unlikely that states will be able to complete the work to submit 8-hour SIPs prior to one year from the effective date of 8-hour designations, and much less likely that states would have submitted them sufficiently in time for EPA to find them adequate before the 1-hour standard is revoked.

Given these facts and the fact that EPA did not include in its June 2003 8-hour implementation proposal an option for revoking the standard earlier than one year after 8-hour designations are effective, EPA did not provide for early revocation of the 1-hour standard, nor will EPA require 8-hour areas to expedite development of their 8-hour SIP for this purpose. As described above, the Clean Air Act provides a one-year grace period before conformity for the 8-hour standard applies, so EPA is not able to mandate 8-hour requirements sooner, as suggested by one commenter. Prior to the revocation of the 1-hour standard, new or revised transportation plans and TIPs must conform to the applicable SIP budgets for the 1-hour standard.

Finally, one commenter believed that the final rule should address the situation where a new ozone nonattainment area can demonstrate conformity for the 8-hour standard during the grace period, but cannot for the 1-hour standard.

EPA has concluded consistent with the April 30, 2004 final 8-hour ozone implementation rule and today's action, the 1-hour standard will remain in effect for one year following the effective date of 8-hour nonattainment designations. EPA believes this is appropriate since 8-hour conformity cannot be required to apply before that time. Therefore, areas currently designated nonattainment or maintenance for the 1-hour ozone standard must demonstrate conformity for the 1-hour standard for any new or revised transportation plan, TIP and project approval during the one-year grace period for the 8-hour standard. In general, if an area must determine plan/TIP conformity during the grace period because of a required deadline and is unable to do so, the nonattainment or maintenance area's conformity for the 1-hour standard will lapse. This lapse would remain in effect until conformity for the 1-hour standard is re-established or the 1-hour standard is revoked, regardless of whether the area conforms for the 8-hour standard during that time period. On the other hand, if an area's plan/TIP meets conformity for the 1-hour standard but cannot meet conformity for the 8-hour standard during the grace period, the area would lapse when the one-year grace period ends, because at that point, conformity applies for the 8-hour standard.

C. How Do Areas Implement the One Year Conformity Grace Period and Transition From the 1-hour Ozone Standard?

In the November 5, 2003 proposal, EPA provided details on the application of the one-year conformity grace period in metropolitan, donut, and isolated rural nonattainment areas (68 FR 62695–62696). New nonattainment areas should refer to A. of this section and the November 2003 proposal for these discussions.

EPA received several questions and comments regarding general implementation for the new standards. The paragraphs below include general information on the implementation of conformity requirements for:

- Initial conformity determinations in new nonattainment areas;
- regional emissions modeling requirements in new nonattainment areas;
- timely implementation of transportation control measures (TCMs) in approved SIPs;
- multi-jurisdictional nonattainment areas (*e.g.*, multi-state areas and areas with sub-area budgets); and
- donut and isolated rural areas.

Both the November 2003 proposal's preamble and our response to comments below are based on implementation precedent to date, and do not create any new conformity policy. Section VI. of today's notice provides more details on the use of 1-hour ozone budgets in 8-hour ozone nonattainment areas. EPA will post more detailed implementation guidance on its transportation conformity website for conformity determinations in new standard areas, including 8-hour ozone areas with 1-hour SIP budgets and multi-state/multi-MPO nonattainment areas. Please see Section I.B.2. of this notice for information regarding EPA's conformity website.

1. Initial 8-hour Ozone and $PM_{2.5}$ Conformity Determinations

As described in A. of this section, areas that are designated nonattainment for the 8-hour ozone and/or $PM_{2.5}$ standard must determine conformity of transportation plans and TIPs by the expiration of the one-year conformity grace period for a relevant pollutant and standard. Metropolitan and donut 8-hour ozone and $PM_{2.5}$ nonattainment areas must complete all of the tasks that are required for a conformity determination (*e.g.*, interagency consultation, regional emissions analyses, public participation, MPO and DOT conformity determinations) during the relevant grace period in order to avoid a conformity lapse upon the expiration of the grace period.[11] Clean Air Act section 176(c)(6) specifically states that conformity will not apply in an area for a particular standard until one year after the area is designated for that standard. Thus, although completing conformity determinations for the new standards is not required prior to the end of the grace period, FHWA, FTA, and MPOs can choose to make determinations early for administrative purposes, when desired. FHWA and FTA have voluntarily agreed that they can make conformity determinations during the grace period even though it is not mandated by the Clean Air Act.

Metropolitan areas that are designated nonattainment for the 8-hour ozone and $PM_{2.5}$ standards can make transportation plan and TIP conformity determinations during their respective grace periods on a voluntary basis. In order to avoid a lapse, DOT must make its conformity determination prior to the end of the grace period. The timing of the next required plan and TIP conformity determinations will be determined pursuant to the frequency requirements in § 93.104 of the conformity rule, starting from the date of DOT's first conformity determination that includes a new regional emissions analysis under the new standards, even if this occurs prior to the end of the grace period. Thus, conformity determinations will always be conducted at intervals as required by the regulations.

Similarly, a conformity determination for a non-exempt FHWA/FTA project in a metropolitan, donut, or isolated rural area could be prepared during the one-year grace period, and submitted to DOT. DOT can make its conformity determination for such a project during the grace period. However, a conformity determination for a new standard might not be necessary if FHWA and FTA take all necessary approval actions prior to the end of the grace period. Once the conformity grace period expires, a project-level conformity determination is required whenever non-exempt projects complete the NEPA process, as defined in 40 CFR 93.101. For projects that complete the NEPA process prior to the end of the conformity grace period without a conformity determination for a new standard, a project-level conformity determination would be required for the next project phase that requires FHWA/FTA approval.

2. Regional Emissions Analysis Requirements in 8-hour Ozone and $PM_{2.5}$ Areas

One commenter requested clarification on whether different regional emissions analysis requirements will apply under the 1-hour and 8-hour ozone standards. In this rulemaking, EPA did not change the regional emissions analysis requirements in § 93.122 for existing and new nonattainment and maintenance areas. Therefore, new 8-hour ozone and PM2.5 areas must adhere to the same emissions analysis requirements as existing areas. For example, only 8-hour ozone nonattainment areas classified as serious, severe and extreme whose metropolitan planning area contains an urbanized population over 200,000 are required to meet the more rigorous transportation modeling requirements contained in § 93.122(b) of the conformity rule. Based on EPA's April 15, 2004 designations and classifications for 8-hour nonattainment areas as published in the **Federal Register** on April 30, 2004 (69 FR 23858), all nonattainment areas classified as serious or severe under the 8-hour ozone standard are already meeting these modeling requirements because they had a similar or higher classification under the 1-hour ozone standard. There are no nonattainment areas classified as extreme under the 8-hour standard.

However, even if these areas were required to expand the geographic area covered by their transportation model, these expanded areas would have a two-year grace period to revise their model to cover the full 8-hour ozone nonattainment area, as described in Section XXIII. and § 93.122(c) of today's action. Similarly, if there are 8-hour ozone nonattainment areas initially classified as serious or severe with an urbanized population greater than 200,000 that were never previously required to comply with the modeling requirements contained in § 93.122(b), either because their 1-hour classification was lower or their urbanized population was under 200,000, these areas would also have a two-year grace period to develop a new transportation model that satisfies these requirements. During the two-year grace period, affected areas must meet the requirements of § 93.122(d) of the conformity rule.

In addition, $PM_{2.5}$ nonattainment areas and all other 8-hour ozone nonattainment areas are also required to

[11] As described in A. of this section, isolated rural areas that are designated nonattainment for the 8-hour ozone and/or $PM_{2.5}$ standard may not need to demonstrate conformity by the expiration of the one-year grace period. Newly designated isolated rural areas are only required to determine conformity for the first time when a non-exempt federal highway or transit project requires funding or approval after the end of the one-year grace period.

comply with the transportation modeling requirements contained in § 93.122(d). This section requires these areas to continue to model regional emissions using all of the procedures described in § 93.122(b) where it has been their past practice. In other words, if an area has previously been required to demonstrate conformity and the area's transportation model and modeling practices either fully or partially complied with the requirements of § 93.122(b), the area must continue to model regional emissions for the 8-hour ozone and/or $PM_{2.5}$ standard using procedures which continue to meet these same aspects of the § 93.122(b) requirements that were previously met. Otherwise, areas may estimate regional emissions using any appropriate methods that account for growth in vehicle miles traveled (VMT) and consider future economic activity, transit alternatives and transportation system policies, as determined through the interagency consultation process.

3. Timely Implementation of TCMs in Approved SIPs

Section 93.113 of the existing conformity rule requires that transportation plans, TIPs, and projects which are not from a conforming plan and TIP must provide for the timely implementation of TCMs from an approved SIP. EPA notes that today's final rule does not change the implementation of these requirements for any existing or new nonattainment or maintenance area, including 8-hour nonattainment areas that have approved 1-hour SIPs that contain TCMs.

Clean Air Act section 176(c) requires that TCMs in approved SIPs be implemented in a timely manner according to the schedules in the SIP. This requirement is not contingent on what type of SIP, pollutant, or standard for which the approved TCM was established. Conformity determinations for any pollutant and standard must provide for the timely implementation of TCMs in approved SIPs, including TCMs in approved SIPs for the 1-hour ozone standard after that standard is revoked. Such TCMs can only be removed from the 1-hour SIP through the SIP process.

4. Multi-State Nonattainment Areas and Nonattainment Areas With Sub-Area Budgets

Some commenters requested clarification regarding how conformity would be implemented under the new standards in nonattainment areas with multiple MPOs or that cover multiple states. EPA believes that today's action is consistent with its existing conformity rule and historical precedent that provides flexibility to such areas. For example, nonattainment areas with multiple MPOs can establish sub-area motor vehicle emissions budgets in their 8-hour ozone or $PM_{2.5}$ SIPs to allow MPOs to do conformity separately, provided that all MPOs in such a nonattainment area continue to have conforming transportation plans and TIPs. EPA will post implementation guidance on its transportation conformity Web site for conformity determinations in multi-state and multi-MPO nonattainment areas. Please see Section I.B.2. of this notice for information regarding EPA's conformity Web site.

5. Donut Areas

A few commenters requested clarifications pertaining to conformity implementation in portions of a nonattainment area that are not contained within the area's MPO boundary (*i.e.*, ''donut areas''). Specifically, one commenter requested that adjacent MPO and donut areas in the same nonattainment area be allowed to submit individual conformity determinations.

In general, EPA believes that regional emissions for an entire nonattainment area, including any donut portion, must be considered at the time a conformity determination is made to ensure that all transportation activities in that area conform. Therefore, EPA has not changed the current rule's requirements and existing precedent for donut areas in response to this comment. Areas that contain a donut portion should refer to the November 5, 2003 proposal (68 FR 62695–62696) for more information on the requirements for demonstrating conformity in donut areas.

Another commenter requested that EPA designate state transportation and air quality agencies as the lead agencies for conducting and completing conformity determinations for donut areas. This commenter believed that this process for demonstrating conformity in donut areas needs to be formalized through the interagency consultation process and/or a memorandum of understanding.

EPA anticipates that the state departments of transportation may take the lead in conducting regional emissions analyses for the donut portion in some nonattainment areas. However, there may be cases where an adjacent MPO is better suited to conduct such analyses or wants to include the donut area's projects in its plan and TIP and supporting regional emissions analysis. Section 93.105(c)(3) of the conformity rule relies on the interagency consultation process (including the MPO and state transportation agency) to determine how best to consider projects that are planned for donut areas located outside the metropolitan area and within the nonattainment or maintenance area in the conformity process. Section 93.105 also requires that such procedures for demonstrating conformity of donut area projects be included in an area's conformity SIP that is approved by EPA. Therefore, EPA believes that the existing rule's requirements and the flexibility provided by this provision remain appropriate and do not need to be revised to address this comment.

Another commenter raised concerns that in some nonattainment areas only portions of the donut area may be included in the MPO's transportation model. This commenter also suggested that emissions information for such outlying donut portions may not be readily available.

EPA understands that the donut portion of some new nonattainment areas may not be included in the adjacent MPO's transportation model and may not have as up-to-date or detailed planning information as the MPO. The conformity rule provides flexibility for modeling requirements in these areas. In fact, existing methods that are used in donut areas may already be suitable for conformity determinations. EPA does not believe that a travel demand model is required to estimate emissions for donut areas in most cases (provided that § 93.122(b) does not apply to the nonattainment area). See C.2. of this section for more information about the general transportation modeling requirements in 8-hour and $PM_{2.5}$ nonattainment areas.

In addition, the conformity rule requires the use of the latest planning assumptions and emissions models that are available at the time a conformity analysis begins (§§ 93.110 and 93.111). Today's change to the latest planning assumptions requirements is discussed in Section XX. of this preamble. For most donut areas, the most recently available Highway Performance Monitoring System (HPMS) estimates of VMT may be the only source of travel data available, and thus, should be used. Some donut areas may also need to rely on national default data (*e.g.*, speeds and vehicle registration data) included in EPA's most recent emissions model, MOBILE6.2, when estimating emissions if no local data is available for the donut area and it appears that the default data is more representative than the local information for the adjacent metropolitan area. In such a case the conformity determination for the area

should contain an explanation of why the default data was used for a portion of the nonattainment area. The interagency consultation process must be used to determine which planning assumptions are considered the latest and best for demonstrating conformity for donut areas prior to the expiration of the one-year conformity grace period.

6. Isolated Rural Areas

We received one comment that supported our November 5, 2003 proposal for implementing the conformity grace period in isolated rural areas. This commenter believed that due to the rarity of new non-exempt projects in these areas, requiring a conformity determination for only exempt projects would be a misuse of resources. EPA agrees with this comment, and therefore, clarified in the November 2003 proposal and today's final rule that conformity in isolated rural areas is required only when a non-exempt FHWA/FTA project(s) needs funding or approval. See A. of this section and the November 2003 proposal (68 FR 62696) for more information.

D. When and For What Ozone Standard Does Conformity Apply in Areas With an Early Action Compact for the 8-hour Ozone Standard?

1. Description of Final Rule

EPA has provisionally deferred into the future the effective date of 8-hour ozone nonattainment designations for areas participating in an Early Action Compact (EAC). The deferral of the 8-hour designation effective date is contingent upon the participating area's adherence to all the terms and milestones of its EAC, as described in EPA's November 14, 2002 memorandum entitled, ''Schedule for 8-Hour Ozone Designations and its Effect on Early Action Compacts,'' the December 16, 2003 proposed EAC rule (68 FR 70108), and the April 30, 2004 final designations rule (69 FR 23864).

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

Conformity for the 1-hour ozone standard will continue to apply in EAC areas that are currently 1-hour ozone maintenance areas and are required to demonstrate conformity for that standard. If a maintenance area meets all of its EAC milestones and attains the 8-hour ozone standard by December 2007, conformity for the 1-hour standard will no longer apply once EPA revokes that standard one year after the effective date of EPA's 8-hour attainment designation (*i.e.*, spring 2009).

If, however, a 1-hour ozone maintenance area fails to meet a milestone in its EAC, EPA would lift its deferral, and the area's 8-hour ozone nonattainment designation would become effective shortly after the missed milestone. Under this scenario, conformity for the 1-hour ozone standard will continue to apply until one year after the effective date of EPA's nonattainment designation. Also occurring at one year after the nonattainment designation will be revocation of the 1-hour ozone standard, expiration of the one-year conformity grace period, and the application of conformity for the 8-hour ozone standard under Clean Air Act section 176(c)(6).

2. Rationale and Response to Comments

All commenters who addressed this topic supported EPA's approach for deferring the 8-hour ozone conformity requirements in EAC areas through deferral of the effective date of 8-hour designations. One of these commenters believed that EPA's proposal can yield positive results while imposing minimal constraints on states and localities. Other commenters believed that the EAC policy is a proactive approach for meeting Clean Air Act requirements and should reduce emissions and provide for attainment without the need of the conformity requirements. EPA agrees with these comments.

Another commenter raised concerns regarding how conformity would be implemented in 8-hour ozone nonattainment areas that are covered only partially by an EAC. For example, in a nonattainment area that contains a few donut counties that are not covered by a metropolitan area's EAC, this commenter argued that the conformity status of such an EAC would not lapse if the donut counties could not demonstrate conformity by the expiration of the one-year grace period. However, since 8-hour ozone nonattainment areas were not designated as the commenter described, EPA is not providing guidance in today's notice for such a situation.

IV. General Changes in Interim Emissions Tests

A. Background

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

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

The following subsections describe the final changes to the interim emissions tests (under § 93.119). Sections V., VI., and VII. describe the application of these tests in different 8-hour ozone and $PM_{2.5}$ areas (under § 93.109).

B. Baseline Year Test for 8-Hour Ozone and $PM_{2.5}$ Areas

1. Description of Final Rule

We are adding the following tests to the conformity rule for 8-hour ozone and $PM_{2.5}$ nonattainment areas:

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

Under these interim emissions tests, conformity would be demonstrated if the emissions from the proposed transportation system are either less than or no greater than 2002 motor

vehicle emissions in a given area. Regulatory text for the 2002 baseline year tests can be found in § 93.119. See Sections V.-VII. for how these tests will be applied in various 8-hour ozone and $PM_{2.5}$ areas.

EPA is not changing the 1990 baseline year tests for 1-hour ozone, CO, PM_{10} and NO_2 areas that do not have adequate or approved SIP budgets. However, § 93.119 has been reorganized to include the provisions for new 8-hour ozone and $PM_{2.5}$ areas.

Consistent with current practice, the interagency consultation process under § 93.105(c)(1)(i) must be used to determine the latest assumptions and models for generating 2002 motor vehicle emissions to complete either baseline year test. All 8-hour and $PM_{2.5}$ areas will be submitting baseline SIP inventories for the year 2002. As described in the proposal, the 2002 baseline year test can be completed with the SIP's 2002 motor vehicle emissions inventory, if the SIP has been submitted in time for the current conformity determination. Draft 2002 baseline year emissions from a SIP inventory under development or the consultation process could also be used to develop 2002 baseline year emissions as part of the conformity analysis. EPA believes that a submitted or draft 2002 SIP inventory may be the most appropriate source for completing the 2002 baseline year tests for an area's first conformity determination under the new standards. This is due to the fact that the 2002 SIP inventories should be under development at the same time as these determinations, and such inventories should be based on the latest available data at the time they are developed. Whatever the source, the 2002 baseline year emissions level that is used in conformity must be based on the latest planning assumptions available for the year 2002, the latest emissions model, and appropriate methods for estimating travel and speeds as required by §§ 93.110, 93.111 and 93.122 of the conformity rule.

2. Rationale and Response to Comments

Most commenters supported the proposal to use 2002 for the baseline year tests for the new air quality standards. These commenters also supported the use of the interagency consultation process to determine how the 2002 baseline emission level is calculated. However, a few commenters supported using a more recent baseline year (*i.e.*, 2003, 2004, 2005) for conformity analyses completed before 8-hour ozone or $PM_{2.5}$ SIP budgets are found adequate. These commenters argued that a more recent year should be used when reliable data are available to ensure that additional project approvals are not made during interim years with an artificially high 2002 motor vehicle emissions inventory.

EPA continues to believe that the year 2002 is more appropriate than either the 1990 baseline year or a more recent baseline year, as some commenters suggested. EPA believes that it is important to have transportation and air quality planning time frames coordinated. Having consistent baseline years for SIPs, conformity determinations and other emission inventory requirements helps to achieve this goal. This was the rationale for maintaining 1990 as the baseline year for conformity tests in existing areas, and past experience indicates that having similar baseline years for SIP and conformity planning purposes has worked well.

As described in the November 2003 proposal, EPA has selected 2002 as the baseline year for SIP inventories under the new 8-hour ozone and $PM_{2.5}$ standards. EPA's November 18, 2002 memorandum, ''2002 Base Year Emission Inventory SIP Planning: 8-hr Ozone, $PM_{2.5}$, and Regional Haze Programs,'' identifies 2002 as the emission inventory base year for the SIP planning process to address both of these pollutants and standards. EPA's April 30, 2004 final 8-hour ozone implementation rule also establishes 2002 as the base year for 8-hour ozone SIP inventories (69 FR 23951), as described in the June 2, 2003 proposal (68 FR 32810). Finally, EPA's Consolidated Emissions Reporting Rule (CERR) requires submission of emission inventories every three years, and 2002 is one of the required years for such updates. EPA continues to believe that coordinating conformity's baseline with other data collection and inventory requirements would allow state and local governments to use their resources more efficiently. In addition, since conformity is to be measured against a SIP it is appropriate to use the baseline year that will be used for SIP planning.

Furthermore, a 2002 baseline year is an appropriate measure for meeting Clean Air Act conformity requirements to not worsen air quality prior to adequate SIP budgets being established. EPA notes that emission inventories are generally not submitted until approximately two years after the year for which they are calculated. The 2002 inventories are scheduled to be submitted by the states to EPA in June of 2004, the year designations are made for the 8-hour ozone and $PM_{2.5}$ standards. In addition, emission inventories are not expected to vary by much in the few years following 2002. Emission inventories are generally trending downward, but year to year changes are generally small. Any advantage gained by using the most recent available inventory as the baseline for conformity purposes would be offset by the loss of coordination with other agencies and processes that will be possible by the use of 2002 as the baseline year. Therefore, EPA is retaining in this final rule the 2002 baseline year tests for conformity under the new air quality standards.

Finally, EPA is responding today to a comment that was raised in the context of the June 2, 2003 proposed 8-hour ozone implementation rule. A commenter supported using only the motor vehicle emissions inventories for the year 2002 as de facto interim motor vehicle emissions budgets for conformity determinations, during the time period before 8-hour areas have adequate or approved SIP budgets for the 8-hour standard. This commenter also suggested that the motor vehicle emissions inventory could be decreased 3% per year between the base year of 2002 and the attainment year, to represent ''reasonable further progress'' for the transportation sector.

EPA understands the commenter's point that the 2002 inventory is similar to a budget, in that both a 2002 baseline inventory and a SIP budget that is established to meet a Clean Air Act requirement serve as an emissions ceiling on future transportation actions. However, EPA does not agree that the 2002 baseline inventory could be used as a ''de facto budget'' and replace the interim emissions test requirements in today's final rule.

As described below, prior to adequate or approved SIP budgets being established, 8-hour ozone areas that are classified as moderate or higher are generally required to complete both the build-less-than-no-build and less-than-2002 interim emissions tests. Areas that are marginal or designated nonattainment under subpart 1 of part D of title 1 of the Clean Air Act (''subpart 1 areas'') could, in general, choose to use either the no-greater-than-2002 or the build-no-greater-than-no-build test prior to an 8-hour SIP. Finally, all 8-hour ozone areas have the option to submit a reasonable further progress SIP with budgets early and use the budget test, instead of the interim emissions test(s).

EPA appreciates the commenter's idea to decrease inventories incrementally for the purpose of the baseline year conformity test. However, given that EPA did not propose and receive public comment on this idea, the commenter's

suggestion is not included in today's final rule. Furthermore, EPA believes that the option for an area to submit an early 8-hour SIP that meets Clean Air Act requirements provides sufficient flexibility to transition areas quickly to the budget test for future conformity determinations, when desired. Please *see* Sections V. and VI. of the preamble for more information regarding the regional emissions tests that apply for 8-hour conformity determinations.

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

1. Description of Final Rule

EPA is revising the build/no-build test for certain existing and new nonattainment areas. Specifically, the final rule amends § 93.119 to create the ''build-no-greater-than-no-build'' test, where conformity is demonstrated if emissions from the proposed transportation system (''build'' or ''action'' scenario) are less than or equal to emissions from the existing transportation system (''no-build'' or ''baseline'' scenario).

Under today's final rule, the build-no-greater-than-no-build test is available to the following subset of new and existing areas:

- 8-hour ozone areas of marginal classification,
- 8-hour ozone areas designated nonattainment under subpart 1 of part D of title 1 of the Clean Air Act (''subpart 1 areas''),
- All $PM_{2.5}$ areas,
- 1-hour ozone areas of marginal and below classifications (*i.e.*, Section 185A, incomplete data, and sub-marginal areas),
- CO areas of moderate classification with design values less than 12.7 ppm,
- Not classified CO areas,
- All PM_{10} areas, and
- All NO_2 areas.

Sections V., VI., and VII. of this rule provide more detail regarding the application of the build/no-build test in various 8-hour ozone and $PM_{2.5}$ areas.

For areas that would be using the build-no-greater-than-no-build test, EPA is also modifying the existing rule so that a regional emissions analysis would not be necessary for analysis years where the build and no-build scenarios contain exactly the same transportation projects and are based on exactly the same planning assumptions, for the reasons described below. Such a case may occur in smaller areas that do not have projects planned for earlier years in the regional emissions analysis, and population, land use, economic, and other assumptions do not change between the build and no-build scenarios for those years. Under the final rule, a regional emissions analysis would continue to be required for any applicable years where the action and baseline scenarios contain different projects and are based on different assumptions.

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

Finally, § 93.119 has been reorganized in general to accommodate the above and other changes articulated in this final rule for new and existing areas.

2. Rationale and Response to Comments

As explained in the November 5, 2003 proposal, EPA believes that allowing certain areas to use a build-no-greater-than-no-build test is consistent with Clean Air Act section 176(c)(3)(A)(iii), which specifically requires that transportation plans and TIPs contribute to annual emissions reductions only in the higher classifications of ozone and CO areas. This statutory provision does not apply to other types of nonattainment areas that are required to demonstrate only that transportation activities do not cause or contribute to new violations, increase the frequency or severity of existing violations, or delay timely attainment, pursuant to Clean Air Act section 176(c)(1)(B). EPA believes that if the ''build'' scenario emissions are no greater than (*i.e.*, less than or equal to) the ''no-build'' scenario emissions, that such a demonstration is made, since only an increase in emissions would worsen air quality.

This change to the build/no-build test also makes its implementation consistent with the implementation of the baseline year tests: In ozone and CO areas of higher classifications, expected emissions from the proposed transportation system must be less than emissions in the baseline year, while in all other areas, expected emissions must be no greater than emissions in the baseline year. For further discussion of the rationale for how and where the baseline year tests apply, please refer to the preamble to the January 11, 1993 proposed rule (58 FR 3782–3784), the preamble to the July 9, 1996 proposed rule (61 FR 36116–36117), and the November 5, 2003 proposal (68 FR 62701, 62705).

Most commenters supported EPA's proposal to provide the build-no-greater-than-no-build test in certain nonattainment areas. Many of these commenters agreed with EPA's interpretation of the Clean Air Act section 176(c)(3)(A)(iii) that ozone nonattainment areas that are not classified moderate or above, lower classified CO nonattainment areas and all PM_{10}, NO_2 and $PM_{2.5}$ areas are not required to demonstrate annual emissions reductions for conformity purposes. One commenter stated that, from a practical standpoint, the build and no-build options are often identical and believed that there is no reason to require emissions reductions prior to the submission of a SIP for such areas. A few commenters also believed that this rule revision would provide flexibility and resolve previous conformity issues in areas with few transportation projects, only non-regionally significant projects, or projects planned for only certain years of the transportation plan. EPA agrees with these comments.

A few commenters also believed that the proposed build-no-greater-than-no-build test should be available to all 8-hour ozone nonattainment areas, not just marginal or subpart 1 areas. Two of these commenters believed that EPA should extend this flexibility as satisfying the Clean Air Act section 176(c)(1)(B) requirement, that transportation plans only be required to not make air quality worse. However, EPA believes that extending this approach to CO and ozone areas of higher classifications would violate Clean Air Act section 176(c)(3)(A)(iii), which also requires transportation plans and TIPs in these areas to contribute to annual emissions reductions. The build-no-greater-than-no-build test does not satisfy this requirement.

In contrast, two commenters did not agree with EPA's proposal to change the previous build-less-than-no-build test to a build-no-greater-than-no-build test in certain nonattainment areas. One of these commenters was concerned that changing the build/no-build test in certain areas may hinder future ozone reductions by not requiring the implementation of transportation activities that would reduce emissions. This same commenter, however, agreed that this proposed revision to the build/no-build test would simplify the planning process. Another commenter did not agree with EPA's proposal because this commenter believed that the conformity requirements should be the same for all parties regardless of size or classification. The commenter believed that all nonattainment and maintenance areas should contribute to reducing emissions not only to improve their own air quality but also to benefit

the air quality in nearby airsheds as well. Further, the commenter argued that EPA's proposal could rectify a previous issue with the build/no-build test where the first analysis year is sufficiently close to the present year (the year in which the regional emissions analysis is being conducted) such that all of the non-exempt projects in the action scenario are also in the baseline scenario.

EPA believes that the Clean Air Act makes the distinction in requirements between areas of different pollutants and classifications and thus certain areas are not required to contribute reductions towards attainment prior to SIP submission. Therefore, EPA is not changing the final rule in response to these comments.

Another commenter requested clarification on the level of precision that is required to demonstrate conformity using the proposed build-no-greater-than-no-build test. For example, if an analysis resulted in emissions from the baseline (no-build) scenario being 9,000 pounds/day (4.500 tons/day) and emissions from the action (build) scenario being 10,998 pounds/day (5.499 tons/day), the commenter asked whether the agency performing the analysis could round both values off to 5 tons/day and claim that the build-no-greater-than-no-build test had been satisfied. This commenter believed that leaving this issue to be resolved through interagency consultation does not recognize that there are separate conformity interagency consultation rules for each region or perhaps each state or metropolitan area. The commenter questioned whether consistency in implementing the build-no-greater-than-no-build test could be maintained without sufficient guidance.

EPA believes that, at a minimum, rounding conventions used in conformity should be consistent with the level of precision used for the motor vehicle emissions budget in the local SIP. Rounding conventions should be discussed through the interagency consultation process and consider past conformity practices for the area. EPA notes that today's final rule only addresses how conformity analyses are performed; budgets cannot be rounded or changed from the emissions level that is determined by the SIP. If questions remain or if the area has never developed a local SIP, the interagency consultation process is the correct place to deal with questions of precision and rounding. The precision used in the development of local emissions inventories may vary depending on the size of the area and the resources available for the analysis. Decisions on rounding conventions for conformity analyses need to be consistent with local analysis methods and cannot easily be made at the national level. However, even given local variations in analysis methods, it is clear in the commenter's example that the build scenario produces emissions greater than the no-build scenario, and thus the test is not passed.

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

EPA believes that in such cases it is obvious that the build-no-greater-than-no-build test is passed without calculating the emissions for such analysis years. Furthermore, the Clean Air Act requirements to not worsen air quality or delay timely attainment may be met by documenting in the conformity determination that projects, assumptions, and thus emissions would remain the same for affected analysis years.

Most commenters supported EPA's proposal to not require a regional analysis in years where the build and no-build scenarios are exactly the same with the same projects and planning assumptions. Many of these commenters believed that the proposal would reduce burden on small urban areas with relatively few projects and resources for conducting conformity analyses. One commenter also believed that this proposal would prevent conformity lapses and would allow states to focus on those nonattainment areas with more transportation projects and more severe air quality issues. Two commenters believed this flexibility should also be extended to ozone nonattainment areas of higher classifications.

EPA agrees that this approach will likely relieve some of the burden of the conformity process on small areas with few projects and less serious air quality problems. However, ozone areas with higher classifications are required to meet a build-less-than-no-build test so this provision of today's final rule does not apply. In these areas, transportation plans and TIPs actually have to reduce emissions from current levels.

One commenter raised concerns with our proposal to waive regional analysis requirements for future analysis years when the build and no-build scenarios are exactly the same. This commenter did not agree with EPA's logic for the proposed rule revision, stating that the build and the no-build cases will always contain different assumptions regarding growth. Another commenter pointed out that EPA's proposal would be beneficial only when new projects are programmed in the later years of a plan, and no new projects are planned for the early years of the plan or TIP. However, in the reverse situation when projects are added in the early years of the TIP or plan but not in the later years, the commenter indicated that the effect of those projects would need to be reflected in the build scenario throughout the horizon years of the plan, via different VMT and speed estimates. In this case, the commenter stated that all analysis years should be modeled and included in the conformity determination.

EPA agrees with the commenter's understanding that the logic given in the November 5, 2003 proposal for this change was incorrect. We agree that an area would have different projects and assumptions in later years where projects were added in earlier years (these projects would always and only be in the build case for any years). However, we still think there are limited cases where projects and assumptions for both scenarios could be the same such as in earlier years. EPA believes that if the build and no-build scenarios are exactly the same and are based on exactly the same planning assumptions, by definition they cannot contain different assumptions about growth. This provision is intended to only apply in situations when the build and no-build scenarios are exactly the same. If there are any differences in the build and no-build scenarios, including differences in planning assumptions, speed or VMT, this provision would not apply.

One commenter believed that this flexibility should be available through the interagency consultation process, and that EPA should modify the conformity regulation to allow it subject to agreement among affected parties though the interagency consultation process. EPA agrees that consultation should be used to determine when this flexibility applies, but no rule change is needed to do that.

Finally, several commenters raised general concerns about the build/no-build test and offered other suggested changes to the test to address these concerns. For example, a few commenters did not believe that the ''no-build'' scenario always provides an

appropriate basis for conformity demonstrations, particularly in the outyears of the transportation plan. To address this issue, one commenter proposed that for all analysis years in the second 10 years of the transportation plan, the ''no-build'' scenario should be the ''build'' scenario from the previous analysis year.

EPA agrees that there are limitations in the usefulness of the build/no-build test for assessing longer-term air quality impacts of highway and transit projects. In fact, this is the primary reason that the build/no-build test is an interim test prior to the availability of an adequate or approved SIP budget. EPA does not believe the suggested changes to the build/no-build test are necessary and would ensure protection of air quality during this interim period. For example, the suggested change proposed by one of the commenters could allow emissions increases. In addition, many commenters supported the flexibility to choose between build/no-build and baseline year tests, as described in Sections V., VI., and VII. Since these general comments were not germane to the proposal, we have included a full response to these comments in the separate response to comments document, which is in Public Docket I.D. no. OAR–2003–0049.

D. Test Requirements for Ozone and CO Nonattainment Areas of Higher Classifications

1. Description of Final Rule

EPA is retaining the requirement that ozone and CO areas of higher nonattainment classifications must meet both the build-less-than-no-build *and* less-than-baseline year tests to demonstrate conformity in the period before SIP budgets are available. This provision will affect moderate and above 1-hour and 8-hour ozone areas, moderate CO areas with design values greater than 12.7 ppm, and serious CO areas. This requirement is identical to the requirement of the existing conformity rule for these areas, and was the first of three options proposed for regional emissions analyses before adequate or approved SIP budgets are established.

EPA had requested comment on the following proposed options for these areas:

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

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

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

The first option, which EPA has selected for the final rule, will retain the current conformity rule requirement that such areas use both the current build-less-than-no-build test and the less-than-baseline year test. Under this option, emissions from the proposed transportation system (build) will have to be less than emissions from the existing system (no build) and less than emissions in 1990 (for higher classification 1-hour ozone and CO areas) or 2002 (for higher classification 8-hour ozone areas). See the proposal for further background information on options 2 and 3 (November 5, 2003, 68 FR 62699–62700).

2. Rationale and Response To Comment

Based on our review of the proposal, the existing requirements of the conformity rule, and comments submitted, EPA has concluded that option 1, the existing conformity requirements, will better meet the dual statutory requirements for ozone and CO areas of higher classifications. These areas must demonstrate that transportation activities not cause or contribute to violations of the standards or delay timely attainment of a standard (Clean Air Act section 176(c)(1)(B)) and that such activities also contribute to annual emissions reductions (Clean Air Act section 176(c)(3)(A)(iii)).

EPA's proposal was intended to explore potential alternatives in an effort to provide the most flexible and least burdensome way of meeting statutory requirements. When EPA first promulgated the transportation conformity rule (January 11, 1993, 58 FR 3782), EPA determined that moderate and above 1-hour ozone areas and CO areas of higher classifications would have to meet both the build-less-than-no-build test and the less-than-baseline year test to satisfy both applicable statutory requirements that transportation activities not cause or contribute to violations of the standards (Clean Air Act section 176(c)(1)(B)) and that such activities contribute to annual emissions reductions (Clean Air Act section 176(c)(3)(A)(iii)). EPA also discussed our rationale for these areas in a July 9, 1996, proposed rule (61 FR 36116–36117).

Although the majority of the comments supported option 2, a choice between either the build/no-build or baseline year test, these commenters primarily supported this option out of a stated desire to obtain greater flexibility in meeting conformity requirements. No commenters provided any further rationale for the option or explained how the statutory requirements could be satisfied with only one test. In contrast, the commenters supporting option 1, continuation of the existing rule requirement to meet both the tests, provided compelling arguments indicating that both tests would be necessary to meet the statutory requirements. Further, comments on option 3 noting why either test would be superior provided additional indication that either test by itself could not meet both statutory obligations. In the face of these comments, as explained below EPA does not believe it can alter the current rule requiring the use of both tests.

The totality of the comments led EPA to conclude that if only the baseline test were required, in an area where motor vehicle emissions were declining significantly as a result of technology improvements in vehicle engines and fuels, the transportation plan itself might not be contributing to emissions reductions while the area as a whole was still meeting the baseline test. This would not meet the statutory requirement that such transportation activities themselves must contribute to emissions reductions. In contrast, in ozone and CO areas of higher classifications, the build/no-build test alone would not guarantee that emissions from the planned transportation system are less than emissions in the baseline year, even if emissions from the planned transportation system (the build case) are less than the current transportation system (the no-build case). This could fail to meet the statutory requirement that activities not contribute to violations of the standard.

Thus, based on the Agency's reasoning in past conformity rules and the comments submitted in this rulemaking, EPA believes that it must continue to require the use of both the baseline year and build/no-build tests in ozone and CO areas of higher nonattainment classifications prior to the availability of SIP budgets in order to satisfy applicable statutory obligations. In light of this conclusion, EPA is not responding in detail in this preamble to the numerous comments indicating policy choices for which of the two tests should be chosen or how the choice should be made, since EPA is requiring the use of both tests on legal grounds. A full response to all comments is included in the separate response to comments document available in the docket for this final rule.

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

A. Description of Final Rule

This section covers the provisions EPA is finalizing in today's rule for regional emissions analyses in 8-hour ozone areas that do not have an existing 1-hour ozone SIP with applicable budgets. These 8-hour ozone areas either were never designated nonattainment under the 1-hour ozone standard or were 1-hour ozone nonattainment areas that never submitted a control strategy SIP or maintenance plan with approved or adequate budgets. A regional emissions analysis is the part of a conformity determination that assesses whether the emissions produced by transportation activities are consistent with state, local, and federal air quality goals. EPA describes the final rule in four parts, as in the proposal: Conformity when 8-hour budgets are available, conformity before 8-hour budgets are available, conformity in clean data areas, and general implementation of regional emissions tests.

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

Once a SIP for the 8-hour ozone standard is submitted with a budget(s) that EPA has found adequate or approved, the budget test must be used in accordance with § 93.118 to complete all future applicable regional emissions analyses for 8-hour conformity determinations. In other words, once EPA finds a budget from an 8-hour ozone SIP adequate or approves an 8-hour ozone SIP that includes such a budget, the interim emissions test(s) will no longer apply for that precursor. This provision is found in § 93.109(d)(1) of today's rule.

The first 8-hour ozone SIP could be a control strategy SIP required by the Clean Air Act (*e.g.,* rate-of-progress SIP or attainment demonstration) or a maintenance plan. However, 8-hour ozone nonattainment areas ''are free to establish, through the SIP process, a motor vehicle emissions budget [or budgets] that addresses the new NAAQS in advance of a complete SIP attainment demonstration. That is, a state could submit a motor vehicle emissions budget that does not demonstrate attainment but is consistent with projections and commitments to control measures and achieves some progress towards attainment'' (August 15, 1997, 62 FR 43799). A SIP submitted earlier than otherwise required can demonstrate a significant level of emissions reductions from the current level of emissions, instead of the specific percentage required by the Clean Air Act for moderate and above ozone areas. For example, an area could submit an early 8-hour ozone SIP that demonstrates a 5–10% reduction of emissions in the year 2007, from 2002 baseline year emissions. An approvable early 8-hour SIP would include emissions inventories for all emissions sources for the entire 8-hour nonattainment area and would meet applicable requirements for reasonable further progress SIPs. For more information on establishing an early SIP and how it could be used for conformity, please refer to the final 8-hour ozone implementation rule (April 30, 2004, 69 FR 23951).

Air quality agencies responsible for developing 8-hour ozone SIPs must consult on their development with the relevant state and local air quality and transportation agencies per § 93.105(b). EPA Regions are available to assist on an ''as needed'' basis, including consultation on the development of early 8-hour ozone SIPs.

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

Before adequate or approved 8-hour ozone SIP budgets are established in 8-hour ozone areas that do not have 1-hour ozone SIPs, the regional emissions analysis is done using one or two interim emissions tests, depending on the area's classification or designation as described below. These provisions are found in § 93.109(d)(2)–(4) of today's rule.

Marginal and below classifications and subpart 1 areas. These 8-hour ozone nonattainment areas include: 8-hour ozone areas classified marginal and 8-hour ozone areas designated nonattainment under Clean Air Act subpart 1. These areas must pass one of the following tests in accordance with § 93.119 for conformity determinations that occur before adequate or approved 8-hour ozone SIP budgets are in place:

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

That is, emissions in all analysis years from the transportation system, as modified by the proposed transportation plan or TIP, must be less than or equal to emissions from either:

- The existing transportation system (the ''no-build'' case) in each of those analysis years, or
- The transportation system in 2002.

A discussion of the interim emissions tests can be found in Section IV. See also EPA's April 30, 2004 final 8-hour ozone implementation rule (69 FR 23951) for more information on 8-hour ozone areas designated under Clean Air Act subpart 1 (''subpart 1 areas'').

Moderate and above classifications. These areas include: 8-hour ozone nonattainment areas classified as moderate, serious, severe, and extreme. These areas must pass both of the following tests in accordance with § 93.119 for conformity determinations that occur before adequate or approved 8-hour ozone SIP budgets are in place:

- The build-less-than-no-build test, and
- The less-than-2002 emissions test.

That is, emissions in all analysis years from the transportation system, as modified by the proposed transportation plan or TIP, must be less than each of the following comparison cases:

- The existing transportation system including projects currently under construction (the ''no-build'' case) in each of those analysis years, and
- The transportation system in 2002.

For more information regarding these interim emissions tests for moderate and above ozone areas, please *see* Section IV.D.

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

In § 93.109(d)(5) of today's rule, EPA is extending the conformity rule's flexibility for 1-hour moderate and above ''clean data areas'' to 8-hour areas that meet the criteria of the clean data policy. As described in the November 5, 2003 proposal, EPA issued a policy memorandum on May 10, 1995 that addressed SIP requirements in a small number of moderate and above 1-hour ozone areas (entitled ''Reasonable Further Progress, Attainment Demonstrations, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard''). Please see the November 5, 2003 proposal for further background on EPA's existing clean data policy and conformity options (68 FR 62700–62701).

Clean data areas under today's final rule are moderate and above ozone areas with three years of clean data for the 8-hour ozone standard that have not submitted a maintenance plan and for which EPA believes it is reasonable to interpret the Clean Air Act's reasonable further progress and attainment demonstration requirements so as not to require areas that are meeting the ozone standard to make certain SIP submissions. In addition, some subpart 1 areas may also be eligible for the clean data policy if they are required to submit control strategy SIPs. Areas that qualify for EPA's clean data policy

under the 8-hour standard can use one of the following three options to complete regional emissions analyses:

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

As stated in Phase 1 of EPA's final 8-hour ozone implementation rule (April 30, 2004, 69 FR 23974), EPA intends to extend the existing clean data policy to applicable 8-hour ozone areas, and will respond on this issue in its future Phase 2 final 8-hour ozone implementation rule.

Please note that EPA's clean data policy, and therefore today's provision allowing emissions in the most recent year of clean data to be used as a budget, might not be available in any area for the first 8-hour conformity determination. Newly designated areas may not yet have three years of clean data for the 8-hour standard when the first conformity determination is due for that standard. As discussed in Section III., the first plan/TIP conformity determination is due by June 15, 2005, one year after the effective date of 8-hour designations.

4. General Implementation of Regional Tests

Regional emissions analyses for ozone areas must address both ozone precursors, which are nitrogen oxides (NO_X) and volatile organic compounds (VOCs) (40 CFR 93.102(b)(2)(i)). Before budgets are available, areas must meet the appropriate interim emissions test(s) for both VOC and NO_X precursors, unless EPA issues a NO_X waiver for the 8-hour standard under Clean Air Act section 182(f). This provision is consistent with the conformity rule to date, although in today's final rule the NO_X waiver provision is moved to § 93.119(f) (from § 93.119(d)) because of the reorganization of § 93.119. Once an adequate or approved SIP budget is available for the 8-hour standard, it must be used for regional emissions analyses.

In general, if a budget is available for only one ozone precursor, the interim emissions test(s) will continue to apply for the other precursor. For example, this situation would occur when a reasonable further progress SIP is submitted with a budget for VOCs only (*e.g.*, a 15% SIP), and this case is specifically covered by § 93.109(d)(3). In this example, an area would use the budget test for VOCs and the interim emissions test(s) for NO_X, unless it has a NO_X waiver as described above.

The consultation process must be used to determine the models and assumptions for completing either the interim emissions tests or the budget test, as required by § 93.105(c)(1)(i) of the current rule.

B. Rationale and Response to Comments

The use of the budget test once budgets are available for an air quality standard is based on the requirements of the Clean Air Act. Once budgets have been found adequate or approved, the budget test provides the best means to determine whether transportation plans and TIPs conform to a SIP and complies with the statutory obligation to be consistent with the emissions estimates in SIPs, according to Clean Air Act section 176(c)(2)(A). Several commenters specifically agreed that once a SIP for the 8-hour ozone standard is submitted with a budget(s) that EPA has found adequate or approved, the budget test should be used. One of these commenters stated that the advantage of the budget test is that areas have a high degree of confidence in attaining and maintaining the standards if emissions are held to budget levels from SIPs demonstrating attainment and maintenance. Another of these commenters strongly supported establishing 8-hour budgets through the submission of early SIPs, as discussed above.

Before budgets are available, the final rule's interim emissions test requirements for 8-hour areas are generally consistent with requirements for 1-hour areas. In general, several commenters supported the flexibility provided by the test options for 8-hour marginal and subpart 1 areas that do not have 1-hour ozone SIPs.

EPA believes that it is reasonable and credible to provide 8-hour ozone areas that are not classified moderate or above the same flexibility that applies under the 1-hour ozone standard. Several commenters specifically supported allowing these 8-hour ozone areas a choice between the baseline year and build/no-build tests. EPA determined in the 1997 conformity rule that either test could satisfy the statutory test of not causing or contributing to violations or delaying attainment in these areas, and the Agency believes this would continue to be true for new 8-hour areas, as discussed further below.

A few commenters requested clarification that the interim emissions test options remain available in subsequent conformity determinations until adequate or approved budgets are in place. These commenters are correct that while no 8-hour ozone budgets are available, areas are free to choose either test for a conformity determination, regardless of what test was used for a prior conformity determination. For example, if an MPO within a marginal 8-hour nonattainment makes a conformity determination based on the build-no-greater-than-no-build test, this would not preclude them, prior to adequate or approved budgets, from making a future conformity determination based on the no-greater-than-2002 emissions test. However, under these final rules, the same test must be used for each analysis year for a given conformity determination. In other words, an MPO may not use the build-no-greater-than-no-build test in one analysis year and the no-greater-than-2002 test in another analysis year within the same conformity determination. EPA believes that sufficient flexibility exists without mixing and matching interim emissions tests for different analysis years within one conformity determination, which is unnecessarily complicated and suggests that the area would not conform using one test consistently.

One commenter advocated that state air agencies should have the authority to determine which test is used, because in the commenter's view the state air agency would best be able to choose the test that ensures progress towards attainment. However, EPA believes that it is appropriate for the decision to be made within the interagency consultation process, as has been done to date. Given that MPOs have responsibility for making the conformity determination, and would need to set up the no-build network if the build-no-greater-than-no-build test is used, EPA believes they need to take part in choosing the test. State air agencies are insured a role in the transportation conformity process through interagency consultation, as § 93.105 of the conformity rule sets forth the requirements for state air agencies' participation in the conformity process, as well as a process for resolving conflicts. The state air agency role is also addressed in the preamble to the 1993 rule (November 24, 1993, 58 FR 62201). EPA continues to believe that the conflict resolution process provides a mechanism for the state air agency to elevate issues to the governor if they cannot be resolved by state agency officials, and that the process facilitates collaboration which is essential to

cooperative transportation and air quality planning. Therefore, EPA is not changing the final rule in response to this comment.

A few commenters supported one or the other of the proposed interim emissions tests in 8-hour marginal or subpart 1 areas. One commenter supported elimination of the build-no-greater-than-no-build test because no specific allowable level or limit is placed on emissions levels associated with the no-build scenario, while the no-greater-than-2002 test compares future emissions to a specified allowable level. However, another commenter made an opposing argument against the use of the no-greater-than-2002 test arguing that if an area was not attaining the 8-hour ozone standard in 2002, then the no-greater-than-2002 test allows emissions to continue at a level that will not bring the area into attainment. A third commenter suggested that prior to adequate or approved SIP budgets, emissions should be held to as low a level as possible to prevent an area from proceeding with transportation projects that may preclude them from meeting the 8-hour ozone standard in the future.

Since the transportation conformity rule was promulgated on November 24, 1993 (58 FR 62188), the build-less-than-no-build and less-than-1990 tests have been part of the transportation conformity rule as appropriate tests in meeting the conformity requirements of the Clean Air Act prior to the availability of SIP budgets. In the August 15, 1997 amendments (62 FR 43780), the transportation conformity rule was amended to allow ozone areas not classified moderate or higher to meet either the build-less-than-no-build test or the no-greater-than-1990 test. Our rationale for this change is found in the proposed rulemaking for those amendments (July 9, 1996, 61 FR 36112).

Though EPA has updated the tests in today's rule, our rationale for allowing 8-hour marginal and subpart 1 areas to choose between the two tests remains the same as described in the 1996 proposal. When there are no adequate or approved budgets, EPA believes that either test meets the Clean Air Act requirement that transportation activities will not cause new violations, increase the frequency or severity of existing violations, or delay timely attainment. In contrast to ozone areas of higher classifications, transportation activities in these areas are not required to contribute to emissions reductions per Clean Air Act section 176(c)(3)(A)(iii).

Though EPA considered additional options for moderate and above 8-hour ozone areas as discussed in Section IV.D., the final rule is consistent with requirements for 1-hour ozone areas. In 8-hour nonattainment areas classified moderate or above, EPA believes the build-less-than-no-build and the less-than-2002 tests together support the determination that a transportation plan, TIP, or project will not cause new violations, increase the frequency or severity of existing violations, or delay attainment. In addition, these tests together demonstrate that plans and TIPs contribute to emissions reductions required by section 176(c)(3)(A)(iii) of the Clean Air Act. Additional discussion of the rationale for both tests in these areas is also found in Section IV.D.

EPA is also continuing to provide more choices to areas that qualify for EPA's clean data policy. As EPA intends to include the clean data policy in EPA's Phase 2 final 8-hour ozone implementation rule, EPA is including the conformity options for such areas in today's conformity rule. These provisions will be able to be used once EPA has found that an area is a clean data area for the 8-hour standard pursuant to the regulations the Agency intends to promulgate under Phase 2 of the 8-hour implementation rule. See EPA's previous discussion and rationale for the conformity clean data options from the preamble to the 1996 proposed and 1997 final transportation conformity rule amendments (July 9, 1996, 61 FR 36116; and August 15, 1997, 62 FR 43784–43785, respectively). Two commenters supported extending the clean data policy to qualifying 8-hour ozone areas. One reasoned that conformance with budgets constrained by emissions levels during years in which the area demonstrated attainment should not cause or contribute to nonattainment, and thus meeting any one of the tests for clean data areas should be sufficient to demonstrate conformity.

However, two commenters stated that EPA should not apply a ''clean data policy'' to ozone areas classified as moderate or above because Clean Air Act sections 172 and 175A require a completed SIP containing measures that must be implemented if the area backslides into nonattainment, and a maintenance plan if the area seeks to avoid implementing some elements of its nonattainment plan.

In today's final rule, EPA is not making changes to its existing clean data policy, nor to the conformity process for clean data areas. EPA is merely extending the conformity flexibility that 1-hour ozone clean data areas have to the 8-hour ozone clean data areas. EPA believes this is appropriate since the Agency intends to extend the clean data policy to 8-hour areas for SIP purposes in Phase 2 of the final 8-hour ozone implementation rule. EPA will respond to all comments on the appropriateness of that extension in the final action on Phase 2 of the final 8-hour implementation rule.

Finally, one commenter wanted EPA to issue VOC waivers for areas that are NO_X limited, so they can focus on getting NO_X reductions. However, though section 182(f) of the Clean Air Act specifically provides that EPA could waive NO_X requirements in certain areas, the Clean Air Act provides no such flexibility with respect to VOCs. Since VOCs are clearly an ozone precursor, ozone areas must demonstrate conformity to VOC levels that provide for attainment and maintenance to prevent potential future violations, even in areas that may not need additional VOC reductions to attain. EPA has no ability to offer any provision to give areas VOC waivers.

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

A. Description of Final Rule

This section covers how regional emissions analyses must be done in 8-hour ozone areas with an existing 1-hour ozone SIP that covers either part or all of the 8-hour ozone nonattainment area. The regulatory text in § 93.109(e) provides a general overview of when the budget test and interim emissions tests apply in 8-hour ozone nonattainment areas with adequate or approved 1-hour ozone SIP budgets. As in Section V., EPA describes the final rule provisions in four parts: conformity when 8-hour budgets are available, conformity before 8-hour budgets are available, conformity in clean data areas, and general implementation of regional emissions tests.

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

Once a SIP for the 8-hour ozone standard is submitted with budget(s) that EPA has found adequate or approved, the budget test with the budgets from the 8-hour ozone SIP must be used in accordance with § 93.118 to complete the regional emissions analysis for 8-hour conformity determinations. The first 8-hour ozone SIP could be a control strategy SIP required by the Clean Air Act (*e.g.*, rate-of-progress SIP or attainment demonstration). The first SIP could also

be submitted earlier and demonstrate a significant level of emission reductions from the current level of emissions, as described in Section V.A.1. Any existing 1-hour ozone SIP budgets and/or interim emissions tests will no longer be used for conformity for either NO_X or VOCs once an adequate or approved 8-hour SIP budget is established for such a precursor. State, local, and federal air quality and transportation agencies must consult on the development of 8-hour ozone SIPs including their budgets as appropriate, pursuant to § 93.105 of the conformity rule.

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

Under today's final rule, all 8-hour areas with adequate or approved 1-hour budgets must use these budgets for 8-hour conformity before 8-hour budgets are available, unless it is determined through the interagency consultation process that using the interim emissions tests is more appropriate for meeting Clean Air Act requirements. In today's rule, the budget test using the existing 1-hour ozone SIP budgets fulfills the regional emissions analysis requirement for the 8-hour ozone standard, rather than the 1-hour ozone standard. Please note that the 1-hour budgets are to be used as a proxy for 8-hour budgets. Conformity for the 1-hour and 8-hour ozone standards will not apply at the same time, according to EPA's April 30, 2004 final 8-hour ozone implementation rule, as described in Section III. of today's action.

There are four potential scenarios into which areas covered by this section can be categorized:

- *Scenario 1:* Areas where the 8-hour ozone area boundary is exactly the same as the 1-hour ozone area boundary;
- *Scenario 2:* Areas where the 8-hour boundary is smaller than the 1-hour boundary, (*i.e.*, the 8-hour area is completely within the 1-hour area);
- *Scenario 3:* Areas where the 8-hour boundary is larger than the 1-hour boundary (*i.e.*, the 1-hour area is completely within the 8-hour area); and
- *Scenario 4:* Areas where the 8-hour boundary partially overlaps the 1-hour area boundary.

EPA has posted diagrams of these four boundary scenarios for further clarification on the transportation conformity Web site. Please note that scenarios are determined according to how the entire 8-hour nonattainment area relates to the entire 1-hour nonattainment or maintenance area(s). For example, in a multi-state 8-hour area, the area's scenario and corresponding conformity requirements are based on the entire 8-hour area boundary, rather than on each state's portion of the 8-hour area. State and local agencies can consult with EPA and DOT field offices to determine which scenario applies to a given 8-hour nonattainment area.

The following paragraphs describe how regional conformity tests are applied in the four boundary scenarios, as well as the circumstances under which another test(s) may be appropriate. Please see A.4. of this section for further information regarding when another test may be appropriate for meeting Clean Air Act requirements. EPA will post more detailed implementation guidance on its transportation conformity website for conformity determinations in new standard areas, including 8-hour ozone areas with 1-hour SIP budgets and multi-state/multi-MPO nonattainment areas. Please also see Section I.B.2. of this notice for information regarding EPA's conformity Web site.

Scenario 1: Areas where 8-hour and 1-hour ozone boundaries are exactly the same. In this case, the 8-hour and 1-hour ozone boundaries cover exactly the same geographic area. Such an area could be formed from a single 1-hour area, or more than one 1-hour area, as long as the entire 8-hour area boundary is exactly the same as the boundary of the previous 1-hour area or areas.

In these areas, conformity must generally be demonstrated using the budget test according to § 93.118 with the 1-hour SIP budgets, as described in A.4. of this section. The regulatory text in § 93.109(e)(2)(i) covers Scenario 1 areas. The interagency consultation process would be used to clarify the 1-hour budget(s) for the 8-hour area. The interim emissions test(s) would only be used if it is determined through the consultation process that an adequate or approved 1-hour budget is not appropriate for a given year(s) in a regional emissions analysis, as explained in A.4. of this section and § 93.109(e)(2)(v) of the final rule. EPA will post on its website implementation guidance for conducting 8-hour conformity determinations in multi-jurisdictional areas, including Scenario 1 areas with multiple states, MPOs, etc. Please see Section I.B.2. of this notice for information regarding EPA's conformity website.

Scenario 2: Areas where the 8-hour ozone boundary is smaller than and within the 1-hour ozone boundary. In this case, the 8-hour nonattainment area is smaller than and completely encompassed by the 1-hour nonattainment boundary. In these areas, conformity must generally be shown using one of the following versions of the budget test:

- The budget test using the subset or portion(s) of existing adequate or approved 1-hour ozone SIP budgets that cover the 8-hour nonattainment area, where such portion(s) can be appropriately identified; or
- The budget test using the existing adequate or approved 1-hour ozone SIP budgets for the entire 1-hour nonattainment area. However, in this case any additional emissions reductions beyond those addressed by control measures in the 1-hour SIP budgets need to pass the budget test and must come from within the 8-hour nonattainment area.

The budget test would be completed according to the requirements in § 93.118, as described in A.4. of this section. The regulatory text in § 93.109(e)(2)(ii)(A) and (B) reflects these two choices. Though the November 5, 2003 proposed rule included both choices in one paragraph, today's rule separates them into different regulatory subparagraphs simply for ease of readability.

Once an area selects either of these budget test options, it must be used consistently for each analysis year of a given conformity determination. EPA believes that to do otherwise would be unnecessarily complicated and would imply that one test option used consistently for all analysis years may not demonstrate conformity. The interim emissions test(s) would only be used if it is determined through the consultation process that an adequate or approved 1-hour budget is not appropriate for a given year(s) in the regional emissions analysis, as explained in A.4. of this section and § 93.109(e)(2)(v) of the final rule.

As described in the November 2003 proposal, the first budget test option is available to an area if it is possible to determine what portion of the 1-hour budget applies to the 8-hour area. In that case, that portion can be used as the budget for the 8-hour area. Determining such a budget would be straightforward, for example, if the budget corresponds directly with an on-road mobile inventory for the 1-hour ozone SIP that was calculated by county, and the portion to be subtracted is a specific county that is not part of the 8-hour ozone area. However, where the 1-hour SIP does not clearly specify the amount of emissions in the portion of the 1-hour ozone area not covered by the 8-hour ozone area, this method may not be available. The consultation process would be used to determine whether using a portion of a 1-hour ozone SIP

budget is appropriate and feasible, and if so, how deriving such a portion would be accomplished.

In the second budget test option, a conformity determination based on the entire 1-hour ozone budget would include a comparison between the on-road regional emissions produced in the entire 1-hour ozone area and the existing 1-hour ozone budgets. However, if additional emissions reductions are required to meet conformity beyond those produced by control measures in the 1-hour SIP budgets, only reductions within the 8-hour ozone nonattainment area can be included in the regional emissions analysis. If conformity cannot be determined on schedule using either budget test option, only the 8-hour ozone nonattainment area would be in a conformity lapse.

Scenario 3: Areas where the 8-hour ozone boundary is larger than the 1-hour ozone boundary. This scenario will result when an entire 1-hour ozone nonattainment or maintenance area is contained within a larger 8-hour ozone area. For example, a Scenario 3 area would result when an 8-hour area is formed from an existing 1-hour area plus an additional county or counties that were not covered by the 1-hour standard. In these areas, the budgets from the previous 1-hour ozone area will not cover the entire 8-hour nonattainment area. However, conformity must consider regional emissions for the entire 8-hour ozone nonattainment area.

Therefore, in these areas, conformity must generally be demonstrated using the budget test based on the 1-hour ozone SIP budgets for the 1-hour ozone area, plus the interim emissions test(s) for one of the following:

- The portion of the 8-hour ozone nonattainment area not covered by the 1-hour budgets;
- The entire 8-hour ozone nonattainment area; or
- The entire portion of the 8-hour ozone nonattainment area within an individual state, in the case where 1-hour SIP budgets are established for each state in a multi-state nonattainment area.

The budget test would be completed according to the requirements in § 93.118, as described in A.4. of this section. The interim emissions tests would only be used instead of the 1-hour budget if it is determined through the consultation process that an adequate or approved 1-hour budget is not appropriate for a given year in the regional emissions analysis, as explained in A.4. of this section and § 93.109(e)(2)(v) of the final rule. The regulatory text in § 93.109(e)(2)(iii)(A) and (B) reflects requirements for Scenario 3 areas. EPA notes that the final rule separates Scenario 3 and 4 area test requirements in the regulation for easier implementation.

The final rule's options for interim emissions tests are intended to give areas the flexibility to continue to implement conformity as they have under the 1-hour standard. EPA is clarifying this flexibility related to multi-state areas in the final rule since it was intended by the proposal and supported by public comments received.

For example, if an 8-hour multi-state nonattainment area with multiple MPOs has separate adequate or approved 1-hour budgets for each state, the MPOs would continue to determine conformity to their state's 1-hour budgets. In this special case where states and MPOs want to continue to work independently under the 8-hour standard, the budget test would be completed with applicable 1-hour SIP budgets for each state. In addition, the interim emissions test(s) would be done for either:

- any portion of a state's 8-hour nonattainment area that is not covered by a state's 1-hour SIP budget; or
- the entire portion of the 8-hour nonattainment area covered by that state.

EPA notes that the interim emissions test(s) could also be done for the entire 8-hour nonattainment areas under this final rule in this example. However, doing so may not allow each MPO in this example to develop transportation plans and TIPs and conformity determinations independently.

Rather than include all the possibilities of this type and others in today's preamble, EPA will post implementation guidance on its transportation conformity Web site for conducting 8-hour conformity determinations with 1-hour SIP budgets, including determinations in multi-state and multi-MPO nonattainment areas. Please see Section I.B.2. of this notice for information regarding EPA's conformity Web site. In any case, whether one or both interim emissions tests is required depends on the area's classification or whether an area is a subpart 1 area, as described in Section V. of today's preamble.

EPA acknowledges that there may be cases where it is difficult to model the remaining portion of the 8-hour ozone area separately, *e.g.*, in an area where the remaining 8-hour ozone area is a ring of counties around the 1-hour ozone area. In this case, an area may choose to complete the interim emissions test(s) for the entire 8-hour ozone area, rather than just the portion not covered by the 1-hour ozone budgets. Once an area selects a particular interim emissions test(s) and geographic coverage for such test(s), these choices must be applied consistently for all regional analysis years in a given conformity determination. For example, a marginal 8-hour ozone area that is larger than the 1-hour ozone area with one applicable 1-hour SIP can complete the regional emissions analysis by meeting the budget test for the 1-hour ozone nonattainment area and the no-greater-than-2002 test for the remaining portion of the 8-hour ozone area for all analysis years.

The consultation process should also be used to select analysis years for performing modeling where both the budget test (§ 93.118) and interim emissions test(s) (§ 93.119) are used. Sections 93.118(d) and 93.119(g) of the conformity rule both require the last year of the transportation plan and an intermediate year(s) to be analysis years where modeling is completed. However, the analysis years for the short-term may be different for the budget test and interim emissions tests in some cases. For example, § 93.118 requires modeling for the budget test to be completed for the attainment year if it is within the timeframe of the transportation plan; § 93.119 requires the first analysis year for the interim emissions tests to be within the first five years of the transportation plan. The consultation process can be used to select analysis years that satisfy both the budget and interim emissions test requirements as appropriate to avoid multiple modeling analyses in these cases.

Scenario 4: Areas where the 8-hour ozone boundary overlaps with a portion of the 1-hour ozone boundary. This scenario results when 1-hour and 8-hour boundaries partially overlap. For example, a Scenario 4 area could be an 8-hour area formed from a portion of one or more 1-hour areas plus new counties that were not covered by the 1-hour standard. As in the previous scenarios, these areas must generally use existing 1-hour budgets whenever feasible to determine conformity, plus the interim emissions test(s) when a portion of the 8-hour nonattainment area is not covered by existing 1-hour budgets.

In Scenario 4 areas, conformity must generally be demonstrated using the budget test based on the portion of the 1-hour ozone SIP budget(s) that covers both the 1-hour and 8-hour areas, plus

the interim emissions test(s) for one of the following:

- The portion of the 8-hour ozone nonattainment area not covered by the portion of the 1-hour budgets;
- the entire 8-hour ozone nonattainment area; or
- the entire portion of the 8-hour ozone nonattainment area within an individual state, in the case where separate 1-hour SIP budgets are established for each state in a multi-state nonattainment area.

EPA has also clarified in the regulatory text that only the budget test would be completed in the limited case where portions of 1-hour SIP budgets cover the entire 8-hour nonattainment area or portions thereof. Whatever the case, the budget test would be completed according to the requirements in § 93.118, as described in A.4. of this section. The regulatory text in § 93.109(e)(2)(iv)(A) and (B) reflect Scenario 4 area requirements. EPA again notes that the final rule separates Scenario 3 and 4 area test requirements for easier implementation.

The interim emissions tests would be used instead of a 1-hour budget only if it is determined through the consultation process that an adequate or approved 1-hour budget is not appropriate for a given year in the regional emissions analysis, or if it is not possible to determine what portion of the 1-hour budgets apply to the 8-hour area, as described in A.4. of this section and § 93.109(e)(2)(v) of the final rule.

As described for Scenario 3 above, the final rule is intended to give areas the flexibility to continue to implement conformity as they have under the 1-hour standard. EPA will post implementation guidance on its transportation conformity Web site for conformity determinations in Scenario 4 and other 8-hour areas. Please see Section I.B.2. of this notice for information regarding EPA's conformity Web site.

As described for Scenario 3, the consultation process should be used to select the analysis years where both the budget test (§ 93.118) and interim emissions test(s) (§ 93.119) are used. It should be possible to choose analysis years in most cases that satisfy both the budget and interim emissions test requirements for areas using both tests. Whether one or both interim emissions tests is required in any case depends on the area's classification or whether an area is a subpart 1 area, as described in Section V. of today's preamble.

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

As described in Section V.A.3., EPA is extending the conformity rule's flexibility for 1-hour ozone ''clean data areas'' to 8-hour ozone areas that meet the criteria of the clean data policy. Clean data areas for the 8-hour ozone standard with adequate or approved 1-hour ozone SIP budgets must generally use one of the following three options to complete conformity:

- The budget test using the adequate or approved motor vehicle emissions budgets in a SIP for the 8-hour ozone standard;
- The budget and/or interim emissions tests using existing 1-hour ozone SIP budgets and/or applicable interim emissions tests, as described in A.2. of this section for different scenarios of 1-hour and 8-hour ozone nonattainment boundaries; or
- The budget test using the motor vehicle emissions level in the most recent year of clean data as budgets, if such budgets are established by the EPA rulemaking that determines an area to have clean data for the 8-hour ozone standard.

See the regulatory text for these options in § 93.109(e)(4), and preamble Section V.A.3. for more information about clean data areas.

4. General Implementation of Regional Tests

Under the existing conformity rule, regional emissions analyses for ozone areas must address NO_X and VOC precursors (40 CFR 93.102(b)(2)(i)). Areas must also complete the interim emissions test(s) for NO_X as required by § 93.119 if the only SIP available is a reasonable further progress SIP for either the 1-hour or 8-hour standard that contains a budget for VOCs only (*e.g.,* a 15% SIP). In all cases where areas use the interim emissions test(s), both precursors must be analyzed unless EPA issues a NO_X waiver for the 8-hour standard for an area under Clean Air Action section 182(f). This is consistent with the conformity rule to date, although today's final rule moves these provisions to § 93.119(f) due to reorganization of § 93.119. See § 93.109(e)(3) for this regulatory text.

The consultation process must be used to determine the models and assumptions for completing the budget test and/or the interim emissions test(s), as required by § 93.105(c)(1)(i) of the rule. The consultation process must also be used to decide if the interim emissions test(s) are more appropriate to meet the Clean Air Act requirements than existing adequate or approved 1-hour budgets before 8-hour ozone SIPs are submitted.

General implementation of the budget test with 1-hour budgets. The budget test requirements in § 93.118 for 8-hour areas will be generally implemented in the same manner as in 1-hour areas, with a few exceptions. First, as described above, the geographic area covered by the 8-hour standard may be different than that covered by the 1-hour standard and SIP budgets in some cases. Second, the years for which regional modeling is performed will slightly differ.

Areas that use 1-hour budgets for their 8-hour conformity determinations will need to determine the modeling analysis years that apply for the 8-hour standard per § 93.118(d). Under this section, a modeling analysis must be completed for the last year of the transportation plan, the attainment year for the relevant pollutant and standard, and an intermediate year(s) such that analysis years are not more than 10 years apart. The attainment year analysis is to be for an area's attainment year for the 8-hour standard, which will be different than the attainment year under the 1-hour standard. The area must then calculate emissions in the analysis years from the existing and planned transportation system.

Once modeling is completed per § 93.118(d)(2), 8-hour areas using 1-hour SIPs will also demonstrate consistency with 1-hour SIP budgets according to § 93.118(b), except for cases where it is determined that 1-hour SIP budgets are not appropriate through the consultation process as described above. According to § 93.118(b) of today's final rule as described in Section XXIII., consistency with 1-hour budgets must be shown for all 1-hour budget years that are within the timeframe of the transportation plan, the 8-hour attainment year (if in the timeframe of the plan), the last year of the plan, and an intermediate year(s) so that all years are not more than 10 years apart. Emissions projected for each analysis year must be within the budgets in the 1-hour SIP from the most recent prior year. Interpolation can be used between analysis years for demonstrating consistency with budgets, just as has been done under the 1-hour standard.

For example, suppose an area designated nonattainment for the 8-hour ozone standard with an 8-hour attainment date of 2010 has the following 1-hour SIP budgets:

- 2005 rate-of-progress budgets for NO_X and VOC_S,
- 2007 rate-of-progress budgets for NO_X and VOC_S, and

• 2007 attainment demonstration budgets for NO_X and VOC_S.

By 2005, this area would determine conformity for its 2005–2025 transportation plan and its TIP, and the conformity determination would be accomplished as follows:

• 2005 budget test, using the 2005 ROP budgets;

• 2007 budget test, using both 2007 ROP and attainment budgets;

• 2010 budget test, using the 2007 attainment budgets; [12]

• 2020 budget test, using the 2007 attainment budgets; and

• 2025 budget test, using the 2007 attainment budgets.

As described in § 93.118(d)(2), emissions for the year 2005 could be generated with a regional emissions analysis, or could be interpolated if the area has run a regional emissions analysis for an earlier year. Emissions for the year 2007 can also be interpolated or the area could choose to model emissions for this year. A regional modeling analysis must be done for the year 2010 (the 8-hour attainment year), any year between 2015 and 2020 for the intermediate year (in the above example, 2020 is the intermediate year), and the year 2025 (the last year of the transportation plan) as required by § 93.118(d)(2).

As stated in A.1. of this section, once adequate or approved 8-hour SIP budgets are established for a given precursor, the budget test would be completed with only the 8-hour SIP budgets for that precursor, rather than the 1-hour SIP budgets.

When might 1-hour SIP budgets not be the most appropriate test for 8-hour ozone conformity? Though EPA anticipates that exceptions to the use of the 1-hour budgets will be infrequent, there are some cases where using another test(s) may be more appropriate to meet Clean Air Act requirements. EPA expects such limited cases to be supported and documented in the 8-hour conformity determination for a given area. EPA notes that an adequate or approved 1-hour SIP budget cannot be considered inappropriate simply because it is difficult to pass for 8-hour conformity purposes. In addition, as noted below and consistent with past conformity precedent, 1-hour SIP budgets cannot be discarded simply because they are based on older planning assumptions or emissions models, unless through interagency consultation it is determined that a different emissions test(s) is more appropriate to ensure that air quality is not worsened for all 8-hour areas and that reductions are achieved in certain ozone areas.

The most likely example of when the budgets may not be the most appropriate test is where a 1-hour SIP budget is not currently used in conformity determinations for the 1-hour standard, and thus is currently not relied upon to measure whether transportation activities are consistent with Clean Air Act requirements. Such a case would happen when the SIP budget year is no longer in the timeframe of the transportation plan and there is no requirement to meet the budget test prior to the year in which the next 1-hour SIP budget is established (*e.g.,* the SIP established a budget for the 1-hour attainment year, but that attainment year has passed and budgets for future years are available).

For example, suppose a 1-hour maintenance area attained in 1999 and has a maintenance plan with budgets for 2009. If the area has an 8-hour attainment date of 2007, it would have to compare emissions in 2007 to the budgets from the most recent prior year, which would be the attainment budgets for the year 1999. In this case, the budgets are not currently in use for the 1-hour standard, and it may be more appropriate for an area to use the 2002 baseline year test for the 2007 analysis year, since the 2002 baseline could be lower and therefore more protective than the 1999 budgets. However, the maintenance area would use its 2009 budgets in the 1-hour maintenance plan to show 8-hour conformity for 2009 and all future analysis years.

Another example of when another test would be more appropriate than existing adequate or approved 1-hour SIP budgets would be in certain Scenario 4 areas where it is impossible to determine which portion of a 1-hour SIP budget covers an 8-hour nonattainment area. In this case, applying the budget test with 1-hour SIP budgets is not feasible, and consequently, only the interim emissions test(s) are available for such unique areas.

As described in Section V., when a SIP budget is not established a moderate or above ozone area would need to pass both interim emissions tests. Areas classified as marginal or designated under Clean Air Act subpart 1 can choose between the two tests when no budgets apply. However, in these cases where a 1-hour budget is available but the area demonstrates it is not the most appropriate test, EPA believes that the no-greater-than-2002 baseline year test would most likely be used. EPA believes it is extremely unlikely that the build/no-build test alone would ever be a more appropriate test than the budget test with existing 1-hour SIP budgets that are currently used for conformity purposes. See B.2. of this section below for further information regarding EPA's rationale for using 1-hour budgets and what is appropriate for meeting Clean Air Act requirements.

Areas must use the consultation process to decide whether the applicable interim emissions tests are more appropriate to meet Clean Air Act requirements than the 1-hour budgets, pursuant to § 93.109(e)(2)(v) of the final rule. In areas where another test(s) is used, areas must also justify selection of the specific test(s) chosen as being more appropriate for meeting Clean Air Act requirements than the available 1-hour SIP budgets. This decision should be discussed with all interagency consultation parties and documented in the conformity determination for the 8-hour standard.

B. Rationale and Response to Comments

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

Several commenters strongly supported establishing budgets for the 8-hour standard through the submission of early SIPs. EPA agrees that Clean Air Act section 176(c) is met when the budget test is used, once budgets are available for an air quality standard. Once 8-hour ozone budgets have been found adequate or approved, the budget test provides the best means to determine whether transportation plans and TIPs conform to an 8-hour ozone SIP and comply with the statutory obligation to be consistent with the emissions estimates in SIPs, according to Clean Air Act section 176(c)(2)(A). A few commenters suggested that EPA urge states to establish budgets for the 8-hour standard early because of the potential complications without 8-hour budgets where the 8-hour boundary differs from the 1-hour boundary. EPA agrees that state and local agencies can choose to establish an early SIP for conformity purposes, however, each area needs to consider the benefits of an early SIP and impacts on state and local resources.

One commenter suggested that ozone areas should be required to consider emissions in the portion of the 8-hour area that is outside the boundary of the 1-hour standard when developing 8-hour SIPs. EPA agrees. In fact, they are required to consider these emissions because the SIP addressing the 8-hour standard must cover the entire 8-hour

[12] EPA has previously interpreted that only attainment budgets apply beyond the attainment year, in cases where ozone areas also have budgets for rate-of-progress SIPs.

nonattainment area. Please note that the conformity rule does not change existing SIP requirements and policy that will apply for the new standards.

Another commenter recommended that once 8-hour budgets are adequate or approved, areas should do conformity to both the 1-hour and the 8-hour standards. The commenter believed that doing conformity to both standards would not represent a significant hurdle. EPA has decided, however, to revoke the 1-hour standard when the 8-hour standard conformity grace period ends, one year after the effective date of 8-hour area designations. Once the 1-hour standard is revoked, conformity will no longer apply for that standard as a matter of law. Conformity therefore will only apply for one ozone standard at a time. Please see Section III. for more information regarding the conformity grace period and revocation of the 1-hour standard.

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

Though EPA proposed that areas could choose among several options before 8-hour budgets are available, today's rule requires the use of 1-hour SIP budgets, where available and appropriate, as a direct result of consideration of all of the relevant comments received on this issue. Section 176(c) of the Clean Air Act requires that transportation activities may not cause new violations, increase the frequency or severity of existing violations, or delay timely attainment. Using 1-hour budgets where available and appropriate ensures that air quality progress to date is maintained, air quality will not be worsened and attainment of the 8-hour standard will not be delayed because of emissions increases.

Once EPA finds a budget adequate or approves the SIP that includes it, the budget test provides the best means to determine whether transportation plans and TIPs meet Clean Air Act conformity requirements. EPA now believes this principle applies with respect to the 1-hour budgets in 8-hour nonattainment areas as well: in most cases, EPA concludes that the 1-hour budgets are the best test for determining conformity to the 8-hour standard before 8-hour ozone budgets are available because the 1-hour budgets have led to current air quality improvements. A couple of commenters noted that attaining the 1-hour standard is a milestone toward attaining the 8-hour standard. Some commenters mentioned that most 1-hour budgets in major urban areas are appropriate to use, especially in serious and above ozone areas that have budgets that have recently been updated with the MOBILE6 emissions factor model.

A number of commenters described how emissions could increase if areas use the interim emissions tests instead of their 1-hour budgets. Emissions could increase if areas use the 2002 baseline year test, commenters stated, because 2002 motor vehicle emissions are significantly higher than existing 1-hour budgets in many cases. Commenters provided an analysis of 2002 baseline emissions estimates compared to 1-hour ozone budget levels for 12 major metropolitan areas to illustrate that the 2002 motor vehicle emissions were significantly higher than the 1-hour budgets in these areas. For one major metropolitan area that had established MOBILE6-based attainment budgets for 2007, the 2002 baseline year test based on MOBILE6 would result in allowable VOC and NO_X emissions increasing by 44% and 56%, respectively, above the budget levels for the 1-hour ozone attainment demonstration. A second commenter corroborated this finding with data that showed VOCs could increase 47% and NO_X could increase 33% if 2002 emissions were used instead of the area's attainment budgets. Commenters concluded that emissions from motor vehicles could increase anywhere from 10 to 50% of the 1-hour budgets, and because motor vehicles represent a quarter to a half of all emissions in most metropolitan areas, the total emissions in an airshed could increase to the point where areas cannot attain the 8-hour standard.

Likewise, the build/no-build test could also lead to an increase in emissions over the 1-hour budgets and from current air quality progress, according to some commenters. Several commenters argued that the build/no-build test sets no meaningful limit on emissions growth because the test is satisfied as long as the build emissions are less than the no-build emissions, regardless of how much emissions increase in both the build and no-build cases.

Commenters also wrote to EPA about the results of using interim emissions tests where budgets are available. Many were concerned with negative impacts on public health due to the increase in emissions that could occur, especially impacts on children. One commenter predicted it would be difficult for areas to adopt future measures sufficient to offset the emissions increases that could result, and that such measures would impose increased burden on other source sectors, such as industrial sources and small businesses.

EPA found the evidence and the arguments presented by these commenters compelling, and we now believe that using the interim emissions tests would not fulfill the Clean Air Act conformity tests when appropriate 1-hour budgets are available. Some areas with 1-hour budgets have not yet attained the 1-hour standard, and the 8-hour standard is generally more stringent. In these areas, EPA believes that every additional ton of motor vehicle emissions allowed above the 1-hour budgets could impact an area's ability to attain the 8-hour standard and necessitate additional control measures.

Under today's rule, therefore, the interim emissions test(s) are only available if the circumstances warrant it, as determined through the interagency consultation process. EPA agrees with these commenters that the budget test is generally more protective of air quality and that the interim emissions tests do not meet sections 176(c)(1)(A) and (B) of the Clean Air Act when an appropriate 1-hour budget is available.

Furthermore, today's final rule is consistent with EPA's historical precedent that the budget test with an adequate or approved SIP budget is more appropriate than the interim emissions tests. As we stated in our July 9, 1996, conformity proposal (61 FR 36115), when motor vehicle emissions budgets have been established by SIPs, they provide a more relevant basis for conformity determinations. The baseline year and the build/no-build tests are sufficient for demonstrating conformity when an area does not have a budget. EPA created these tests based on the language in Clean Air Act section 176(c)(3). They ensure that emissions do not increase above emissions in a recent year, and show that the transportation plan and TIP contribute to emissions reductions, where required. However, these tests usually do not ensure that transportation emissions promote progress toward the air quality standards to the same extent that the use of motor vehicle emissions budgets do. Although the 1-hour SIP budgets are for a different standard, they still address ozone, will help areas make progress toward the new standard, and are a better reflection of the ozone pollution problem that each area faces than the interim emissions tests.

One commenter who supported requiring the budget test asked EPA to clarify whether 1-hour budgets remain in effect after revocation of the 1-hour standard. Once we revoke the standard, these budgets do not remain in effect for the 1-hour standard as conformity does not apply with respect to the 1-hour standard. However, those 1-hour budgets that are adequate or approved continue to be part of an area's SIP and

are therefore appropriate to use as proxies for the 8-hour standard. EPA notes that adjusting the 1-hour ozone budgets to correspond to the boundaries of the 8-hour area for purposes of conducting 8-hour ozone conformity analyses is legally appropriate since any 1-hour ozone SIP demonstrations and budgets would only be used as a proxy for the 8-hour ozone standard and would themselves no longer be for an applicable standard. Therefore, EPA believes that using the portion of the 1-hour SIP budget that covers the 8-hour nonattainment is appropriate for 8-hour conformity and that the relevant portion can be derived through the consultation process. For example, adding county level emissions to, or subtracting county level emissions from, the 1-hour budgets to reflect the geographic 8-hour area does not need to occur through a SIP revision or be reviewed through EPA's adequacy process. Using portions of 1-hour SIP budgets in this manner does not necessitate 8-hour or 1-hour SIP revisions, but merely are administrative analyses of what tests should be conducted for conformity purposes prior to submission of 8-hour SIPs. How these budgets are derived can be determined through the consultation process and documented in an area's conformity determination.

Many commenters supported our proposal to offer a menu of choices and use the interagency consultation process to choose the test. Most of these commenters simply stated their preference, but a few offered that the 2002 baseline year test may be better than the budget test when the 1-hour budgets are based on outdated planning assumptions or models. Today's final rule preserves an area's ability to decide that the 1-hour budgets are not the most appropriate test. However, budgets cannot be ignored solely because more recent planning assumptions or models are available. When budgets are not currently in use and in other cases where it is more appropriate for meeting Clean Air Act section 176(c) requirements, the consultation process must be used and the rationale for using other test(s) documented in the conformity determination.

Another commenter suggested that EPA should allow areas to choose among several tests because it has not yet classified areas or established attainment years. This was true as of the November 5, 2003 proposal, but at this point EPA has classified areas and established attainment years in the final 8-hour designations rule (April 30, 2004, 69 FR 23858). A few commenters thought that emissions should be held as low as possible, and therefore EPA should require areas to determine which of the tests is more protective through the interagency consultation process. Another commenter thought that the state air quality agency alone should choose the test to ensure that the conformity requirements of the Clean Air Act are met. EPA believes, however, that the budget test using the 1-hour budgets generally maintains current air quality progress and satisfies the Clean Air Act requirement that transportation activities not cause new violations, worsen existing violations, or delay timely attainment, as described above. Therefore, EPA is not incorporating the commenter's suggestion in today's rule, although air quality agencies are expected to play a significant role in the selection of the appropriate test through the consultation process in these areas, because they developed 1-hour SIPs and budgets.

One commenter suggested that where the 8-hour area is smaller than the 1-hour area (Scenario 2), a budget could be created for the 8-hour area by reducing the 1-hour budget proportional to the population of the 8-hour area (*i.e.*, 8-hour budget = 1-hour budget × 8-hour area population / 1-hour area population). EPA does not agree that this method would necessarily produce an appropriate proxy budget, because such a calculation may not accurately reflect the portion of the 1-hour SIP budget that applies for the geographic area covered by the 8-hour standard. Furthermore, emissions are not directly proportional to population but also depend on travel distances, speeds, and fleet characteristics, all of which may differ greatly among counties within one nonattainment area.

Where the 8-hour area is larger than the 1-hour area (Scenario 3), one commenter suggested that EPA should allow conformity to be demonstrated if the entire 8-hour area can meet the 1-hour budget. EPA did not propose this option in the November 2003 proposal because we do not believe that it would be possible for a larger 8-hour area to meet a 1-hour budget for a smaller area. However, EPA believes that if this case does occur in practice, such an area could demonstrate conformity for the 8-hour standard by completing the budget test with the 1-hour budget for the entire 8-hour nonattainment area. Although this case is not explicitly addressed in the regulatory text for today's final rule, if an 8-hour area that is larger than the 1-hour area meets its 1-hour SIP budgets, it would satisfy the requirements of § 93.109(e)(2)(iii). It would meet the budget test in (A) of this paragraph, and it would implicitly show that the interim emissions test(s) in (B) of this paragraph had been met.

Several commenters requested clarification that all of the test options remain available in subsequent conformity determinations until adequate or approved budgets for the 8-hour standard are in place. Though today's final rule does not offer the full range of options proposed, areas will still evaluate how to apply the budget test using 1-hour SIP budgets with each new conformity determination. In addition, the consultation process will be used to decide details for how to apply the interim emissions tests where the 8-hour boundary is larger than or partially overlaps with the 1-hour boundary (Scenario 4). Until 8-hour ozone budgets are available, areas do have the option to apply these tests as appropriate in any subsequent conformity determinations regardless of how the test was applied in a prior conformity determination.

The final rule also gives flexibility for how the interim emissions tests are applied in Scenario 3 and 4 areas. EPA is finalizing the budget test plus interim emissions tests either for:

- The whole area to be covered by an 8-hour SIP,
- the portion not covered by the 1-hour budget, or
- the entire portion of the 8-hour ozone nonattainment area within an individual state, in the case where 1-hour SIP budgets are established for each state in a multi-state nonattainment area.

EPA originally proposed that these areas would meet the interim emissions tests for the whole area, or the budget test for the 1-hour portion plus the interim emissions tests for the remainder. Though we did not specifically propose that areas would use the budgets plus the interim emissions tests for the entire area, we did propose that areas could meet the interim emissions tests for the whole area. Today's final rule includes this option because EPA now believes that, in most cases, the budgets must be used, but that offering a choice where possible with regard to the interim tests provides some flexibility for areas where they are also required. This option is a logical outgrowth of the proposal and comments received regarding the use of budgets. In addition, because many commenters supported the use of interim reduction tests by themselves for the whole area, EPA believes there is support for this option in conjunction with the 1-hour SIP budgets prior to 8-hour SIPs being established. Finally, as described above, EPA is finalizing a third interim

emissions test option for multi-state nonattainment areas with separate 1-hour SIP budgets, due to comments received from such areas.

One commenter raised questions about the situation where an existing 1-hour ozone nonattainment or maintenance area can demonstrate conformity, but the new 8-hour counties within the same 8-hour nonattainment area cannot. In this general case, the commenter believed that the 1-hour portion of the 8-hour ozone nonattainment area should be able to proceed with projects that will be implemented in the 1-hour portion even though the new 8-hour portion of the area fails to demonstrate conformity.

EPA does not agree. As described in Section III., during the one-year conformity grace period, conformity using the appropriate 1-hour ozone conformity test applies only in 1-hour nonattainment and maintenance areas. Once the grace period for the 8-hour standard expires and the 1-hour standard is revoked, however, the 1-hour ozone standard and conformity requirements for that standard no longer apply. At that time, new 8-hour ozone nonattainment areas (including the previous 1-hour area or portions thereof) must demonstrate conformity for the entire 8-hour area or the area will lapse. Therefore, EPA has not changed the final rule to address this comment. However, EPA will elaborate how 8-hour conformity determinations in multi-jurisdictional areas with existing 1-hour SIP budgets in implementation guidance. Please *see* Section I.B.2. of today's final rule for more information about EPA's conformity website.

Finally, some commenters supported the use of 1-hour SIP budgets based on legal rationale with which EPA disagrees. First, commenters stated that the Clean Air Act does not allow existing approved budgets for any pollutant or standard to be waived. Second, commenters stated that all elements of a SIP, including 1-hour budgets, remain enforceable until revisions are submitted by the state and approved by EPA as satisfying the requirements of Clean Air Act sections 110(k) and (l). EPA agrees that 1-hour ozone budgets should be used for 8-hour ozone conformity, but disagrees with these legal arguments. In section 109(d)(1) of the Clean Air Act, Congress directed EPA to review the standards every 5 years and ''make such revisions in such criteria and standards and promulgate such new standards * * *.'' EPA interprets ''make such revisions in * * * standards'' to mean that EPA has the authority to replace one standard with another, and that implicit in this authority is the authority to revoke a standard. Once a standard is revoked, although control measures remain in a SIP the budgets for that standard are no longer in force for conformity purposes because areas are not required to conduct conformity determinations for such standards. Therefore, EPA does not agree that the 1-hour ozone budgets would automatically still apply for 8-hour conformity purposes, nor that section 110(k) and (l) requirements would have to be met before areas stopped using these budgets for conformity purposes. Section 176(c)(5) of the Act terminates conformity for the 1-hour standard at revocation. Conformity for the 8-hour standard begins one year after designation, but the SIP contains no budgets for the 8-hour standard until 8-hour SIPs are submitted. EPA believes that the remaining 1-hour budgets will generally represent the best approximation of future 8-hour budgets and thus should be used for 8-hour conformity in most cases, but does not agree that they must always be used as a legal matter as suggested by the commenter.

Third, commenters argued that EPA's previous statement in the preamble to the August 15, 1997 conformity rule supports their view that 1-hour SIP budgets in approved SIPs must be used for conformity determinations under the 8-hour standard. They quoted, ''EPA does not believe that it is legal to allow a submitted SIP to supersede an approved SIP for years addressed by the approved SIP * * *. Clean Air Act section 176(c) specifically requires conformity to be demonstrated to approved SIPs. SIP revisions that EPA has approved under Clean Air Act section 110 are enforceable and cannot be relieved by a submission, even if that submission utilizes better data.'' (62 FR 43783). EPA does not agree that this quote is relevant, as we are not discussing submitted budgets that will replace the approved 1-hour ozone budgets. This language must be interpreted in context as referring to SIP revisions for the same applicable standard as the existing SIP.

Furthermore, EPA does not agree that Clean Air Act section 176(c)(2)(A) requires the use of 1-hour ozone budgets for conformity under the 8-hour standard. This section requires that emissions from the planned transportation plan and TIP must be consistent with emissions in the applicable SIP, but a 1-hour ozone SIP ceases to be the applicable SIP once the 1-hour standard is revoked. The 8-hour SIP, once available, will be the applicable SIP for conformity determinations under the 8-hour ozone standard. Instead of relying on Clean Air Act section 176(c)(2)(A), EPA believes the 1-hour budgets must be used where possible in 8-hour areas because their use best meets the requirements of 176(c)(1)(A) and (B) for the 8-hour standard.

VII. Regional Conformity Tests in $PM_{2.5}$ Areas

A. Description of Final Rule

Today's final rule requires that the budget test be used to complete a regional emissions analysis once a $PM_{2.5}$ SIP is submitted with budget(s) that EPA has found adequate or approved. Although the first $PM_{2.5}$ SIP may be an attainment demonstration, $PM_{2.5}$ nonattainment areas ''are free to establish, through the SIP process, a motor vehicle emissions budget [or budgets] that addresses the new NAAQS in advance of a complete SIP attainment demonstration. That is, a state could submit a motor vehicle emissions budget that does not demonstrate attainment but is consistent with projections and commitments to control measures and achieves some progress towards attainment.'' (August 15, 1997, 62 FR 43799). To be approvable, such a SIP would include inventories for all emissions sources and meet other SIP requirements. EPA encourages nonattainment areas to develop their $PM_{2.5}$ SIPs in consultation with federal, state, and local air quality and transportation agencies as appropriate.

Today's final rule also requires that $PM_{2.5}$ nonattainment areas meet one of the following interim emissions tests for conformity determinations conducted before adequate or approved $PM_{2.5}$ SIP budgets are established:

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

The rule allows $PM_{2.5}$ nonattainment areas to choose between the two interim emissions tests each time that they determine conformity during this period. For example, an area may use the build-no-greater-than-no-build test in its first conformity determination for the $PM_{2.5}$ standard and then use the no-greater-than-2002 emissions test in a subsequent conformity determination. However, under this final rule, the same test must be used for each analysis year in a given conformity determination. In other words, an MPO may not use the build-no-greater-than-no-build test in one analysis year and the no-greater-than-2002 test in another analysis year for the same conformity determination. As noted in Section V. with respect to certain ozone areas, to do otherwise

would be unnecessarily complicated and would imply that one test used consistently for all years might not demonstrate conformity. The interagency consultation process should be used to determine which test is appropriate. EPA concludes that for reasons similar to those described for 8-hour ozone areas classified marginal and subpart 1 areas, conformity is demonstrated if the projected transportation system emissions reflecting the proposed plan or TIP (build) are less than or equal to either the emissions from the existing transportation system (no-build) or the level of motor vehicle emissions in 2002.

During the time period before a SIP is submitted and budgets are found adequate or approved, regional emissions analyses will be completed at a minimum for directly emitted $PM_{2.5}$ from motor vehicle tailpipe, brake wear, and tire wear emissions, as described in Section VIII. This section also provides information on EPA's further consideration of $PM_{2.5}$ precursors in conformity analyses. Sections IX. and X. describe situations under which regional emissions analyses would also include direct $PM_{2.5}$ emissions from re-entrained road dust and construction-related dust.

The consultation process should be used to determine the models and planning assumptions for completing any regional emissions analysis consistent with related requirements, as required by § 93.105(c)(1)(i). See the regulatory text in § 93.109(i) for a general overview of when the budget test and interim emissions tests apply in $PM_{2.5}$ areas, and § 93.119(e) for a description of the interim emissions tests for $PM_{2.5}$ nonattainment areas.

B. Rationale and Response to Comments

The final rule addresses the concerns of many stakeholders by providing flexibility before adequate or approved $PM_{2.5}$ SIP budgets are established. EPA received a number of comments on this section of the proposal. Most of the commenters supported the proposal to allow areas to choose between the two interim emissions tests. These commenters indicated that having a choice provided appropriate flexibility for local areas to tailor conformity requirements. One commenter stated that the interagency consultation process should be used to select the interim emissions test to be used in the nonattainment area.

EPA agrees with these commenters. As described in the proposal, EPA has previously determined that only ozone and CO areas of higher classifications are required to satisfy both statutory requirements that transportation activities not cause or contribute to violations of the standards or delay attainment (Clean Air Act section 176(c)(1)(B)) and that such activities contribute to annual emissions reductions (Clean Air Act section 176(c)(3)(A)(iii)) (January 11, 1993 proposed rule, 58 FR 3782–3783). EPA continues to believe that Clean Air Act section 176(c)(3)(A)(iii) does not apply to any other areas, including $PM_{2.5}$ areas; only Clean Air Act section 176(c)(1)(B) applies to these areas. To that end, the conformity rule currently allows many areas to conform based on only one interim emissions test if transportation emissions are consistent with current air quality expectations, rather than having to complete two tests and contribute further reductions toward attainment. Today's final rule continues to apply this same test structure and rationale to $PM_{2.5}$ areas. EPA also agrees that an area's interagency consultation process provides an appropriate forum for determining which of the two interim emissions tests should be used in conformity determinations.

Some commenters recommended that $PM_{2.5}$ nonattainment areas be required to pass both interim emissions tests prior to SIP budgets being found adequate or approved, for a variety of reasons. These commenters noted that it is possible that an area could pass the no-greater-than-2002 test, but fail the build-no-greater-than-no-build test. According to the commenter, failing the build-no-greater-than-no-build test could indicate increasing emissions and be inconsistent with Clean Air Act section 176(c)(1) because any increased emissions could cause or contribute to new violations, worsen existing violations or delay timely attainment of the air quality standard. In addition, two other commenters recommended that EPA require both interim emissions tests in areas with the more serious $PM_{2.5}$ nonattainment problems because these areas should be required to meet more stringent conformity tests. Three additional commenters indicated that both interim emissions tests should be required because this is the most conservative approach to ensure protection of public health, that it would reduce transport of emissions and it would maintain progress toward meeting the standard. One of these commenters indicated that the build-no-greater-than-no-build test requires that total emissions be less than a no-build scenario and the no-greater-than-2002 test prevents increases above a historical level of emissions; therefore, both tests should be applied.

EPA disagrees with the assertion that in order to demonstrate conformity during the time period before $PM_{2.5}$ budgets are found adequate or are approved an area must pass both interim emissions tests. As described above, EPA has previously determined that only ozone and CO areas of higher classifications are required to satisfy both statutory requirements that transportation activities not cause or contribute to violations of the standards or delay attainment (Clean Air Act section 176(c)(1)(B)) and that such activities contribute to annual emissions reductions (Clean Air Act section 176(c)(3)(A)(iii)) (January 11, 1993 proposed rule, 58 FR 3782–3783). EPA continues to believe that either of the two interim emissions tests are sufficient to meet Clean Air Act section 176(c)(1)(B) provisions. As noted by these commenters an area could pass only the build-no-greater-than-no-build test and fail the no-greater-than-2002 test and this would allegedly indicate increasing emissions which could cause new violations, worsen existing violations or delay timely attainment of the standard. EPA recognizes that meeting only the build-no-greater-than-no-build test is a possible outcome in some areas; however, as EPA stated in the section of the preamble to the November 24, 1993 final transportation conformity rule that addressed requirements for NO_2 and PM_{10} areas during the time before a SIP was submitted, ''The build/no-build test is consistent with the interim requirements for ozone and CO areas and sufficient to ensure that the transportation plan, TIP or project is not itself causing a new violation or exacerbating an existing one.'' (58 FR 62197)

Conversely, some areas may fail the build-no-greater-than-no-build test and pass only a no-greater-than-2002 test. EPA believes that this would also be an acceptable outcome because it would ensure that emissions from on-road mobile sources are no greater than they were during the 2002 baseline year that is used for SIP planning purposes under the new standards. If future on-road emissions do not increase above their base year levels, EPA believes that new violations will not be created, existing violations will not be made worse and timely attainment will not be delayed. This is consistent with the approach applied to emissions in PM_{10} and NO_2 areas in the preamble to the January 11, 1993 notice of proposed rulemaking for the transportation conformity rule. Specifically, in that preamble EPA

stated that, ''* * * EPA believes that preventing emissions from increasing above 1990 levels would be sufficient to prevent the exacerbation of existing violations during the interim period.'' (58 FR 3783).

With regard to the recommendations that we require both interim emissions tests based either on the severity of an area's nonattainment problem or on the conservative nature of requiring both tests, EPA is not accepting either recommendation. As stated above, EPA continues to believe that either test is sufficient to meet the requirements of Clean Air Act section 176(c)(1)(B) which applies to $PM_{2.5}$ nonattainment areas. Additionally, EPA intends to designate all $PM_{2.5}$ nonattainment areas under subpart 1 of the Clean Air Act. Subpart 1 does not mandate a classification scheme for nonattainment areas based on the severity of an area's air quality problem. Therefore, there is no basis for EPA to determine in this rulemaking what would constitute a serious $PM_{2.5}$ nonattainment problem and require both interim emissions tests in such areas. Areas should use the interagency consultation process to determine which of the two tests is most appropriate in their area. Although areas may voluntarily choose to perform both interim emissions tests during the time before a SIP is submitted and budgets are found adequate or approved if a conservative approach is desired, they are not required to do so. EPA believes that areas should make their own decisions on how conservative to be prior to SIP adoption so long as they meet the minimum requirements for conformity.

One commenter recommended that only the build-no-greater-than-no-build test be made available to $PM_{2.5}$ areas because it shows improvements resulting from the transportation plan and TIP. This commenter was concerned that the no-greater-than-2002 emissions test is not appropriate in $PM_{2.5}$ areas because re-entrained road dust is dependent on VMT and future year emissions will always be greater than 2002 emissions when dust emissions increases are included. EPA has not changed the rule in response to this comment.

First, because EPA believes that some $PM_{2.5}$ areas may be able to use the no-greater-than-2002 test successfully, EPA does not want to require that all areas must use the build-no-greater-than-no-build test. EPA believes that areas should have a choice of the two interim emissions tests since EPA concludes that both tests allow areas to demonstrate that they meet the requirements of Clean Air Act Section 176(c)(1)(B).

Second, while some PM_{10} areas experienced difficulties passing the baseline year test, it is not certain that $PM_{2.5}$ areas will experience the same difficulty. Road dust represents a much smaller fraction of total $PM_{2.5}$ mass than of PM_{10} because most road dust particles are larger than 2.5 microns. Also, as stated in Section IX. of today's notice, EPA is finalizing a provision that only requires re-entrained road dust to be included in conformity determinations before $PM_{2.5}$ SIP budgets are available if EPA or the state air agency makes a finding that road dust is a significant contributor to an area's $PM_{2.5}$ nonattainment problem. Therefore, not all areas will be required to include road dust in conformity determinations initially. For areas where it is determined that road dust is a significant contributor to the nonattainment problem and therefore must be included in conformity determinations, EPA will be issuing future guidance on how to quantify more appropriately road dust emissions for purposes of conducting regional emissions analyses.

Another commenter suggested that neither of the interim emissions tests should be required before a SIP is submitted and that mobile sources should not be targeted when they may not be the source of an area's $PM_{2.5}$ problem. EPA disagrees. Clean Air Act section 176(c)(6) requires that conformity apply in new nonattainment areas one year after the effective date of the nonattainment designation, even prior to the submission of SIPs establishing budgets for a particular pollutant. Clean Air Act section 176(c)(4) provides EPA with the authority to establish conformity tests that will ensure that transportation plans, programs and projects do not result in new violations of an air quality standard, worsen an existing violation or delay timely attainment of a standard during that time period. While the contribution of mobile sources to PM2.5 nonattainment problems is likely to vary from area to area, on-road sources are likely to make some contribution in all areas. Therefore, EPA believes that in order to protect public health it is both required by the Clean Air Act and necessary for PM2.5 areas to begin demonstrating conformity using appropriate interim emissions tests once conformity applies, before adequate or approved SIP budgets are established.

One commenter expressed support for the use of the budget test particularly in maintenance areas. The commenter noted that the budget test provides the area with a high degree of confidence that it will remain in attainment if emissions are held to the SIP budget levels. EPA agrees that once a SIP is submitted and budgets are found adequate or approved, the budget test is appropriate for meeting statutory requirements. Section 176(c)(2)(A) requires, in part, that a transportation plan or TIP may only be found to conform if a final determination has been made that emissions expected from the implementation of the plan and TIP are consistent with estimates of emissions from motor vehicles and necessary emissions reductions contained in the applicable implementation plan.

A number of comments were received on the suggestion that areas could submit early SIP budgets. One commenter supported this suggestion, while several other commenters were opposed to the suggestion. These commenters opposing early budgets believed that: Budgets should be developed as part of an area's attainment demonstration with adequate interagency consultation recognizing the complexities of the $PM_{2.5}$ problem; early budgets could isolate motor vehicle emissions in advance of considering reductions from other source categories; and the idea of developing these budgets in advance of the attainment demonstration is flawed in principle and would encourage incomplete air quality planning and delay the overall SIP development process.

EPA believes that commenters misunderstood the proposal, and we continue to believe that it is acceptable for areas to establish early motor vehicle emission budgets through the SIP process at an area's discretion. If an area chooses to prepare an early SIP, it must develop that SIP in consultation with EPA and state, local and federal transportation and air quality planners. To be approvable, such a SIP would have to include inventories for all source sectors and meet other SIP requirements. While these early SIPs would have to show some progress toward attainment, it is not a requirement that all of the reductions would come from on-road motor vehicles. It is not EPA's intention that motor vehicle emissions be solely controlled in a voluntary early SIP, but rather, to highlight that some areas may find it beneficial to establish early budgets by selecting appropriate controls on a range of sources instead of relying on one of the interim emissions tests to demonstrate conformity for $PM_{2.5}$. EPA agrees that $PM_{2.5}$ nonattainment is a complex issue. However, some areas will have

information (*e.g.*, air quality studies, modeling results) to guide them in the development of an early SIP, if desired.

Furthermore, EPA does not agree that the idea of early SIPs is flawed or that it will result in incomplete air quality planning or delay required SIPs. A voluntary early SIP does not relieve an area of its obligation ultimately to submit other required SIPs in a timely manner (*e.g.*, an attainment demonstration); therefore, an early SIP should not lead to incomplete air quality planning in the long run. An area that decides to submit an early SIP should recognize that it must still comply with submission dates for other applicable SIP requirements.

One commenter stated that early $PM_{2.5}$ SIPs may include some quantification of direct $PM_{2.5}$ emissions, but that these preliminary quantifications in emission inventories, which are not explicitly intended to be SIP budgets, should not trigger additional conformity requirements. EPA does not anticipate such early SIP submissions to cause confusion in the conformity process, as suggested by this commenter.

EPA believes that only control strategy SIPs establish motor vehicle emission budgets for conformity purposes. Section 93.101 of the conformity rule defines a control strategy SIP as an implementation plan which contains specific strategies for controlling the emissions of and reducing ambient levels of pollutants in order to satisfy Clean Air Act requirements for demonstrations of reasonable further progress and attainment. If the early SIP described by the commenter is submitted to satisfy different Clean Air Act requirements, it would most likely not establish budgets or trigger additional conformity requirements. It should be noted that § 93.105(b)(2) of the conformity rule requires that the interagency consultation process be used during the development of an area's SIP. Therefore, the MPO should be aware of any SIPs that are to be submitted that will establish budgets for future conformity determinations.

C. Comments Not Related to the Proposal

One commenter offered suggestions for alternate interim emissions tests for $PM_{2.5}$ areas. The commenter believed that $PM_{2.5}$ nonattainment areas will need reductions from on-road sources even before a SIP is established in order to attain the air quality standard. The commenter argued that EPA has the authority to require reductions in all nonattainment areas before a SIP is submitted under Clean Air Act Section 176(c)(1)(A), which requires conformity to the purpose of the SIP.

The commenter described an alternate interim emissions test that should be used prior to a SIP being submitted and budgets being found adequate or approved. Specifically, the transportation agency would prepare a motor vehicle emissions trends analysis for the 20-year planning horizon based on the current transportation plan. The transportation agencies would then assess the emissions reductions that could be achieved by the implementation of facilities, services and economic incentives. Based on this assessment the area would select measures to optimize the emissions reductions from the transportation sector towards attainment. The consultation process would be used to establish an emissions reduction curve that would serve as a conformity benchmark until a SIP is developed and submitted to EPA. The commenter believes such a test would identify the range of emissions reductions available from the transportation sector, yield valuable information for the development of a SIP and establish a framework for interagency collaboration to identify emissions reductions that could be implemented before adoption of a SIP containing motor vehicle emission budgets.

EPA is not changing the final rule in response to this comment. EPA agrees that the process described by the commenter may yield valuable information for the development of the $PM_{2.5}$ SIP for an area, and areas could elect to use it at their discretion for that purpose. However, EPA continues to believe that only Clean Air Act section 176(c)(1)(B) applies to $PM_{2.5}$ nonattainment areas prior to the time that a SIP is submitted and budgets are found adequate or approved, since section 176(c)(2)(A) requiring compliance with budgets only applies once a SIP is established. Although section 176(c)(1)(A) does require conformity to the purposes of a SIP, where a SIP has not been submitted to establish budgets, EPA does not believe this provision would mandate a test such as that suggested by the commenter.

As discussed above, EPA has concluded that use of either existing interim emissions test is sufficient to meet the requirements of section 176(c)(1)(B) in $PM_{2.5}$ areas. Moreover, the SIP process, which includes consultation with transportation agencies, is the appropriate venue for deciding on SIP control strategies for attaining the $PM_{2.5}$ air quality standard. Requiring a test such as the one described by the commenter would in effect extend the provisions of Clean Air Act section 176(c)(3)(A)(iii) requiring emissions reductions to $PM_{2.5}$ nonattainment areas as a mandatory matter, which is inconsistent with the statute.

The same commenter also recommended a change to the build-no-greater-than-no-build test for $PM_{2.5}$ areas. Specifically, the commenter recommended that emissions from the build scenario be compared to both the no-build scenario as is currently required and also to emissions resulting from implementing the projects in the current fiscally constrained transportation plan. The commenter believes that it is reasonable to expect that projects in the current plan would be implemented because of past political decisions, resource commitments and existing emissions analyses. Therefore, the commenter believes that area should examine the consequences of changing the current transportation plan.

EPA does not agree with requiring this type of test in $PM_{2.5}$ nonattainment areas. EPA believes that the current build/no-build test alone, as used for other pollutants and standards, is sufficient and more appropriate for meeting Clean Air Act section 176(c)(1)(B) requirements, which are intended to ensure that the emissions produced by an area's existing and planned transportation system are consistent with air quality goals. In contrast, the commenter's suggestion for redefining the build and no-build scenarios would focus conformity determinations on the specific projects and ongoing transportation decisions that are reflected within plans and TIPs. EPA believes that the transportation planning process is the more appropriate forum for deciding which specific projects are necessary to meet an area's transportation needs. As long as the statutory conformity requirements are met through the current form of the build/no-build test, EPA believes that additional tests such as the commenter suggested are not necessary to ensure that Clean Air Act requirements are met. Therefore, EPA is not including this suggested test in today's final rule.

VIII. Consideration of Direct $PM_{2.5}$ and $PM_{2.5}$ Precursors in Regional Emissions Analyses

A. Description of Final Rule

Today's final rule requires that all regional emissions analyses in $PM_{2.5}$ nonattainment and maintenance areas consider directly emitted $PM_{2.5}$ motor

vehicle emissions from the tailpipe, brake wear, and tire wear. The regulatory text can be found in § 93.102(b)(1). Sections IX. and X. provide information on when re-entrained road dust and construction-related dust must also be included in $PM_{2.5}$ conformity analyses.

To calculate emissions factors for direct $PM_{2.5}$ from motor vehicles all states except California would use the latest EPA-approved motor vehicle emissions factor model (currently MOBILE6.2). $PM_{2.5}$ nonattainment and maintenance areas in California would use EMFAC2002 or a more recently EPA-approved model. MOBILE6.2 and California's EMFAC2002 are designed to generate emissions factors for direct $PM_{2.5}$ as well as other emissions from on-road vehicles in the same modeling run.

EPA is not finalizing any requirements for addressing $PM_{2.5}$ precursors in transportation conformity determinations at this time. EPA will be proposing a broader $PM_{2.5}$ implementation rule to seek comment on options for addressing $PM_{2.5}$ precursors in the New Source Review program and in SIP planning activities such as reasonable further progress plans, attainment demonstrations, reasonably available control technology (RACT) requirements, and reasonably available control measure (RACM) analyses. EPA believes that it would be inappropriate to select an option for addressing $PM_{2.5}$ precursors in transportation conformity determinations prior to considering the precursor options in the $PM_{2.5}$ implementation rule. EPA plans to promulgate conformity requirements that address precursors prior to $PM_{2.5}$ designations being effective.

In the November 5, 2003 proposal, EPA presented several conformity options for $PM_{2.5}$ precursors for comment. Specifically, EPA proposed to add potential transportation-related $PM_{2.5}$ precursors—NO_X, VOCs, sulfur oxides (SO_X), and ammonia (NH_3)—for consideration in the conformity process. Under the proposal, a regional emissions analysis would be required for a given precursor if the $PM_{2.5}$ SIP established an adequate or approved budget for that particular precursor.

EPA also proposed two options for addressing how the various $PM_{2.5}$ precursors would be considered in conformity determinations conducted before adequate or approved $PM_{2.5}$ SIP budgets are established. EPA proposed regulatory text in §§ 93.102(b)(2) and 93.119(f) for both of these options.

The first proposed option would require regional emissions analyses for NO_X and VOC precursors in all areas, unless the EPA Regional Administrator or the state air agency makes a finding that one or both of these specific precursors are *not a significant contributor* to the $PM_{2.5}$ air quality problem in a given area. Regional emissions analyses would not be required for SO_x and NH_3 before an adequate or approved SIP budget for such precursors is established, unless EPA or the state makes a finding that on-road emissions of one or both of these precursors *is a significant contributor.*

EPA's second option would only require regional emissions analyses for one or more $PM_{2.5}$ precursors (*i.e.,* NO_X, VOC, SO_X and NH_3) before adequate or approved $PM_{2.5}$ SIPs have been established if EPA or the state makes a finding that one or more of these precursors *are significant contributors* to the $PM_{2.5}$ air quality problem in a given area.

As stated above, EPA intends to finalize the transportation conformity rule's $PM_{2.5}$ precursor requirements after further consideration through the $PM_{2.5}$ implementation rule and before $PM_{2.5}$ designations become effective. By finalizing the $PM_{2.5}$ precursor requirements before the effective date of the designations, areas will be fully aware of the conformity requirements at the start of the one-year $PM_{2.5}$ conformity grace period.

Although today's final rule does not address $PM_{2.5}$ precursors, conformity implementers can begin preparing for $PM_{2.5}$ conformity now, because this final rule includes the $PM_{2.5}$ regional conformity tests that apply for transportation plan and TIP conformity determinations that occur before and after $PM_{2.5}$ SIPs are established. In addition, the final rule and the existing conformity rule provide all other requirements for $PM_{2.5}$ determinations. For example, an MPO might choose to begin the no-greater-than-2002 test, as described in Section VII., prior to the release of final $PM_{2.5}$ precursor conformity requirements. Transportation and emissions modeling for $PM_{2.5}$ areas could also be prepared based on today's final rule, if desired. This is because VMT and speed estimates are based on the existing conformity rule's requirements, and can be made without regard to which precursors apply. Furthermore, MOBILE6.2 and EMFAC2002 emissions factor models generate direct $PM_{2.5}$ and precursor emissions factors from on-road vehicles at the same time in the same modeling run. Once $PM_{2.5}$ precursor requirements are finalized, $PM_{2.5}$ areas can document in conformity determinations that the applicable interim emissions test is met for direct $PM_{2.5}$ and any relevant precursors that apply.

Finally, EPA is not re-opening the comment period on the proposed transportation conformity requirements for addressing $PM_{2.5}$ precursors in transportation conformity determinations. EPA will address all of the comments received on the November 2003 proposal's $PM_{2.5}$ precursor options when we finalize these requirements, as described above.

B. Rationale and Response to Comments

EPA received a number of comments on this portion of the proposal. Most commenters supported the requirement that direct $PM_{2.5}$ emissions from the tailpipe and brake and tire wear be addressed in all regional emissions analyses. EPA believes that it is important to address direct $PM_{2.5}$ in conformity determinations because it is an important contributor to the air quality problem in these nonattainment areas and because of public health concerns with exposures to fine particles. A few commenters indicated that these direct emissions should only be required to be included in regional emissions analyses before a SIP is submitted if a finding of significance is made. One of these commenters also submitted the results of an emissions analysis that he prepared. The results of the analysis showed direct $PM_{2.5}$ emissions from on-road mobile sources (including re-entrained road dust) compared to emissions of $PM_{2.5}$ precursors and, in particular, emissions of NO_X. One commenter indicated that her agency would have data available to make findings of significance. EPA believes that it would be inappropriate to require a significance finding before direct emissions from motor vehicles can be included in regional emissions analyses, prior to the submission of a SIP for an area.

EPA believes that areas must include direct $PM_{2.5}$ emissions, including tailpipe emissions and emissions from brake and tire wear, in conformity determinations prior to the time that SIPs are submitted and budgets are found adequate. Clean Air Act Section 176(c)(1)(B) requires that activities not cause or contribute to any new violation of the air quality standard, increase the frequency or severity of any existing violation of the standard or delay timely attainment or any required interim emission reductions or other milestones. In order for an area to demonstrate compliance with the requirements of Clean Air Act Section 176(c)(1)(B) before a SIP is established, the area

must, at a minimum, conduct a regional emissions analysis for direct $PM_{2.5}$ emissions from motor vehicles. EPA anticipates that in most nonattainment and maintenance areas direct $PM_{2.5}$ emissions will be an important contributor to the $PM_{2.5}$ air quality problem. For these reasons, EPA is requiring that transportation conformity determinations consider direct $PM_{2.5}$ emissions. As noted above, EPA will finalize rules on how to account for $PM_{2.5}$ precursors, after further consideration in the context of EPA's broader $PM_{2.5}$ implementation strategy. See Section IX. of this notice for more information on $PM_{2.5}$ requirements for re-entrained road dust.

One commenter indicated that EPA's insignificance policy should apply to $PM_{2.5}$ emissions. EPA agrees with this commenter. The insignificance policy may be applied to direct $PM_{2.5}$ emissions during the period after a SIP is submitted for the area. If the SIP for the area demonstrates that direct $PM_{2.5}$ emissions from on-road mobile sources, including dust where relevant, do not need to be constrained in order to ensure expeditious attainment of the $PM_{2.5}$ standard, the requirement for a regional emissions analysis for direct $PM_{2.5}$ would no longer apply. See Section XXIII. for more details on requirements for demonstrating that motor vehicle emissions are insignificant contributors to an area's air quality problem.

One commenter recommended that conformity tests for direct $PM_{2.5}$ be done collectively, meaning that one budget test or interim emissions test be done for all of the relevant types of direct $PM_{2.5}$. EPA agrees with the commenter. EPA expects all $PM_{2.5}$ nonattainment and maintenance areas to complete the required regional emissions analyses for direct $PM_{2.5}$ by examining all of the relevant types of direct $PM_{2.5}$ in one analysis rather than separate analyses for each type of particle: Therefore, the analysis for direct $PM_{2.5}$ must include:

- Tailpipe exhaust particles,
- Brake and tire wear particles,
- Re-entrained road dust, if before a SIP is submitted EPA or the state air agency has made a finding of significance or if the applicable or submitted SIP includes re-entrained road dust in the approved or adequate budget, and
- Fugitive dust from transportation-related construction activities, if the SIP has identified construction emissions as a significant contributor to the $PM_{2.5}$ problem.

See Sections IX. and X. for more information on requirements for re-entrained road dust and fugitive dust from construction activities.

Three commenters expressed concern over the need to use MOBILE6.2 to estimate $PM_{2.5}$ motor vehicle emissions. One of the three was concerned about the accuracy of the modeling tools. Another was concerned about unexpected problems occurring because areas lack experience in using MOBILE to evaluate particulate matter levels.

EPA understands the concerns that these areas have expressed. Since the conformity proposal was published in November 2003, EPA has released MOBILE6.2. MOBILE6.2 is based on the latest available information concerning vehicle emissions and is therefore the best available tool at this time for calculating on-road emissions of direct $PM_{2.5}$ (*e.g.,* tailpipe emissions and brake and tire wear). The **Federal Register** notice announcing the release of the model was published on May 19, 2004 (69 FR 28830). EPA released SIP and conformity policy guidance on the use of MOBILE6.2 on February 24, 2004, entitled, ''Policy Guidance on the Use of MOBILE6.2 and the December 2003 AP–42 Method for Re-Entrained Road Dust for SIP Development and Transportation Conformity.'' EPA will also be releasing technical guidance on the use of the MOBILE6.2 model in the future. Information on training in the use of MOBILE6.2 and related policy memoranda are available on EPA's MOBILE Web site at *http://www.epa.gov/otaq/m6.htm.* EPA believes there is adequate time for new areas to gain MOBILE experience and conduct conformity analyses for the $PM_{2.5}$ standard, before the end of the one-year conformity grace period for that standard.

IX. Re-entrained Road Dust in $PM_{2.5}$ Regional Emissions Analyses

A. Description of Final Rule

With today's action, EPA is finalizing the first of the two proposed options for addressing re-entrained road dust in conformity analyses prior to adequate or approved $PM_{2.5}$ SIP budgets. During this time period, re-entrained road dust will only be included in regional emissions analyses if the EPA Regional Administrator or state air quality agency determines that re-entrained road dust *is a significant contributor* to the $PM_{2.5}$ regional air quality problem. In other words, $PM_{2.5}$ areas can presume that re-entrained road dust is not a significant contributor and not include road dust in $PM_{2.5}$ transportation conformity analyses prior to the SIP, unless EPA or the state finds road dust significant. Re-entrained road dust is granular material released into the atmosphere as a result of motor vehicle activity on paved and unpaved roads.

EPA is applying this approach regardless of whether a $PM_{2.5}$ area is also a PM_{10} nonattainment or maintenance area. Therefore, even if the $PM_{2.5}$ area is also a PM_{10} area, the state or MPO can presume that re-entrained road dust is not a significant contributor and exclude it from $PM_{2.5}$ transportation conformity analyses prior to the SIP, unless EPA or the state finds road dust significant for $PM_{2.5}$. Regulatory text for this rule change is in §§ 93.102(b)(3) and 93.119(f).

An EPA or state air agency finding of significant re-entrained road dust emissions (a ''finding of significance'') would be based on a case-by-case review of the following factors: the contribution of road dust to current and future $PM_{2.5}$ nonattainment; an area's current design value for the $PM_{2.5}$ standard; whether control of road dust appears necessary to reach attainment; and whether increases in re-entrained dust emissions may interfere with attainment. Such a review would include consideration of local air quality data and/or air quality or emissions modeling results. Today's action with respect to $PM_{2.5}$ road dust is consistent with EPA's existing insignificance policy for all areas as described in Section XIV.B.

A finding of significance should be made only after discussions within the interagency consultation process for the $PM_{2.5}$ nonattainment area. These discussions should include a review of the data being considered. Interagency consultation will also ensure that all of the relevant agencies are aware that such a finding is being considered and is supported by the air quality information that is available. Findings of significance should be made through a letter to the relevant state and local air quality and transportation agencies, MPO(s), DOT, and EPA (in the case of a state air agency finding).

Road dust SIP emissions inventories and regional emissions analyses for conformity would be calculated using methods described in EPA's guidance entitled, ''AP–42, Fifth Edition, Volume 1, Chapter 13, Miscellaneous Sources'' (US EPA Office of Air Quality Planning and Standards; available at *http://www.epa.gov/ttn/chief/ap42/ch13/*). States and MPOs should consult with EPA before using alternative approaches, and EPA approval is needed before such approaches can be used. Details on the use of AP–42 for road dust estimation are given in ''Policy Guidance on the Use of MOBILE6.2 and the December 2003 AP–

42 Method for Re-Entrained Road Dust for SIP Development and Transportation Conformity,'' memorandum from Margo Oge and Steve Page to EPA Regional Air Division Directors, February 24, 2004 available at *http://www.epa.gov/otaq/models/mobile6/mobil6.2_letter.pdf*).

EPA notes that the absence of a finding of significance prior to the SIP should not be viewed as the ultimate determination of the significance of road dust emissions in a given area. State and local agencies may find through the SIP development process that road dust emissions are significant and should be included in the $PM_{2.5}$ SIP budget and subsequent conformity analyses, although they did not have sufficient data to support a finding prior to the development of the SIP.

As described in the November 5, 2003 proposal, EPA plans to issue guidance on how to adjust estimated $PM_{2.5}$ road dust emissions to reflect the true impact of re-entrained road dust on regional air quality. This guidance will take into account differences between road dust emissions measured near the roadway and measured on regional air quality monitors and allow states and MPOs to adjust road dust emissions estimates to reflect accurately the regional impact of these emissions. EPA plans to issue this guidance by the time final $PM_{2.5}$ designations are effective.

B. Rationale and Response to Comments

All of the commenters that directly addressed this issue supported the option of not requiring that re-entrained road dust be included in $PM_{2.5}$ conformity analyses prior to an adequate or approved SIP budget, regardless of whether the area is also a PM_{10} area. Reasons commenters stated for supporting this option included uncertainties about the role of re-entrained road dust for $PM_{2.5}$ air quality, likelihood that re-entrained dust will be dominated by larger particles, and concerns about needless expenditure of resources. As discussed in the proposal, at issue is the question of whether or not re-entrained road dust has a significant impact on $PM_{2.5}$ air quality and should be included in conformity analyses in all $PM_{2.5}$ areas. EPA believes that, unless there is already strong evidence of the importance of re-entrained road dust for $PM_{2.5}$ air quality, the proper time to make that determination is during the development of the $PM_{2.5}$ SIP.

There is still a great deal of uncertainty about the overall impact of re-entrained road dust on $PM_{2.5}$, and evidence suggests that re-entrained road dust is likely to have a relatively small impact on $PM_{2.5}$ compared to PM_{10} in general. The development of a SIP requires an in-depth review of all the available emissions and air quality data for a particular area. EPA expects that this review will resolve many of the uncertainties about the impact of re-entrained road dust on $PM_{2.5}$ in an area. However, if clear evidence of the impact of re-entrained road dust in a local area is available before the SIP is developed, the option of finding road dust significant so that it is included in conformity analyses can provide for the protection of public health and the environment in the short term. In the absence of such a finding prior to a $PM_{2.5}$ SIP, it is more productive for areas to focus control efforts on vehicle emissions that clearly contribute to the $PM_{2.5}$ air quality problem, rather than on re-entrained road dust emissions that have not been found to be significant. In addition, EPA does not believe there is compelling evidence to require that PM_{10} areas presume that re-entrained road dust will be a significant contributor to $PM_{2.5}$ air quality problems in all cases based on our current understanding and on the comments received.

Several commenters suggested that the final rule require that both EPA *and* the state make findings of significance before road dust is included in conformity analyses. EPA is not making this change to the final rule because we believe it is unnecessary given that the finding will be discussed through the interagency consultation process. The language used in the final rule for $PM_{2.5}$ road dust is consistent with how such findings for PM_{10} precursors have been implemented since the original 1993 conformity rule.

One commenter who supported the option EPA is finalizing also suggested as an alternative that re-entrained road dust be counted as part of the area source inventory not subject to transportation conformity at all. EPA disagrees. While the deposition of silt on a roadway is not necessarily completely dependent on vehicle activity, the release of that silt into the atmosphere is dependent on vehicle activity, and is therefore properly classified as an on-road mobile source emission subject to transportation conformity requirements.

Several commenters supported the future release of EPA guidance to allow road dust emissions estimates to be adjusted to reflect the true regional impact of those emissions. Several more commenters raised general concerns about the quality of methods available for estimating road dust emissions. These commenters believed that the existing methods overestimate road dust emissions. EPA agrees and believes that concerns about the inaccuracy of emission estimation methods arise from discrepancies between the observed emissions near the roadway surface and observed emissions at the regional air quality monitors. Allowing emissions estimates to be adjusted to reflect the true regional air quality impact through EPA's planned future guidance should alleviate many of these concerns. Without these adjustments, planners may not apply the proper combination of control measures on dust and vehicle emissions needed to address properly the regional $PM_{2.5}$ air quality problem. Based on observed discrepancies, EPA believes that controls on road dust would have a smaller impact on regional air quality than would initially appear based on unadjusted emissions inventories, and the Agency's planned guidance will address this issue.

Two commenters proposed that separate emission budgets be established for vehicle exhaust emissions and re-entrained road dust, rather than the current practice of including all on-road $PM_{2.5}$ emissions in one regional emissions analysis. The commenters believe that this approach would ''avoid the risk that improvements in the measurement of a poorly characterized inventory be used to offset increases in direct emissions of primary particles from combustion.'' In general, EPA believes that emissions from all motor vehicle sources should be examined in a unified manner for transportation planning and air quality planning purposes. It is also important that conformity analyses in $PM_{2.5}$ areas are consistent with how $PM_{2.5}$ SIP budgets will be developed.

As long as Clean Air Act requirements are met when all motor vehicle emissions are considered in conformity analyses, EPA does not believe it is beneficial to further constrain the transportation project or control strategy development processes of state and local governments for transportation conformity purposes. If it is determined that $PM_{2.5}$ from road dust is significant, it may prove extremely difficult to meet a separate road dust budget with any growth in VMT. Because dust and vehicle $PM_{2.5}$ both contribute to direct on-road $PM_{2.5}$ emissions levels, EPA believes it would be appropriate to treat them jointly for purposes of transportation conformity. For these reasons, EPA is not requiring separate budgets for road dust and exhaust emissions.

X. Construction-Related Fugitive Dust in $PM_{2.5}$ Regional Emissions Analyses

A. Description of Final Rule

EPA is finalizing the proposal to include construction-related fugitive dust from highway or transit projects in regional emissions analyses in $PM_{2.5}$ nonattainment and maintenance areas only if the SIP identifies construction dust *as a significant contributor* to the regional air quality problem. Construction-related fugitive dust is granular material released into the atmosphere during construction. Construction-related dust emissions would not be included in any $PM_{2.5}$ conformity analyses before adequate or approved $PM_{2.5}$ SIP budgets are established. Regulatory text is in § 93.122(f) of this final rule. This is consistent with the way construction dust is considered in the current rule for PM_{10} nonattainment and maintenance areas.

The consultation process should be used during the development of $PM_{2.5}$ SIPs when construction emissions are a significant contributor, so that these emissions are included in the SIP's motor vehicle emissions budget for conformity purposes. EPA has previously provided similar guidance to PM_{10} nonattainment and maintenance areas for PM_{10} construction-related emissions requirements.[13] See the preamble to the proposal for this final rule for further information regarding how EPA intends to implement the $PM_{2.5}$ construction dust requirement (November 5, 2003, 68 FR 62711).

Construction dust SIP emissions inventories and regional emissions analyses for conformity can be calculated using methods described in EPA's guidance entitled, ''AP–42, Fifth Edition, Volume 1, Chapter 13, Miscellaneous Sources'' (US EPA Office of Air Quality Planning and Standards; available at *http://www.epa.gov/ttn/chief/ap42/ch13/*) or locally developed estimation methods that are selected through the interagency consultation process.

In addition, EPA will allow $PM_{2.5}$ emissions to be adjusted to reflect the true impact of construction-related fugitive dust on regional air quality, as explained in Section IX. EPA will issue guidance on how to adjust estimated $PM_{2.5}$ construction dust emissions to reflect more accurately the impact of construction dust on regional air quality before EPA's final $PM_{2.5}$ nonattainment designations are effective. Under EPA's future guidance, calculated emissions could then be adjusted downward, if appropriate and necessary, to account for discrepancies based on an analysis of the relative impact of construction dust on ambient $PM_{2.5}$ concentrations as determined by regional air quality monitors and the $PM_{2.5}$ SIP's demonstration in a given area.

B. Rationale and Response to Comments

Most of the commenters who addressed this issue supported the proposal that EPA is finalizing today. Section 176(c) of the Clean Air Act requires that the air quality impacts of transportation projects be evaluated so that new violations or worsened violations do not occur and that attainment is not delayed. If emissions of fugitive dust from highway or transit project construction contribute to air quality problems in $PM_{2.5}$ areas and as a result, air quality is worsened or timely attainment is delayed, then it is appropriate to evaluate those emissions in conformity before federal funding or approval is given. Section 93.122(e) of the transportation conformity rule requires regional PM_{10} emissions analyses to include construction-related PM_{10} dust if the SIP identifies construction emissions as a contributor to the nonattainment problem.

If construction-related fugitive PM_{10} is not identified as a contributor to the air quality problem in the SIP, areas are not required to include these emissions in the regional emissions analysis for transportation conformity. The consultation process should be used to help determine whether construction dust is a significant contributor to regional air quality problems in the development of the $PM_{2.5}$ SIP, and EPA will consider the significance of construction dust in its review of the SIP submission. Today's action applies the current rule's general approach for PM_{10} areas to $PM_{2.5}$ areas.

One commenter who supported the proposal said that the determination of whether construction dust is a significant contributor to the air quality problem should consider the temporary nature of these emissions, the mitigating impact of construction dust suppression measures, and the limitations of existing fugitive dust estimation methods. EPA believes that it is appropriate to include construction dust mitigation measures required in the local area when determining the air quality significance of construction dust. The temporary nature of these emissions can only be considered if the release is so short in duration that it does not affect regional air quality. The limitations of the existing fugitive dust method described by the commenter will be addressed by allowing the adjustment of the dust emissions inventory to reflect the impact of dust on regional air quality, which will be discussed in future EPA guidance.

A smaller group of commenters opposed any inclusion of construction dust in transportation conformity analyses, citing the temporary nature of these emissions. While EPA agrees that these emissions only occur during the construction phase of a transportation project and that they may also be covered by other requirements, this is not a compelling rationale for excluding them from transportation conformity if they do have a significant impact on regional air quality. Dust from highway or transit construction projects could contribute to regional air quality problems for months or even years depending on the size of the project. Therefore, EPA has not changed the final rule in response to this comment.

Some commenters argued construction dust should not be included because it is already addressed in the nonroad or area source inventory and that different emissions models and control strategies apply to nonroad sources. Other commenters argued construction dust should not be included because VOC and NO_X emissions from construction equipment used during road construction projects are not required to be included in conformity analyses. EPA disagrees, because these factors have no bearing on whether construction dust should be included in conformity determinations. Construction dust from highway or transit projects is the direct result of decisions made during the transportation planning process and these decisions should take those emissions into account. The fact that different estimation methods and control methods are used for these emissions does not negate the connection with the transportation planning process. If construction dust is determined to be a significant contributor to the regional air quality problem, the state or MPO should make sure that only construction dust from highway and transit projects and not from other types of construction projects is included in the conformity analysis.

Several commenters argued construction dust should not be included because construction projects are separately covered by project-level and National Environmental Policy Act (NEPA) requirements. Because project-level and NEPA requirements do not

[13] October 28, 1996, memorandum entitled, ''Transportation Conformity: Regional Analysis of PM_{10} Emissions from Highway and Transit Project Construction,'' memorandum from Gay MacGregor, then-Director, Regional and State Programs Division, Office of Mobile Sources to EPA Regional Air Division Directors.

take into account other on-road sources of $PM_{2.5}$ emissions in other portions of the nonattainment or maintenance area, relying on these requirements exclusively would miss situations in which additional construction dust emissions from transportation projects worsen an existing region-wide $PM_{2.5}$ air quality problem.

A few commenters asked that full interagency consultation be required as part of the SIP development process with respect to the issue of the significance of construction dust. EPA agrees. Section 93.105(b)(1) of the conformity rule already requires that state and local transportation and air agencies, and other organizations with responsibilities for developing or implementing SIPs must consult with each other and with EPA, FHWA, and FTA field offices on the development of the SIP, transportation plan, TIP, and associated conformity determinations.

One commenter stated that emission analyses to determine if construction dust is a significant contributor to regional air quality should be required only in $PM_{2.5}$ areas for the 24-hour standard because the commenter believed that these emissions would have no effect on attainment of the annual $PM_{2.5}$ standard. EPA disagrees since it is impossible to make the determination that construction dust emissions will have no effect on attainment of the annual $PM_{2.5}$ standard in any area until a proper analysis has been done as part of the SIP development process, especially where construction activity continues for several years.

One commenter suggested that § 93.122(f)(2) should not include ''the dust producing capacity of the proposed activities'' because the commenter believes this requirement exceeds the SIP inventory requirements. EPA believes that an estimation of the dust producing capacity of the proposed transportation project is necessary in order to make a determination of the significance of construction dust on regional air quality. It is clearly possible to do this since the language in § 93.122(f)(2) is consistent with the requirement to account for construction dust for PM_{10} conformity, which has already been implemented for many years. Therefore, the final rule has not been changed in response to this comment.

One commenter stated that construction dust emissions were generally more significant than emissions of re-entrained road dust. This commenter believed that without a regulatory requirement to account for construction-related $PM_{2.5}$ emissions in all cases in conformity, effective measures to control these emissions would be inconsistent and only voluntary. As a result, this commenter recommended that construction dust emissions be considered in conformity analyses prior to the submission of an adequate $PM_{2.5}$ SIP budget. EPA believes based on the available data that construction dust will not be significant in all areas and that therefore requiring the inclusion of construction dust before it has been determined to be significant through the SIP process is unnecessary and could lead to the diversion of limited state and local resources. Furthermore, EPA did not include an option for including construction dust in all cases in the November 2003 proposal. Therefore, EPA is not changing the rule in response to this comment.

XI. Compliance With $PM_{2.5}$ SIP Control Measures

A. Description of Final Rule

The final rule requires that FHWA and FTA projects in $PM_{2.5}$ nonattainment and maintenance areas comply with the applicable SIP's $PM_{2.5}$ control measures, when such measures exist. Under the final rule, FHWA and FTA would assure implementation of a required control or mitigation measure by obtaining enforceable written commitments from the project sponsor and/or operator prior to making a project-level conformity determination. This requirement would be satisfied if the project-level conformity determination contains a written commitment from the project sponsor to include the control measures in the final plans, specifications and estimates for the project. This final rule is consistent with a similar requirement for PM_{10} areas.

EPA notes, however, that § 93.117 is only applicable after a $PM_{2.5}$ nonattainment area has an approved $PM_{2.5}$ SIP, because the requirement is to comply with the measures in the approved $PM_{2.5}$ SIP. Today's final rule does not affect any separate state or other SIP requirements for compliance with control measures.

The purpose of a $PM_{2.5}$ control measure is to limit the amount of $PM_{2.5}$ emissions from construction activities and/or normal use and operation associated with the project. Examples of specific control or mitigation measures that may be approved into a SIP include limitations on fugitive dust during construction or street sweeping. Normal project design elements (dimensions, lane widths, materials, etc.), however, are not considered mitigation or control measures.

B. Rationale and Response to Comments

Commenters were supportive of the proposal. The purpose of conformity is to ensure that federal actions are consistent with the SIP air quality objectives. If the approved SIP includes control measures for mitigating $PM_{2.5}$ emissions from federal transportation projects, then conformity should include a written commitment from the project sponsor to include these SIP measures in the final plans, specifications, and estimates for the project. EPA believes that this requirement will help $PM_{2.5}$ areas achieve clean air by ensuring that federal projects comply with control measures that result in air quality improvements as anticipated in the SIP. Although such projects must comply with SIP requirements in any event, documenting compliance in a conformity determination adds an important enforcement tool to aid in SIP compliance.

Some commenters requested clarification that such control measures are not considered transportation control measures (TCMs) requiring timely implementation under 40 CFR 93.113. EPA is not changing the regulatory text in response to this comment. Not all control measures included in the SIP are TCMs. However, if a TCM is included in an approved $PM_{2.5}$ SIP as a $PM_{2.5}$ control measure, it must be implemented as required by the SIP and the conformity rule's timely implementation requirements. $PM_{2.5}$ SIP control measures can include many different kinds of control measures, including TCMs as defined under Clean Air Act section 108 and § 93.101 of the conformity rule. EPA believes this clarification is consistent with current practice for implementing §§ 93.117 and 93.113 requirements in PM_{10} areas.

One commenter generally supported EPA's proposal but was unsure how enforcement of $PM_{2.5}$ SIP control measures would take place within the conformity process. This commenter recommended that enforcement of $PM_{2.5}$ control measures be completed through the NEPA process, similar to the requirements for dealing with other environmental issues. EPA agrees that enforcement of $PM_{2.5}$ SIP control measures is important, but the conformity rule is the appropriate context for meeting Clean Air Act conformity requirements. If a SIP $PM_{2.5}$ control measure is not implemented, then EPA believes it would not be appropriate to make a project-level conformity determination. Finally, it is

EPA's experience that implementation of § 93.117 for PM_{10} areas has worked well within the framework of the existing conformity rule. For all of these reasons, EPA is finalizing the proposed § 93.117 without further changes.

XII. $PM_{2.5}$ Hot-Spot Analyses

In the November 2003 proposal, EPA presented two options concerning hot-spot analyses in $PM_{2.5}$ nonattainment and maintenance areas. One proposed option was to not require hot-spot analyses for FHWA and FTA projects in $PM_{2.5}$ nonattainment and maintenance areas. The other proposed option was to require hot-spot analyses for such projects at certain types of locations if the SIP for the area identified any such locations. Under the second option hot-spot analyses would not be required for any projects before a SIP was submitted and then only if the $PM_{2.5}$ SIP identifies susceptible types of locations.

EPA received substantial comment on this portion of the November 2003 proposal. After considering these comments, EPA, in consultation with DOT, has decided to request further public comment on these and additional options for $PM_{2.5}$ hot-spot requirements. Therefore, EPA is not taking final action on this issue at this time. EPA will be publishing a supplemental notice of proposed rulemaking (SNPRM) on hot-spots in the near future. In that notice, EPA will be soliciting comment on additional options for addressing hot-spot analysis requirements in $PM_{2.5}$ nonattainment and maintenance areas.

EPA will address all comments received on $PM_{2.5}$ hot-spot analysis requirements both in response to the November 2003 proposal as well as the future SNPRM on hot-spots in a final rulemaking after the close of the comment period for the SNPRM. EPA intends to complete its rulemaking on $PM_{2.5}$ hot-spot requirements before $PM_{2.5}$ nonattainment designations become effective.

XIII. PM_{10} Hot-Spot Analyses

EPA also proposed several options for amending PM_{10} hot-spot requirements in its November 2003 proposal. These options included maintaining the current conformity rule's hot-spot analysis requirements. A second option was to limit the analyses to certain circumstances. For example, only requiring analyses if the SIP has identified motor vehicle emissions as a localized problem. Under this scenario PM_{10} hot-spot analyses would not be required if the SIP determined that motor vehicle emissions do not cause localized problems. A third option was to limit PM_{10} hot-spot analyses to certain types of project locations. EPA also proposed an option to eliminate all PM_{10} hot-spot analysis requirements from the conformity rule.

Similar to Section XII. on $PM_{2.5}$ hot-spot requirements, EPA has decided to delay making a final decision on changes to the existing PM_{10} hot-spot analysis requirements, since EPA received substantial comment on the proposed options. In light of those comments and due to the close relationship between PM_{10} and $PM_{2.5}$ hot-spot requirements, EPA and DOT have decided to propose additional options for PM_{10} hot-spot analyses in a future SNPRM for hot-spots. In that notice, we will solicit comment on additional options for addressing hot-spot analysis requirements in PM_{10} nonattainment and maintenance areas.

EPA will address all comments received on PM_{10} hot-spot analysis requirements both in response to the November 2003 proposal and the future SNPRM in a final rulemaking after the close of the comment period for the SNPRM. EPA intends to complete rulemaking on PM_{10} hot-spot requirements before $PM_{2.5}$ nonattainment designations become effective. EPA notes, however, that the existing conformity rule's PM_{10} hot-spot requirements continue to remain in effect at this time. Until a final action is taken, PM_{10} nonattainment and maintenance areas will continue to meet the PM_{10} hot-spot requirements of §§ 93.116 and 93.123 of the current conformity rule.

XIV. Federal Projects

A. Description of Final Rule

Today's final rule is consistent with the June 30, 2003, proposal and the most recent EPA and DOT guidance implementing the March 2, 1999 court decision. The final rule modifies § 93.102(c) of the conformity rule so that no new federal approvals or funding commitments for non-exempt projects can occur during a transportation conformity lapse. A conformity lapse generally occurs if transportation plan and TIP conformity determinations are not made within specified time frames. During a conformity lapse no new conformity determinations for plans, TIPs, and FHWA or FTA non-exempt projects may be made. Under the new § 93.102(c) provision, non-exempt transportation project phases can be implemented during a lapse if they have received all required FHWA or FTA approvals or funding commitments and have met associated conformity requirements before the lapse. However, no new federal approvals or funding commitments for subsequent or new project phases can be made during the lapse.

EPA is making one minor revision to § 93.102(c) in today's rulemaking that was not included in the June 30, 2003 proposal. Specifically, we are clarifying that § 93.102(c) requirements do not have to be satisfied at the time of project approval for TCMs that are specifically included in an applicable SIP (provided that all other relevant transportation planning and conformity requirements are met). During the development of this final rule, EPA realized that the conformity rule § 93.114(b), as amended on November 15, 1995 (60 FR 57179), provided this exception for TCM project approvals during a conformity lapse. Therefore, EPA is including this exception in § 93.102(c) of today's action. EPA does not believe a reproposal is necessary to finalize this minor change to § 93.102(c) as this revision will not change the requirements for federal funding and approval of projects and project phases as determined by the court and simply clarifies the relationship between existing § 93.114(b) requirements and today's § 93.102(c) revision. Areas should refer to the November 1995 rulemaking for more information on § 93.114(b) requirements.

As proposed, today's final rule also moves previous § 93.102(c)(2) requirements relating to approved projects to § 93.104(d) to limit redundancy and improve organization of the conformity rule. The conformity rule continues to require a new conformity determination when a significant change in a project's design concept and scope has occurred, a supplemental environmental document for air quality purposes is initiated, or three years have elapsed since the most recent major step to advance a project has occurred. A major step is defined in today's conformity rule as ''* * * NEPA process completion; start of final design; acquisition of a significant portion of the right-of-way; and construction (including Federal approval of plans, specifications and estimates)'' (40 CFR 93.104(d)).

See EPA's conformity website listed in Section I.B.2. to download an electronic copy of the June 30, 2003 proposal to this final rule and the latest EPA and DOT guidance implementing the court decision.

B. Rationale and Response to Comments

EPA is revising the conformity rule in a manner consistent with the Clean Air Act, as interpreted by the court decision. Previously, section 93.102(c)(1) of the 1997 conformity rule

(62 FR 43780) allowed a highway or transit project to receive additional federal approvals and funding commitments during a lapse if the project came from a previously conforming plan and TIP, a conformity determination for the project had been made, and the NEPA process was completed before the lapse. In its decision, the court held that § 93.102(c)(1) of the 1997 rule violated the Clean Air Act since it allowed such transportation projects (*i.e.*, ''grandfathered'' projects) to receive further federal approvals or funding commitments during a lapse. As a result, the final rule allows projects and project phases to advance during a conformity lapse only if approvals or funding commitments for these projects and project phases were granted prior to the lapse.

Most commenters supported EPA's proposal for advancing project phases during a conformity lapse and believed that DOT and EPA's interpretation of the court decision was appropriate. Two commenters also agreed that EPA's June 30, 2003 proposal is a better interpretation of the court decision than a previous interpretation reflected in a FHWA/FTA guidance document issued on June 18, 1999. The June 1999 guidance has since been revised and superceded by the January 2, 2002 FHWA/FTA guidance. Under the FHWA/FTA January 2002 guidance document and today's final rule, any project phase (*e.g.*, right-of-way (ROW) acquisition, final design or construction) that is authorized before a conformity lapse can be implemented during the lapse. However, no further approvals or funding commitments for subsequent project phases can occur during the lapse. See Section II. for further information regarding these guidance documents.

EPA believes this change is appropriate because the court did not explicitly rule on the issue of how previously authorized project phases are affected during a lapse. Therefore, the court decision has led EPA and DOT to conclude that a project phase that previously receives all federal approvals and funding commitments can be implemented during a conformity lapse. EPA and DOT believe suspending such authorized commitments during a conformity lapse is not required by the Clean Air Act.

Although most commenters understood that EPA's proposed rule revision is constrained by the court decision, a few commenters still expressed a preference for the previous rule's grandfathering provision. Specifically, one commenter stated that without the grandfathering provision, conformity lapses will lead to costly delays in infrastructure development and will waste valuable planning resources. Another commenter stated that the conformity process should be a forward-looking process and that once a project is included in a conforming plan and TIP, that project should be permanently ''grandfathered'' until built, changed substantially or removed from the plan/TIP, as having previously satisfied all of its requirements under the Clean Air Act. Another commenter urged EPA to change the conformity rule so that projects can go forward during a conformity lapse once the environmental requirements pertaining to air quality in the NEPA process have been satisfied. This commenter questioned why project approvals and funding commitments that are unrelated to air quality (*e.g.*, ROW acquisition) should be impacted by the conformity rule.

As stated above, the court ruled that the previous rule's grandfathering provision did not meet Clean Air Act requirements since it allowed project approvals and funding commitments to be granted during a conformity lapse (*i.e.*, when the transportation plan and TIP do not conform). Thus, this rule change is mandated by the court decision, as noted by most commenters. This decision has resulted in a process for advancing projects that is more protective of air quality than the previous rule's grandfathering provision. Although some project phases, such as ROW acquisitions, will not affect regional motor vehicle emissions by themselves, such phases are significant steps towards the eventual construction and operation of a transportation project. EPA believes that if unauthorized project phases are allowed to proceed during a lapse, federal approval and funding may be expended on projects that do not conform to the SIP's air quality goals.

Also, EPA believes it is important to understand the practical impact and scope of eliminating the previous rule's grandfathering provision in most areas. This final rule will affect only those areas that are unable to meet a conformity deadline, and as a result, enter into a conformity lapse. This rule does not affect federal funding and approval of projects in areas that have a conforming plan and TIP in place and are meeting the conformity rule's requirements.

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

A. EPA's Role in the Adequacy Process

1. General Description of Final Rule

Today's final rule continues to allow certain SIP budgets to be used for conformity before a SIP is approved. However, this final rule modifies several provisions under §§ 93.109 and 93.118 of the conformity regulation to specify that EPA must affirmatively find submitted budgets adequate before they can be used in a conformity determination. The final rule also establishes the process by which EPA will review and make adequacy findings for submitted SIPs, as described in the June 30, 2003 proposal.

Specifically, the final rule eliminates those provisions in §§ 93.109 and 93.118(e) that required areas to use budgets from submitted SIPs 45 days after submission unless EPA had found them inadequate. Instead, today's rule stipulates that before a budget from a SIP submission can be used in conformity, EPA must find it adequate using the criteria in § 93.118(e)(4). Under this final rule, a budget cannot be used until the effective date of the **Federal Register** notice that announces that EPA has found the budget adequate, which would be 15 days from the date of notice publication (unless the adequacy finding is included in EPA's final approval notice for the SIP; *see* Section XV.C.1 below for more information).

This final rule also incorporates language from the November 5, 2003 conformity proposal (68 FR 62690). EPA's November 2003 proposal was consistent with the June 30, 2003 proposal that addressed the March 1999 court decision. However, the November 2003 proposal further clarified when the budget test would be required when EPA publishes a final approval or direct final approval of a SIP and budgets in the **Federal Register**. For more information on when approved budgets can be used in conformity determinations, see Section XV.C. of this final rule.

Today's final rule addresses only the procedures for making adequacy findings for submitted SIPs in accordance with the court decision. The final rule does not change the criteria listed in § 93.118(e)(4) of the rule for determining the adequacy of submitted SIPs, as the court did not address this provision in its decision. The final rule is consistent with the June 30, 2003 proposed rule and the adequacy

procedures already in place as a result of EPA's May 14, 1999 guidance issued to implement the court decision. Therefore, existing adequacy procedures will generally remain the same as they have been since the 1999 guidance was issued. EPA notes, however, that the June 30, 2003 proposal and today's final rule include more detailed information on the implementation of the adequacy process and expand upon EPA's May 1999 guidance. See Section II. of this notice for more background information on EPA's guidance document.

2. Rationale and Response to Comments

In its ruling, the court remanded § 93.118(e)(1) of the conformity rule to EPA for further rulemaking. This section of the conformity rule had allowed budgets to be used in conformity determinations 45 days after SIP submission even if EPA had not found them adequate. However, the court ruled that a submitted budget could only be used for conformity purposes if EPA had first found it adequate.

Specifically, the court stated that ''where EPA fails to determine the adequacy of budgets in a SIP revision within 45 days of submission, * * * there is no reason to believe that transportation plans and programs conforming to the submitted budgets ''will not—(i) cause or contribute to any new violation of any standard in any area; (ii) increase the frequency or severity of any existing violation of any standard in any area; or (iii) delay timely attainment of any standard * * *'' 42 U.S.C. § 7506(c)(1)(B).'' 167 F.3d, at 650. The court remanded § 93.118(e)(1) to EPA so that it could be harmonized with these Clean Air Act requirements. EPA believes this final rule achieves the court's directive.

Most commenters favored using submitted SIPs and budgets that have been found adequate before SIP approval in conformity determinations. Most commenters also supported EPA's proposal to incorporate the existing adequacy process into the conformity rule in accordance with the court decision. EPA received similar statements of support for our proposed adequacy process from one commenter that submitted comments on the November 5, 2003 proposal. Some commenters believed that the existing adequacy process provides certainty to the conformity process and ensures that submitted budgets are consistent with Clean Air Act requirements before they are used in conformity determinations. Additional comments on specific aspects of the adequacy process and EPA's responses to those comments can be found in Sections XV.B. through XV.F. below.

B. General Description of the Adequacy Process

1. Description of Final Rule

The final rule adds a new provision, § 93.118(f), to the conformity rule that provides the basic framework of the adequacy process. The new § 93.118(f) generally reflects EPA's existing adequacy process as proposed in the June 30, 2003 rulemaking and described in EPA's 1999 adequacy guidance. The adequacy process consists of three basic steps: public notification of a SIP submission, a public comment period, and EPA's adequacy finding, including response to submitted comments. These three steps are described below. Section XV.B. of today's preamble specifically addresses the adequacy procedures listed in § 93.118(f)(1) that will be used for submitted SIPs in most cases. Section XV.C. covers alternative procedures listed in § 93.118(f)(2) for determining the adequacy of submitted SIPs through the SIP approval process.

EPA will review the adequacy of submitted SIP budgets in cases where a budget can be used for conformity prior to approval. Adequacy reviews would be completed for the following cases:

- SIPs that are considered ''initial SIP submissions'' (generally the first SIP submission to meet a given Clean Air Act requirement). A discussion of ''initial SIP submissions'' can be found in the preamble of the proposed rule entitled, ''Transportation Conformity Rule Amendments: Minor Revision of 18-month Requirement for Initial SIP Submissions and Addition of Grace Period for Newly Designated Nonattainment Areas'' (August 6, 2002, 66 FR 50956–50957);
- Revisions to previously submitted but not approved SIPs; and
- Revisions to certain approved SIPs, as described further in Section XV.D.1. of today's action.

For more information on the SIP submissions that EPA will review for adequacy, see the June 30, 2003 conformity proposal (68 FR 38982–38984).

Notification of SIP submissions: After a state officially submits a control strategy SIP or maintenance plan to EPA, we will notify the public by posting a notice on EPA's adequacy Web site and will attempt to do so within 10 days of submission. EPA's adequacy Web site is the central national location for adequacy information. Currently, the Web site is found at *http://www.epa.gov/otaq/traq/traqconf/adequacy.htm*. We will consider a SIP submission to be formally submitted on the date that the EPA regional office receives the official SIP. In addition, EPA will directly notify identified interested members of the public. If a member of the public would like to be notified when we receive a SIP submission for a particular state or area, he or she should contact in advance the EPA regional employee listed on the Web site for that state. EPA's Web site provides EPA regional contact information so that interested parties can arrange or discuss notification processes. For example, EPA could use postcards, letters, emails or phone calls to notify requesters, as agreed on by the interested party and EPA.

Public comment: A 30-day public comment period will be provided at a minimum in either of the following cases:

- If the state has made the entire SIP submission electronically available to the public via a Web site, electronic bulletin board, etc., the 30-day comment period will start immediately upon the posting of the SIP notice on the EPA adequacy website. EPA will include a link to the state website in its public notification.
- If the SIP is not available via the Internet or is only available in part, if someone requests a paper copy of the entire SIP and EPA receives the request within the first 15 days after the SIP is posted, the 30-day public comment period will start on the date that EPA mails the requested copy of the SIP. However, if no one has requested a copy of the SIP from EPA within 15 days after the date of EPA posting notification, EPA will consider the 30-day comment period to have started immediately upon EPA's adequacy Web site posting.

Our Web site will state when the public comment period begins and ends, and to whom to send comments. The adequacy Web site will also include information on how to obtain a copy of a SIP submission under adequacy review. EPA will not make SIP submissions electronically available on our adequacy Web site. If someone requests a copy of the SIP, the Web site will be updated to reflect any extension of the public comment period.

EPA's adequacy finding: After a thorough review of all public comments received and evaluation of whether the adequacy criteria have been met, the appropriate EPA regional office will make a finding that the submitted SIP is either adequate or inadequate and send a letter indicating EPA's finding, including response to comments, to the state or local air agency and other relevant agencies such as the MPO and state transportation agency. The EPA

regional office will also mail or email a copy of the letter and response to comments to others who request it, as previously arranged.

The EPA regional office will also subsequently announce the adequacy finding in the **Federal Register**. If EPA finds a budget adequate, it can be used for conformity determinations on the effective date as stated in the **Federal Register** notice, which will be 15 days after the notice is published. EPA will post EPA's adequacy letter, our response to any comments, and the **Federal Register** notice on the EPA adequacy Web site.

Alternatively, in cases where EPA is conducting an adequacy review and moving quickly to rulemaking on a SIP, EPA may use the proposed or final rulemaking notice for a control strategy SIP or maintenance plan to announce our adequacy finding, instead of first sending a separate letter to the relevant agencies and following it with a **Federal Register** notice. In these cases, EPA would post our finding on the adequacy Web site, along with the relevant proposed or final rulemaking notice for the SIP that would include any response to comments.

Adequate budgets must be used in all future conformity determinations for an area after the effective date of EPA's adequacy finding pursuant to § 93.109 of today's final rule (or upon EPA's promulgation of a SIP approval as described in Section XV.C.I below); inadequate budgets cannot be used for conformity.

EPA notes that two minor changes to the proposed regulatory text have been incorporated in this final rule regarding the procedures for EPA's adequacy process in § 93.118(f)(1). First, EPA is clarifying in § 93.118(f)(1)(iii) that EPA's response to comments received on the adequacy of a submitted SIP budget must be sent to the state along with EPA's letter that includes its finding. In the June 30, 2003 proposal EPA stated that we will send our letter and response to comments to individuals who request a copy of these documents, but we did not specifically indicate that we would send a copy of the response to comments to the state. As a matter of practice, EPA does not issue adequacy findings through a formal letter to the state without including our responses to comments. Therefore, this minor clarification to the final rule language simply reflects how the adequacy process is currently being implemented.

Second, EPA is also clarifying in § 93.118(f)(1)(iii) that we will only review and consider any comments submitted through the state SIP process that are relevant to our adequacy finding. In § 93.118(f)(2)(iii) of the June 30, 2003 proposal EPA stated that we would respond to any comments submitted through the state process in the docket of our rulemaking to approve or disapprove a SIP (if adequacy is conducted through the SIP approval process). However, this language should be interpreted in context to refer only to comments relating to adequacy. If interpreted to apply to all comments on a submitted SIP, the language is not consistent with EPA's interpretation of existing requirements in §§ 93.118(e)(5) [14] or EPA's current process for adequacy findings of submitted SIPs and budgets that only require consideration of public comments addressing adequacy that were submitted through the state process. EPA and the states have separate established processes for taking action on a SIP and responding to all comments, including comments that relate to other aspects of a submitted SIP, that are received through those individual processes.

EPA believes that a reproposal is not necessary to make these two minor corrections in today's final rule. These minor revisions are consistent with EPA's original intentions and current practice of making adequacy findings.

Finally, EPA intends to review the adequacy of a newly submitted budget through the process described above within 90 days of EPA's receipt of a full SIP submission in most cases. However, adequacy reviews could take longer particularly when EPA receives significant public comments. EPA will work with state and local agencies when adequacy findings can be expedited to meet conformity deadlines.

2. Rationale and Response to Comments

EPA received a number of comments pertaining to different aspects of the proposed adequacy process. In particular, several commenters raised concerns about the length of time EPA has allocated to conduct adequacy reviews, indicating that 90 days is too long before submitted SIPs can become available for conformity purposes. Two commenters specifically urged EPA to commit sufficient staff and resources to ensure that adequacy determinations are timely. Some commenters suggested ideas for shortening the 90-day process by, for example, eliminating the 30-day public comment period and relying solely on the state's public involvement process for SIP development, or conducting adequacy reviews through parallel processing for all SIP submissions. Another commenter suggested eliminating the 15-day effective date for adequacy findings, since the adequacy process can be used to correct mistakes and later find budgets inadequate, if appropriate. In contrast, however, one commenter asked that the effective date be extended, as the current 15-day period does not allow sufficient time to prepare a petition for review and motion for stay in situations where a member of the public might disagree with EPA's finding. Other commenters suggested that parallel processing through the SIP approval process be used in all adequacy reviews to enable submitted SIPs to become available sooner in the conformity process.

Two commenters that submitted comments on the November 5, 2003 proposal requested that EPA commit to making adequacy findings during an explicit time period (*e.g.*, 90 days) to ensure that conformity deadlines are met and to provide more predictability to the conformity process.

After full consideration of all these comments, EPA believes that the current 90-day time frame for conducting adequacy reviews is appropriate and does not need to be modified. EPA believes that providing a 30-day public comment period that is focused entirely on the adequacy of a submitted SIP and that is separate from the state's public process is necessary to make an informed decision on the appropriateness of using a submitted SIP in the conformity process. In addition, we believe that the 15-day effective date is appropriate and should not be shortened or extended. We recognize that the public should be given some time to challenge EPA's finding before it becomes effective in cases where an individual disagrees with EPA's conclusion. We believe this time period before an adequacy finding becomes effective is necessary to ensure a fair and equitable process. However, EPA also understands the needs of conformity implementers to receive new air quality information for incorporation into the transportation planning and conformity processes in a timely manner. Therefore, EPA believes the existing adequacy process that provides a 15-day effective date best achieves these dual goals.

EPA also wants to assure implementers that we are committed to conducting adequacy reviews, especially when such reviews are closely aligned with an upcoming conformity deadline, in an efficient and timely manner. However, as discussed in the June 30, 2003 proposal, some adequacy reviews that are complicated and draw a great deal of public interest

[14] August 15, 1997 final rule; 62 FR 43782.

can take longer than 90 days. EPA is willing to conduct the adequacy review of any SIP submission through parallel processing to expedite our review and finding, if requested to do so by the state. Areas should use the interagency consultation process to consult on the development of SIPs and budgets and to determine whether parallel processing would expedite EPA's adequacy review so that conformity deadlines can be met in a timely manner.

Two commenters disagreed with EPA's existing process for determining the adequacy of submitted SIPs, and instead believed that adequacy findings should be conducted through full notice and comment rulemaking. One of these commenters argued that, in difficult cases, the public needs to have the procedural protections required by Administrative Procedures Act (APA) rulemaking when EPA determines the adequacy of a submitted SIP for conformity purposes. The commenter also argued that under the existing adequacy process, EPA fails to include a statement of basis and purpose in a proposed action that would inform the public prior to submitting comments of the action that the Agency intends to take and the reasons supporting that action, as required by the APA. The commenter cites a pleading filed in a challenge to an adequacy finding that states that under the current adequacy process the public is given no advanced notice of whether EPA considers the SIP and budgets adequate, and if so, what criteria have been applied and what facts have been considered by EPA in its decision.[15]

In response, EPA has always held that adequacy findings do not need to be made through APA notice and comment rulemaking. EPA does not believe these actions involve rulemaking, but rather they are conducted through informal adjudications. In the preamble to the 1997 conformity rule (62 FR 43783) EPA stated, ''it is appropriate not to provide notice and comment for adequacy determinations for submitted SIPs, since these determinations are only administrative reviews and not substantive rules.'' Adequacy reviews are carried out on an informal, case-by-case basis and apply existing criteria in the conformity rule (40 CFR 93.118(e)(4)) that were previously subjected to notice and comment rulemaking.[16] Further, case law establishes that agencies have discretion to decide whether to conduct such actions through rulemaking or adjudication.[17] Since the March 1999 court decision did not address this aspect of the adequacy process, EPA is not reopening this legal conclusion as stated in the 1997 conformity rule in today's action.

However, EPA believes that providing some opportunity for public involvement even in these adjudications adds value to our adequacy review. We believe public comment can assist us in making more informed decisions regarding submitted budgets and their ability to ensure that new transportation activities will not cause or contribute to new violations, worsen existing violations, or delay timely attainment of the air quality standards. As a result, the existing adequacy process that is included in today's final rule provides a minimum 30-day public comment period for each SIP that we review for adequacy. This adequacy public comment period, along with the state's public process during SIP development, allows EPA to make an informed decision through adjudication on whether a submitted SIP meets the adequacy criteria established under § 93.118(e)(4) of the conformity rule.

C. Adequacy Reviews Through the SIP Process

1. Description of Final Rule

EPA is finalizing procedures for conducting adequacy reviews and making adequacy findings through the SIP approval process in § 93.118(f)(2). EPA may use the SIP approval process to conduct our adequacy review when we are moving quickly to approve a SIP soon after it has been submitted. These rule revisions are consistent with the June 30, 2003 conformity proposal and EPA's May 1999 guidance that implements the court's decision. EPA is also clarifying in § 93.109 when the budget test must be satisfied as required by § 93.118 if EPA finds SIP budgets adequate, and also if EPA approves SIPs and budgets through final and direct final rulemakings. This clarification to § 93.109 is consistent with EPA's November 5, 2003 proposal.

When EPA reviews the adequacy of a SIP submission simultaneously with EPA's approval of the SIP, the adequacy process will be substantially the same as that which we have outlined in Section XV.B.1. of this final rule as follows:

Notification of SIP submission: In these cases, EPA will use a notice of proposed rulemaking to notify the public that EPA will be reviewing the SIP submission for adequacy. For example, we will notify the public of our adequacy review through the proposal notice when we are proposing to approve a SIP through parallel processing. In addition, when we make an adequacy finding for a SIP through direct final rulemaking, EPA will publish a proposed approval and a direct final approval in the **Federal Register** on the same day. In both the proposed and direct final rulemakings, EPA would announce the start of its adequacy review.

Public comment: The publication of EPA's proposed approval notice (and direct final approval, when applicable) for a SIP submission will start a public comment period of at least 30 days. EPA will post the relevant proposed and direct final rulemakings on our Web site to notify the public when the comment period for adequacy, as well as for other aspects of the SIP, begins and ends. EPA will also include on the adequacy website information on how to obtain a copy of the SIP submission that EPA has proposed to approve and find adequate.

EPA's adequacy finding: When we announce our adequacy review in a proposal notice only, we will subsequently issue our finding through either a letter to the state or through our final action on the SIP in the **Federal Register**. In the case where we issue our finding prior to a final action on the SIP, EPA will update the adequacy website to include the letter to the state that indicates our finding, responses to any comments received during the public comment period that are relevant to the adequacy of the SIP, and our separate adequacy notice that is published in the **Federal Register** in accordance with § 93.118(f)(1)(iii)–(v). Such findings will become effective 15 days after our published adequacy notice.

In the case where we make our adequacy finding and address response to comments in a subsequent final rule that approves or disapproves the SIP, EPA will update the adequacy website with our finding as published in the final **Federal Register** approval or disapproval notice. In cases where EPA finds the budgets adequate when we approve a SIP, the budgets could be used for conformity purposes upon the publication date of the final approval action in the **Federal Register**. EPA is finalizing this clarification to § 93.109 for each criteria pollutant covered by the current conformity rule, consistent with the November 5, 2003 proposal. As stated in the November 2003 proposal, Clean Air Act section 176(c) requires that transportation activities conform to the motor vehicle emissions level established in the approved SIP.

[15] *TRANSDEF* v. *EPA*, 9th Circuit Court of Appeals, No. 02–70443, Petitioners Motion for Stay, June 2002 at xxiii–xxiv.

[16] July 9, 1996 proposed rule (61 FR 36112) and August 15, 1997 final rule (62 FR 43780).

[17] See, *NCRB* v. *Bell Aerospace Co.*, 416 U.S. 267,294 (1974).

Therefore, EPA believes that once a SIP is approved, its budgets must be used in future conformity determinations under the statute.

When EPA conducts adequacy through direct final rulemaking, EPA's approval and adequacy finding generally become effective 60 days after publication according to the date indicated in the direct final **Federal Register** notice, provided that we receive no adverse comments and no other information or analysis changes EPA's position in that time period. However, if we receive adverse comments or our position changes as a result of further information or analysis, we will publish a notice in the **Federal Register** withdrawing our direct final action and adequacy finding prior to its effective date in most cases. In the case where EPA receives adverse comments that do not affect our adequacy finding, we could publish a notice that withdraws only our direct final approval of the SIP but retains our adequacy finding in the **Federal Register** prior to the effective date of the direct final rule. In any case, EPA will use its Web site to inform the public when the adequacy finding included in a direct final rule takes effect, or that we received comments that resulted in a withdrawal of all or part of our direct final approval action.

Given the nature of the public comment process and effective date associated with direct final rulemaking, an adequacy finding cannot become effective until the effective date of the direct final rule. EPA is including this clarification in § 93.109 of today's rule. This rule revision is consistent with the November 2003 proposal.

Finally, consistent with language in § 93.118(f)(1)(iii), EPA is clarifying in § 93.118(f)(2)(iii) that when we conduct adequacy reviews through the SIP approval process, we will review and consider only those comments submitted through the state SIP process that are relevant to our adequacy finding (in addition to comments that are submitted through EPA's SIP approval process). In § 93.118(f)(2)(iii) of the June 30, 2003 proposal we stated that we would respond to any comments submitted through the state process in the docket of our rulemaking to approve or disapprove a SIP (if adequacy is conducted through the SIP approval process). However, as stated in Section XV.B.1. of today's action, one interpretation of this broad language could have implied that EPA would consider comments submitted through the state process beyond those comments relating to adequacy, which is not consistent with existing requirements or EPA's current adequacy process. Therefore, EPA believes that our final action clarifying this issue is a logical outgrowth of the proposal and that a reproposal is not necessary to make this minor correction limiting our consideration of comments submitted to the state to those comments relevant to the adequacy process in today's final rule.

2. Rationale and Response to Comments

One commenter did not agree with the 60-day effective date of budgets that are found adequate and approved through direct final rulemaking. This commenter argued that the 60-day effective date for direct final rulemaking unnecessarily burdens conformity implementers with additional time requirements, as these budgets would have already undergone public comment through the state's approval process.

EPA disagrees with this comment. When a SIP is found adequate and approved through direct final rulemaking (provided EPA receives no adverse comments), the 60-day effective date provides a 30-day public comment period and a 30-day time period for EPA to review any comments received and issue a withdrawal notice, if necessary. APA rulemaking procedures require EPA to provide a minimum 30-day public comment period when we approve a SIP through direct final rulemaking. In addition, EPA believes that providing a public comment period on our adequacy finding and SIP approval separate from the state's public process is necessary for EPA to make an informed decision on the appropriateness of using a submitted SIP in the conformity process. We also believe that the subsequent 30 days after the close of the 30-day public comment period is critical to review any comments we receive and decide whether any would change our approval of the SIP. If we receive comments that cause us to withdraw our direct final approval of the SIP, the subsequent 30 days is also necessary to perform the administrative tasks to ensure that the approval is withdrawn before it becomes effective. Areas should use the interagency consultation process to coordinate the introduction of new SIPs and budgets so that adequacy reviews can be completed and new budgets are available in time to meet any upcoming conformity deadlines.

Another commenter suggested that adequacy reviews of all submitted SIPs could be accomplished through parallel processing procedures and direct final rulemaking to meet EPA's objective of incorporating submitted SIPs into the conformity process in a timely manner. This commenter was generally opposed to EPA's existing adequacy process and believed that EPA should use notice and comment rulemaking for all adequacy findings.

EPA agrees with the comment that adequacy findings can be expedited through parallel processing procedures. Several states have requested such procedures to expedite EPA's adequacy findings since the 1999 court decision. As stated in the June 2003 proposal, EPA will parallel process a SIP if requested to do so by the state. However, we should note that parallel processing can expedite the adequacy review of a submitted SIP only if no changes to that SIP and its budgets are made before the state officially submits the SIP to EPA for approval. In the event that the SIP significantly changes between the time EPA begins its initial adequacy review and the state's formal submission of the SIP, EPA would have to re-start the adequacy process once the new SIP is formally submitted.

EPA does not believe, however, that direct final rulemaking would expedite the adequacy process for submitted SIPs in most cases. Under the situation the commenter has suggested, we would conduct our adequacy review and develop a proposed and direct final approval of our adequacy finding either at the same time that the state holds its public comment period (*i.e.*, parallel processing) or after the SIP has been formally submitted to EPA. Once EPA completes its review and publishes the proposed and direct final rulemakings in the **Federal Register**, the budgets could not be used until 60 days after publication even if no adverse comments were received on EPA's direct final approval. If we received any relevant adverse comments, we would have to withdraw our direct final rule and publish a subsequent approval notice with response to comments.

The purpose of the current adequacy process is to introduce new adequate submitted SIPs and budgets into the conformity process in a timely manner. EPA believes conducting all adequacy reviews through direct final rulemaking would defeat this purpose in many cases. EPA believes that conducting an adequacy review, preparing proposed and direct final rulemakings and providing a 60-day effective date (that includes a 30-day comment period), would require a time period much greater than the 90 days that EPA currently contemplates for the process. This required time period would significantly delay the use of adequate submitted budgets in conformity, especially in cases where EPA cannot

begin its adequacy review of a SIP until the state formally submits it to EPA for approval. Under the current adequacy process, EPA is able to complete its initial adequacy review concurrently with the adequacy public comment period, and thus, reduce the amount of time necessary to make an adequacy finding. Under direct final rulemaking, however, EPA would need to complete its adequacy review of submitted budgets before it could prepare and publish both a proposed approval and direct final approval of the budget's adequacy.

In addition, direct final rulemaking is typically used only when an approval is straight-forward and no adverse comments are expected. In cases where SIPs are more controversial and adverse comments are received, the use of direct final rulemaking could delay the use of adequate budgets in the conformity process if EPA is required to spend time withdrawing its direct final approval and publish a subsequent final approval notice in the **Federal Register** with response to comments some time significantly later.

For information on EPA's position regarding the general need to find submitted SIPs adequate through notice and comment rulemaking, *see* Section XV.B.2. above.

D. Use of Submitted Revisions to Approved SIPs

1. Description of Final Rule

EPA is also finalizing a minor clarification to a sentence in § 93.118(e)(1), consistent with the June 30, 2003 conformity proposal. Paragraph § 93.118(e)(1) of today's rule clarifies that a budget from a submitted SIP cannot be used for conformity if an area already has an approved SIP that addresses the same pollutant and Clean Air Act requirement (*e.g.*, rate-of-progress or attainment for a given air quality standard), and that approved SIP has budgets established for the same year as the submitted SIP.

2. Rationale and Response to Comments

EPA received a number of comments on the issue of using submitted SIPs in conformity once an approved SIP has already been established. Several commenters encouraged EPA to amend the conformity rule to allow adequate budgets to supercede approved budgets in all cases or when EPA believes it to be justified. One commenter that submitted comments on the November 5, 2003 proposal requested further clarification on when adequate budgets replace existing approved budgets. This commenter indicated that there has been confusion over this aspect of the rule and believed that requiring adequate budgets to be fully approved before they can replace existing approved budgets would be burdensome and would defeat the purpose of the adequacy process. In contrast, another commenter expressed concern over the use of submitted SIPs in conformity determinations when an approved SIP for the same year and Clean Air Act requirement already exists.

EPA believes that Clean Air Act section 176(c) clearly requires transportation plans, TIPs and projects to conform to a nonattainment or maintenance area's approved SIP before such activities can be funded or approved. Therefore, EPA believes it has no statutory authority to allow submitted budgets that are established for the same year and Clean Air Act requirement to supercede budgets that have already been approved into the SIP. In general, a submitted budget replaces a previously approved budget established for the same year and Clean Air Act requirement only after EPA has approved the submitted budget. EPA notes, however, that submitted budgets that are established for a different year or Clean Air Act requirement than a previously approved budget must be used in conformity upon EPA's adequacy finding, along with all other applicable adequate and approved budgets. Thus, EPA cannot agree with commenters' request to allow submitted SIPs to supercede approved SIPs in all cases.

However, there have been cases where, based on unique circumstances, EPA has agreed to a state's request to limit our approval of a SIP in such a manner that a revision to that SIP could be used upon the effective date of EPA's adequacy finding. Also, EPA has limited its approval of certain serious and severe 1-hour ozone attainment SIPs so that updated adequate SIP budgets based on the MOBILE6 emissions factor model could be used prior to EPA's approval.[18] In these cases, EPA has limited its approval of the original SIP so that the budgets included in that SIP are no longer considered ''approved'' upon the effective date of our subsequent adequacy finding for the revised SIP. EPA concludes that such actions to limit the approval of a SIP are permitted under the Clean Air Act and conformity rule, as both the statute and regulations only require the use of approved SIPs and budgets in the conformity process.

Another commenter objected to the continued use of submitted SIPs in conformity altogether, arguing that such SIPs lacked sufficient authority and validity to provide the basis for a conformity test in the absence of an approved SIP. At a minimum, the commenter suggested that in cases where a submitted SIP is used in conformity, the final rule should require that any transportation project approved on the basis of that submitted SIP should be subject to rescission, until the SIP itself is finally approved. Under circumstances where a SIP is submitted and found adequate, but subsequently found inadequate or disapproved, the commenter believed that this subsequent action on the SIP should reverse the approval of highway capacity increasing projects that received approval or funding after having conformed to budgets that are ultimately found inadequate or disapproved.

EPA disagrees with these comments. When no adequate or approved budgets are available for conformity purposes, the interim emissions tests (*i.e.*, the build/no-build test and/or the baseline emissions tests) in § 93.119 must be met to fulfill the conformity requirements. EPA, along with most stakeholders, prefers the use of submitted adequate SIPs and budgets for conformity rather than the interim emissions tests provided by § 93.119[19] because we believe that submitted SIPs and budgets are a better measure of emissions, consistent with attaining and maintaining a given standard and pollutant. Submitted SIPs and budgets that EPA has found adequate should be based on the most recent data and models available at the time the SIP is developed and should reflect accurate estimates of emissions that are consistent with attaining or maintaining a given pollutant and standard. Therefore, EPA believes that a submitted SIP for an applicable standard that satisfies the adequacy criteria in § 93.118(e)(4) provides a reasonable basis for ensuring that transportation activities do not worsen existing violations, create new violations or delay timely attainment of the relevant air quality standard.

Furthermore, EPA concludes that the use of submitted SIPs is supported by the Clean Air Act. Before a SIP has been submitted and approved by EPA, the Clean Air Act section 176(c)(3) requires

[18] November 8, 1999, Memorandum from Lydia N. Wegman, Director of the Air Quality Standards and Standards Division of EPA's Office of Air Quality Planning and Standards, and Merrylin Zaw-Mon, then-Director of the Fuels and Energy Division of EPA's Office of Mobile Sources, to Air Director, Regions I–VI, ''1-Hour Ozone Attainment Demonstrations and Tier 2/Sulfur Rulemaking.''

[19] August 15, 1997, 62 FR 43781–43783.

that transportation plans and TIPs must be consistent with the most recent estimates of mobile source emissions, provide for the expeditious implementation of TCMs in approved SIPs, and contribute to the attainment of the air quality standards in certain ozone and CO areas. Clean Air Act section 176(c)(1) also requires that transportation activities not worsen violations or delay timely attainment of the air quality standards. Because the adequacy criteria require submitted budgets to be consistent with progress and attainment requirements, we believe that conformity determinations based on submitted budgets that have been reviewed and found adequate by EPA through the adequacy process meet these statutory requirements in cases where an approved budget does not exist for the same year and Clean Air Act requirement. In addition, EPA believes that the use of a submitted adequate budget for a given air quality standard serves the Clean Air Act's goals for that standard better than either of the interim emissions tests. This position regarding the use of submitted SIPs in conformity in the absence of an approved SIP has also been endorsed by a court in *1000 Friends of Maryland* v. *Carol Browner, et al.*, 265 F.3d 216 (4th Cir. 2001).

EPA also notes that in situations where a SIP has not yet been approved, the March 1999 court decision did not find the use of submitted budgets in conformity unlawful. In its decision, the court only ruled against the use of submitted SIPs that EPA had failed to affirmatively find adequate for conformity purposes. In the absence of EPA's adequacy finding, the court believed that there is no assurance that transportation activities would not cause new violations, increase the severity of existing violations or delay the timely attainment of an air quality standard. However, the court did not make a similar finding in the case where EPA has found a budget adequate. As a result of this decision, EPA developed the existing adequacy process to ensure that submitted SIPs and budgets are appropriate for use in the conformity process, while still retaining the flexibility of the 1997 conformity rule that allows submitted SIPs to be used in a timely manner in place of the interim emissions tests.

EPA also disagrees with the commenter's suggestion that transportation project approvals that conform to an adequate budget should be subject to rescissions in the event that the SIP and motor vehicle emissions budgets are later found inadequate or disapproved. We believe that such an approach would cause significant confusion and only serve to severely disrupt the transportation planning and conformity processes. EPA has always regarded conformity as a prospective and iterative process. EPA believes that a conformity determination that meets the Clean Air Act and conformity rule's requirements at the time the determination is made should remain valid, regardless of whether the SIP and budgets on which that determination is based are subsequently found to be inadequate or disapproved. Since 1997, § 93.118(e)(3) and § 93.120(a)(1) of the conformity rule have provided for conformity determinations based on budgets that are subsequently found inadequate or disapproved to remain in effect, and in overturning § 93.118(e)(1) and § 93.120(a)(2) of the rule, the court did not indicate any concern with these other provisions.

In the limited case where a transportation plan and TIP have been found to conform to applicable budgets that are later found inadequate or disapproved, such budgets could no longer be used in future conformity determinations once the disapproval or inadequacy finding becomes effective. In the next conformity determination, emissions projected from the transportation plan and TIP, together with emissions projected from the existing transportation network, would have to meet new and/or existing budgets that have been found adequate or approved, or if no budgets are available, the interim emissions test(s) in § 93.119.[20] As a result, the next conformity determination would ensure that the emissions from all on-road transportation sources would again be consistent with the area's goals for attaining or maintaining the air quality standards. In that determination, projected emissions reflecting projects that were approved based on the previous inadequate or disapproved SIP would have to be taken into account, before the plan and TIP could again conform. EPA believes these existing requirements and the iterative nature of the conformity process will address any of the above concerns.

E. Changing a Previous Finding of Adequacy or Inadequacy

1. Description of Final Rule

As explained in the June 30, 2003 conformity proposal, EPA can change an adequacy finding from adequate to inadequate or from inadequate to adequate for a specific reason such as receiving new information or conducting further review and analyses that affect our previous finding. For example, EPA might change a finding of inadequacy if a state submits additional information that clarifies or supports the adequacy of the submitted SIP and budget. In this case, EPA will treat the additional information as a supplement to the previous SIP submission, and would post a notice on the adequacy Web site and begin a new 30-day public comment period on the entire SIP including this new information. After reviewing any comments, we would make a new finding, as appropriate, in accordance with those procedures in § 93.118(f) of this final rule.

We could change our finding to inadequate in the case where we find the budgets in a submitted SIP adequate but later discover based on additional information or further review that they do not meet the criteria for adequacy. EPA requested comment in the June 30, 2003 proposal on whether the public should be provided an opportunity to comment on any new information before a subsequent finding of inadequacy becomes effective in cases where EPA reconsiders its initial finding of adequacy.

Based on comments received, the final rule does provide for a subsequent public comment period of at least 30 days in cases where EPA believes the public could provide helpful insight and analysis for determining whether an initial finding of adequacy should be changed because of new information. In such cases, EPA would re-post the SIP on the adequacy Web site and start another minimum 30-day public comment period. EPA would also provide an explanation of how the new information has caused us to reconsider our initial adequacy finding. After evaluating any comments received during the public comment period, EPA will determine whether the submitted SIP is inadequate using the adequacy procedures described in either § 93.118(f)(1) or (f)(2) of today's rule. In cases where EPA reverses its previous finding to a finding of inadequacy using procedures in § 93.118(f)(1), such findings would become effective

[20] EPA also notes that upon the effective date of a SIP disapproval without a protective finding, an area would enter into a ''conformity freeze.'' During a conformity freeze, only projects in the first three years of the current conforming plan and TIP can proceed. No plan and TIP conformity determinations can be made until a new control strategy SIP revision fulfilling the same Clean Air Act requirement as that which EPA disapproved is submitted, and EPA finds the motor vehicle emissions budgets in that SIP adequate for conformity purposes or approves the new revision. For more information on conformity freezes and the consequences of a SIP disapproval without a protective finding, see Section XVII. of this final rule.

immediately upon the date of EPA's letter to the state. EPA believes this is necessary to prevent further use of inadequate budgets. Under § 93.118(f)(1), we would also publish a notice of our inadequacy finding in the **Federal Register** and announce our finding on EPA's adequacy Web site.

However, the final rule does not provide for a subsequent comment period under certain circumstances where it is obvious that a budget has become inadequate. For instance, if a state has submitted a new SIP indicating that the prior SIP submission no longer provides for attainment, it would be clear that the prior submission is inadequate. The final rule allows EPA to proceed on a case-by-case basis using the adequacy procedures described in § 93.118(f)(1) to make a finding of inadequacy effective immediately by explaining these facts in a letter to the state. In this case, EPA would also publish a **Federal Register** notice of that finding and post it on the adequacy Web site. EPA believes that in such situations public comment would not be necessary or in the public interest. Rather, it would be more important for EPA to complete the adequacy process quickly and limit further use of such clearly inadequate budgets in the conformity process.

2. Rationale and Response to Comments

EPA received four comments on whether an additional public comment period should be provided before EPA can reverse an initial adequacy finding to a finding of inadequate. Three of these commenters supported a public comment period of at least 30 days in these cases, with two of the commenters specifically stating that the additional time provided by the comment period could facilitate the completion of a conformity determination based on a previously adequate budget prior to the budget being deemed inadequate. One commenter, however, agreed with EPA's position that it is not always in the best interest of public health to delay an inadequacy finding until after a public comment period on new information has concluded.

Based on these comments, EPA is promulgating a final rule that would provide at least a 30-day public comment period in certain cases where new information is subjective and does not provide a clear answer as to whether the submitted SIP is still adequate. In these cases, EPA believes that soliciting public comment is appropriate and could provide helpful insight and analysis on determining the impact of the new information on the adequacy of a submitted SIP. However, under this final rule, EPA would not provide a public comment period in cases where it is obvious that a budget has become inadequate. EPA believes this approach to the final rule would serve to protect the public health while still preserving the role of public involvement in the adequacy process. Under this final rule, EPA will proceed on a case-by-case basis to determine whether new information for a submitted SIP budget warrants an additional public comment period, if such information causes us to reconsider our initial finding of adequacy.

One commenter also suggested that EPA investigate the necessity of even having to make a finding of inadequacy for SIPs that EPA has previously found adequate. The commenter argued that since the court directed EPA to make a formal adequacy finding for a submitted SIP before it can be used in a conformity determination, the SIP approval process could subsequently be used to further review the adequacy of the SIP's budgets. In cases where further review or additional information reveals that an adequacy finding is no longer appropriate, EPA assumes from this comment that a subsequent finding of inadequacy would be issued through a SIP approval or disapproval action.

EPA agrees that in some cases the SIP approval or disapproval process could be used to issue a subsequent finding of inadequacy for a SIP that was previously found adequate. However, in other cases, we believe that issuing a subsequent finding of inadequacy prior to EPA's approval and/or disapproval action for the SIP is necessary to protect public health. In most cases, EPA conducts a lengthy and detailed review of a submitted SIP as part of the SIP approval process. This review involves an evaluation of many aspects of the SIP that are not directly related to the motor vehicle emissions budgets. In situations where new information becomes available that clearly indicates that the budgets in a submitted SIP are inadequate prior to EPA's completed review of the entire SIP, we may determine that it is in the best interest of public health to issue a separate finding of inadequacy before going forward with a SIP approval and/or disapproval action. As a result, this final rule reserves EPA's ability to change a previous finding to a finding of inadequacy as provided by the existing adequacy process with public comment where the Agency deems necessary.

F. Adequacy Provisions Not Affected by This Rulemaking

1. Description of Final Rule

This final rule does not change any of the existing adequacy criteria in the conformity regulation (§ 93.118(e)(4)). Furthermore, the rule continues to provide that reliance on a submitted budget for determining conformity is deemed to be a statement by the MPO and DOT that they are not aware of any information that would indicate that emissions consistent with such a budget would cause or contribute to any new violation, increase the frequency or severity of an existing violation, or delay timely attainment of the relevant standards (§ 93.118(e)(6)). These provisions were not affected by the court decision; therefore, EPA did not address these provisions in this rulemaking.

2. Rationale and Response to Comments

One commenter objected to an alleged presumption inherent in § 93.118(e)(6) of the conformity rule. Prior to EPA's approval of a SIP, § 93.118(e)(6) requires the MPO and DOT's conformity determination to be considered a statement that the MPO and DOT are not aware of any information that would indicate that emissions consistent with a submitted SIP would violate the Clean Air Act's requirements that transportation activities not cause or worsen a violation or delay timely attainment of the air quality standards. The commenter stated, however, that this presumption may not lawfully be substituted for the affirmative determination that an MPO is required to make under Clean Air Act section 176(c)(2)(A) or that DOT is required to make under Clean Air Act section 176(c)(1). The commenter also indicated that the regulatory requirement in § 93.118(e)(6) effectively relieves MPOs and DOT of meeting these statutory requirements before a SIP has been submitted or after a SIP has been approved. In the commenter's opinion, this provision implies that EPA assumes the statutory criteria are satisfied if a budget is from an approved SIP, and therefore, silently waives any requirement that these criteria be addressed in such cases. The commenter also argued that the budget test demonstrated for select analysis years over the time frame of a transportation plan does not fully satisfy the statutory requirement that transportation activities conform to the SIP and not cause or worsen air quality violations in every year consistent with Clean Air Act section 176(c)(1)(A) and (B).

In this rulemaking, EPA did not propose any changes to the rule's existing § 93.118(e)(6) provision. Therefore, EPA cannot address this comment in today's final rule and is not re-opening this aspect of the conformity rule in this action.

Furthermore, EPA does not agree that there is a presumption inherent in § 93.118(e)(6) of the rule, nor do we agree with the commenter's interpretation of § 93.118(e)(6) as it relates to the statutory requirements before a SIP is submitted and after a SIP has been approved. When EPA established the § 93.118(e)(6) requirement in the 1997 conformity rule, we did so as another ''check'' to ensure that submitted SIPs and budgets are appropriate to use in conformity determinations before such SIPs and budgets are approved. EPA's adequacy review is a cursory review of the SIP and motor vehicle emissions budgets to ensure that the minimum adequacy criteria are met before a submitted SIP is used in a conformity determination. Therefore, we included § 93.118(e)(6) in the 1997 final rule to share responsibility with the MPO and DOT for ensuring that the use of submitted budgets would not cause or contribute to any new violation; increase the frequency or severity of any existing violation; or delay timely attainment of the air quality standards. This provision clarifies that, in the absence of an EPA approved SIP, the MPO and DOT may not base conformity determinations on submitted SIPs that they have reason to believe do not satisfy Clean Air Act requirements.

Once EPA has approved a SIP, however, we have always held that conformity to that approved SIP fulfills the Clean Air Act's conformity requirements. Section 176(c)(2)(A) of the Act specifically requires conformity determinations to show that ''emissions expected from implementation of such plans and programs are consistent with estimates of emissions from motor vehicles and necessary emission reductions contained in the applicable implementation plan.'' Consistent with the Clean Air Act, section 93.101 of the conformity rule defines an ''applicable implementation plan'' as the portion(s) of a SIP, or most recent revision thereof, that has been approved by EPA. When EPA approves a SIP it is because we have concluded that the SIP and budgets are consistent with the SIP's purpose for attaining or maintaining a given air quality standard. Thus, since EPA promulgated the original conformity rule in 1993 (58 FR 62188), the budget test has been the mechanism that EPA believes is appropriate for meeting the statutory requirements for demonstrating conformity once a SIP becomes available for conformity purposes. Other tests or analyses in addition to the budget test have never been required by the conformity rule once a SIP is approved and EPA has not reopened this issue in this rulemaking.

EPA also disagrees with the commenter's statement that the conformity rule's current budget test and regional emissions analysis year requirements are inconsistent with the Clean Air Act. The Clean Air Act does not address the specific time frame or years in which conformity emissions tests or analyses must be conducted. Since the November 24, 1993 conformity rule (58 FR 62188), EPA has maintained that once a budget becomes available for conformity purposes a demonstration of conformity for specific budget test years as described in § 93.118 is sufficient for meeting the Clean Air Act requirements and ensuring that emissions from transportation activities do not cause violations, worsen existing violations or delay timely attainment of the air quality standards. In addition, EPA has always held that prior to a submitted SIP, the interim emissions tests as required by § 93.119 of the current rule are also appropriate for meeting the statutory requirements (58 FR 62188).

Conducting conformity determinations, including regional emissions analyses to satisfy §§ 93.118 and 93.119 requirements, demands a significant amount of state and local resources. Therefore, EPA believes it would be impractical and overly-burdensome to require MPOs and state transportation agencies to conduct the applicable conformity test and regional emissions analysis for every year of a 20-year transportation plan. Based on EPA's interpretation of the Clean Air Act, we believe that the current rule's conformity test and emissions analysis year requirements are consistent with the statute, reasonable to implement and protective of public health. Again, EPA has not reopened this aspect of the conformity rule in this rulemaking, although we are clarifying § 93.118 as described in Section XXIII. of this final rule.

The same commenter also expressed concern over how EPA has applied the adequacy criteria established in § 93.118(e)(4) of the conformity rule to certain submitted SIPs. Specifically, the commenter objected to adequacy findings for submitted SIPs that, (1) lack a control strategy that identifies all the control measures needed for reasonable further progress, attainment or maintenance, or (2) lack either fully adopted measures that satisfy the requirements of 40 CFR 51.121 or written commitments to adopt specific measures that have been conditionally approved pursuant to Clean Air Act section 110(k)(4). The commenter argues that EPA has failed to adhere to the requirements of the Clean Air Act and conformity rule when we issue adequacy findings for submitted SIPs that rely on enforceable commitments to adopt additional control measures. In cases where additional mobile source controls are needed to satisfy a SIP's enforceable commitments, the commenter believed that the motor vehicle emissions budgets in such SIPs cannot be adequate to provide for attainment, since the budgets do not reflect the emissions reductions from the additional measures. As a result, the commenter requested that EPA clarify that enforceable commitments may not be relied upon to make an adequacy finding for SIPs that fail to contain sufficient, adopted, enforceable control measures to meet the statutory requirements for reasonable further progress, attainment or maintenance. The commenter believed that such a clarification would reaffirm the conformity rule's requirements that only SIPs that contain sufficient control measures to demonstrate attainment can be found adequate.

In this rulemaking, EPA did not propose changes or clarifications to the existing adequacy criteria listed in § 93.118(e)(4). This rulemaking only addresses the process by which EPA finds submitted SIPs adequate for conformity purposes, in accordance with the March 1999 court decision. The existing adequacy criteria were established in the 1997 conformity rule (62 FR 43780) and were not impacted by the court decision. Therefore, EPA is not revising these criteria nor reopening this aspect of the conformity rule in this action.

EPA also disagrees with the commenter's position that SIPs that rely on enforceable commitments fail to meet the adequacy criteria established in § 93.118(e)(4) of the rule. Section 93.118(e)(4) of the conformity rule does not require that all necessary control measures be identified and adopted to find a submitted SIP adequate. The adequacy criteria in the conformity rule only requires a budget to come from a submitted SIP that provides for reasonable further progress, attainment or maintenance of a given standard. The relevant section of the rule, § 93.118(e)(4)(iv), states that a submitted SIP is adequate if: ''The motor vehicle emissions budget(s), when considered together with all other emissions

sources, is consistent with applicable requirements for reasonable further progress, attainment, or maintenance * * *''. This provision of the rule only requires that the total emissions allowed by the SIP, including the motor vehicle emissions budgets, are consistent with the Clean Air Act's purpose of the SIP (*e.g.*, attainment). This provision of the rule does not require a submitted SIP to include all of the specific control measures necessary to meet its statutory purpose.

Furthermore, EPA disagrees with the commenter that budgets from SIPs that include enforceable commitments cannot be adequate to provide for attainment. Clean Air Act provisions that address control strategy SIPs, such as sections 110(a)(2)(A), 172(c) and 182, require SIPs to contain a control strategy that provides sufficient emission reductions to demonstrate attainment by the statutory deadline. EPA believes that the use of enforceable commitments as a limited part of an overall control strategy for a SIP is reasonable and consistent with these provisions of the Clean Air Act. Therefore, EPA believes that where we approve or find adequate a SIP control strategy that includes an enforceable commitment, EPA's approval or adequacy finding for the motor vehicle emissions budgets in such a SIP would also be appropriate. EPA believes that as long as the budgets, in addition to all other emission sources and controls identified in the SIP (including any enforceable commitments), are consistent with a SIP's purpose of attaining or maintaining a given air quality standard, conformity to such budgets will also be consistent to the SIP's clean air goals.

EPA also believes that SIPs that include enforceable commitments are consistent with both 40 CFR 51.121 relating to SIP control measures and Clean Air Act section 110(k)(4) requirements regarding conditional approvals. 40 CFR 51.281 requires that in cases where a SIP relies on a specific regulation as the basis for emissions reductions, that regulation must be properly adopted and copies of it must be submitted to EPA. This provision, however, does not require SIPs to consist only of rules that have been enacted as regulations and has no bearing on our ability to find a submitted budget adequate for conformity purposes. Clean Air Act section 110(k)(4) gives EPA the authority to conditionally approve a SIP that contains a commitment to adopt ''specific enforceable measures.'' Such a conditional approval automatically converts to a disapproval if the measures are not adopted within one year, and thus the commitment itself is not enforceable. EPA believes, however, that SIPs that include adopted control measures as well as the enforceable commitment to identify and adopt additional measures can be found adequate and fully approved if such commitments meet various criteria and will achieve sufficient emission reductions to meet Clean Air Act deadlines and attain or maintain the air quality standards. In these cases, such commitments may extend beyond one year and are enforceable against the state if the state fails to meet the commitment by the specified time frame. EPA believes that it is appropriate to consider and approve the use of qualified enforceable commitments in cases where a state is not able to identify currently feasible measures to fill a small gap of needed emissions reductions.

EPA's current policy for approving SIPs that are based on enforceable commitments was recently upheld in a decision by the court of appeals, *BCCA Appeal Group, et al.*, v. *U.S. EPA, et al.*, 348 F.3d 93 (5th Cir. 2003). A complete discussion of our position on the use of enforceable commitments can be found in EPA's briefs in *BCCA Appeal Group, et al.*, v. *U.S. EPA, et al.*, 5th Cir. No. 02–60017, September 20, 2002, at 115–146 and *TRANSDEF, et al.*, v. *EPA, et al.*, 9th Cir. No. 02–7044, Respondent EPA's Second Supplemental Memorandum, August 22, 2002, at 4–7. In addition, EPA's complete response to these comments pertaining to conformity rule provisions that are not addressed in this rulemaking can be located in the response to comments document for this final rule. Copies of all these documents are located in the public docket for this rulemaking listed in Section I.B. of today's action.

Finally, one commenter stated that EPA should consider the entire SIP when determining adequacy of the budgets, as not doing so may permit conformity determinations to rely on SIPs that contain substantive flaws in inventories and control strategies for other sources. EPA would like to clarify that when we conduct an adequacy review of a submitted SIP, we always consider the SIP in its entirety as well as the budgets in that SIP. Section 93.118(e)(4)(iv) of the conformity rule requires that ''the motor vehicle emissions budget(s), when considered together with all other emissions sources, is consistent with applicable requirements for reasonable further progress, attainment, or maintenance * * *''. Therefore, EPA is required to consider emissions from other sources and their contribution towards meeting the purpose of the SIP before issuing an adequacy finding. Furthermore, some SIPs such as limited maintenance plans and those SIPs that qualify for EPA's insignificance policy do not contain budgets where certain findings are made. In these cases, EPA also focuses on the entire SIP and how such SIPs qualify for these specific policies. See the June 30, 2003 proposal to this final rule (68 FR 68983–4) for more information about EPA's adequacy review of SIPs that do not contain motor vehicle emissions budgets.

XVI. Non-Federal Projects

A. Description of Final Rule

EPA is amending § 93.121(a) of the conformity rule so that regionally significant non-federal projects can no longer be advanced during a conformity lapse unless they have received all necessary state and local approvals prior to the lapse. Non-federal projects are projects that are funded or approved by a recipient of federal funds designated under title 23 U.S.C. or the Federal Transit Laws, but that do not require any FHWA/FTA funding or approvals. Under this final rule, recipients of federal funds cannot adopt or approve a regionally significant, non-federal project unless it is included in a currently conforming plan and TIP or is reflected in the regional emissions analysis supporting a currently conforming plan and TIP. The definition of non-federal project ''approval'' should be decided on an area-specific basis through the interagency consultation process, and should be formalized in the area's conformity SIP. For more information on how areas have defined the point of final approval for a regionally significant non-federal project, see EPA's June 30, 2003 proposed rule (68 FR 38984), which is consistent with EPA's May 14, 1999 guidance that implements the court decision.

B. Rationale and Response to Comments

In its ruling, the court found § 93.121(a)(1) of the 1997 conformity rule to be in violation of Clean Air Act section 176(c)(2)(C). This provision of the 1997 rule had allowed state or local approval of transportation projects in the absence of a currently conforming plan and TIP. The court found that the Clean Air Act requires all non-exempt projects subject to the conformity rule, including regionally significant non-federal projects, to come from a conforming plan and TIP (or included in their supporting regional emissions analysis) to be funded or approved. However, the court also noted that once

a non-federal project receives all appropriate state or local approvals, it need not meet any further conformity requirements.

Commenters generally concurred with EPA's proposed amendments to § 93.121(a) as being consistent with the court decision. One commenter stated that it is reasonable to treat federal and regionally significant non-federal projects in like manner so that neither type of project can proceed during a lapse, as required by the court. Another commenter also agreed that the definition of non-federal project ''approval'' should be determined through the interagency consultation process.

One commenter, however, requested that EPA clarify the required approach for approving non-federal projects in isolated rural areas. As stated in the June 30, 2003 proposal, the conformity rule only applies to non-federal projects that are considered regionally significant, in that these projects must be included in a conforming transportation plan and TIP and/or the regional emissions analysis supporting a conforming plan and TIP. Isolated rural areas, however, are not required to develop metropolitan transportation plans and TIPs and are not subject to the conformity frequency requirements for plans and TIPs in § 93.104 (including the 3-year conformity update requirement). A conformity determination in isolated rural areas is required only when a new non-exempt project needs federal funding or approval. Therefore, the commenter regarded the proposed rule as being unclear about whether isolated rural areas would need to conduct a separate conformity analysis that includes a new non-federal project before such a project could be funded or approved.

EPA refers this commenter to § 93.121(b) of the current conformity rule that includes the requirements for regionally significant non-federal projects in isolated rural nonattainment and maintenance areas. Section 93.121(b) states that no recipient of federal funds can approve or fund a regionally significant highway or transit project in an isolated rural area, regardless of funding source, unless: (1) The project was included in the regional emissions analysis supporting the most recent conformity determination; or (2) A new regional emissions analysis including the project and all other regionally significant projects expected in the isolated rural nonattainment or maintenance area demonstrates conformity. Such regional emissions analyses in isolated rural areas would include those projects in the statewide transportation plan and statewide TIP, including any existing or planned federal and regionally significant non-federal projects, that are in the nonattainment or maintenance area.

Although EPA has always believed that the Clean Air Act does not require project-level conformity determinations for regionally significant non-federal projects, the Clean Air Act does require such projects to be included in the regional emissions analysis supporting a conformity determination before funding or approval can be given. See the January 11, 1993 proposal to the November 24, 1993 conformity rule for further background (58 FR 3772–3773). Recognizing that isolated rural areas do not have transportation plans and TIPs, in the preamble to the November 24, 1993 conformity rule (58 FR 62208) EPA states: ''In isolated rural areas, non-federal projects may be considered to have been included in a regional emissions analysis of the transportation plan and TIP if they are grouped with federal projects in the nonattainment or maintenance area in the statewide plan and STIP for the purposes of a regional emissions analysis.'' Therefore, we would consider the statute's conformity requirements to be satisfied in an isolated rural area if a regionally significant non-federal project is included in the area's previous regional emissions analysis and conformity determination (provided the project's design concept and scope have not changed significantly since the analysis and determination were made). If the project was not included in the previous regional emissions analysis and conformity determination, a new regional emissions analysis including the project must be completed.

XVII. Conformity Consequences of Certain SIP Disapprovals

A. Description of Final Rule

Consistent with the June 30, 2003 proposal, this final rule changes the point in time at which conformity consequences apply when EPA disapproves a control strategy SIP without a protective finding. Specifically, the final rule deletes the 120-day grace period from § 93.120(a)(2) of the 1997 conformity rule, so that a conformity ''freeze'' occurs immediately upon the effective date of EPA's final disapproval of a SIP and its budgets that does not include a protective finding. A conformity freeze means that only projects in the first three years of the transportation plan and TIP can proceed. During a freeze, no new plans, TIPs or plan/TIP amendments can be found to conform until a new control strategy SIP fulfilling the same Clean Air Act requirement as that which EPA disapproved is submitted, and EPA finds the budgets in that SIP adequate for conformity purposes.

In cases where EPA does not first make an affirmative adequacy finding for a new control strategy revision that is submitted to address a disapproved SIP, EPA is also clarifying in § 93.120(a)(2) of today's rule that no new plans, TIPs or plan/TIP amendments can be found to conform during a freeze until EPA approves the submitted SIP revision. EPA is adding this clarification to § 93.120(a)(2) to address the situation when EPA conducts its adequacy review through the SIP approval process. This clarification was not included in the June 30, 2003 proposal; however, EPA does not believe that a reproposal is necessary to incorporate this minor revision in today's final rule. This minor revision simply clarifies how the conformity process currently operates in practice and is a logical outgrowth of the June 2003 proposal that described how EPA can determine adequacy through the SIP approval process because such approval actions include a finding that a submitted SIP is adequate. See Section XV.C. above for more information on adequacy reviews that are conducted through the SIP approval process.

EPA will not issue a protective finding for our disapproval of a submitted control strategy SIP (*e.g.*, reasonable further progress and attainment SIPs) if the SIP does not contain enough emission reduction measures, or commitments to such measures, to achieve its specific purpose of either demonstrating reasonable further progress or attainment. If EPA disapproves a SIP without giving it a protective finding, the budgets cannot be used for conformity upon the effective date of EPA's disapproval action. *See* the June 30, 2003 proposal for more information on issuing a protective finding when EPA disapproves a control strategy SIP.

Today's final rule does not impact the 1997 conformity rule's provisions for a SIP disapproval with a protective finding under § 93.120. This final rule also does not affect the 1997 conformity rule's flexibility that aligned conformity lapses with Clean Air Act highway sanctions (§ 93.120(a)(1)). Today's rule affects only the timing of conformity freezes for SIP disapprovals without a protective finding.

B. Rationale and Response to Comments

In its ruling, the court found the 120-day grace period provided by

§ 93.120(a)(2) of the 1997 rule to be in violation of Clean Air Act section 176(c)(1) and remanded it to EPA for further rulemaking. Specifically, the court said that where EPA disapproves a SIP without a protective finding there is no basis to believe that conformity of transportation plans and TIPs to the submitted budget in the disapproved SIP will not cause or contribute to new violations, increase the frequency or severity of existing violations, or delay timely attainment of the air quality standards.

Under § 93.120(a)(2) of the 1997 rule, if EPA disapproved a submitted SIP or SIP revision without a protective finding, areas could use the 120-day grace period to complete a conformity determination that was already in progress. The court ruled that this grace period was not authorized by the statute because it would allow conformity to be demonstrated to a SIP that was determined not to be protective of the air quality standards. Therefore, we are eliminating the 120-day grace period from the conformity rule.

Most comments on this rule revision supported the June 30, 2003 proposal. One commenter specifically stated that this change will clarify time periods and eliminate confusion regarding the conformity requirements when a SIP is disapproved. One commenter, however, did not fully agree with EPA's proposal. This commenter argued that the proposed revision to § 93.120(a)(2) still allows budgets to be used for some period after EPA disapproves a SIP without a protective finding, since such budgets could still be used in a conformity determination until the disapproval action becomes effective. The commenter objected to any rule that would allow budgets to be given effect for conformity purposes when the disapproved SIP and budgets are not consistent with reasonable further progress, attainment or maintenance.

EPA agrees that SIPs and budgets that are inconsistent with Clean Air Act requirements for reasonable further progress, attainment or maintenance, should not be used in future conformity determinations. However, EPA also believes that a specific point in the SIP disapproval process at which budgets become ''disapproved'' and unavailable for conformity purposes needs to be established to provide certainty and consistency between the conformity and SIP processes. In this final rule we are establishing that point in the process as the effective date of EPA's SIP disapproval action. EPA has linked the immediate conformity consequences of a SIP disapproval without a protective finding to the effective date of that action to be consistent with an August 4, 1994 rulemaking that established the timing and implementation of offset and highway sanctions following certain SIP failures under 40 CFR 52.31.[21] Specifically, 40 CFR 52.31(d)(1) states that ''the date of the [SIP disapproval] finding shall be the effective date as defined in the final action triggering the sanctions clock.'' In the August 1994 rulemaking, EPA has already concluded as a legal matter that a SIP disapproval, and by extension any consequences (*e.g.,* sanctions, conformity freeze, etc.) associated with that disapproval, do not take effect until the effective date of EPA's action in the **Federal Register**.

When EPA disapproves a SIP, the effective date of that action is generally only 30–60 days after the **Federal Register** publication of the disapproval. EPA believes that the minimum 30-day period is mandated by §§ 552(a)(1) and 553(d) of the Administrative Procedure Act. These provisions require the publication of actions that may adversely affect areas in the **Federal Register** to include a minimum 30-day effective date.

EPA also notes that such SIP disapprovals have occurred on a very infrequent basis, as EPA has only disapproved SIPs without a protective finding in three instances since the 1997 conformity rule was promulgated. Furthermore, for a SIP to be used in a conformity determination prior to the effective date of its disapproval, EPA would have found the SIP budget adequate. Such findings that would provide for the use of a SIP in the conformity process prior to its disapproval would not be expected in all cases, especially if the SIP is so deficient as to ultimately be disapproved without a protective finding. Therefore, EPA believes the impact of this rule change will be limited and generally will not result in the use of disapproved budgets in the conformity process.

The same commenter also argued that EPA's approval of SIPs that include enforceable commitments to adopt additional future control measures for rate-of-progress, attainment or maintenance purposes, does not meet Clean Air Act requirements for these specific SIPs. To address this issue, the commenter requested that EPA revise § 93.120 so that submitted SIPs that rely on enforceable commitments to adopt unspecified control measures could no longer be approved by EPA. The commenter argued that only SIPs that include adopted enforceable measures per 40 CFR 51.281 or written commitments to adopt specific measures that have been conditionally approved pursuant to Clean Air Act section 110(k)(4) can be approved.

EPA did not propose revisions to § 93.120 that would prohibit the full approval of SIPs that include enforceable commitments in this rulemaking, and therefore, cannot amend the conformity regulation to address this comment in today's final rule. This rulemaking merely deletes the 120-day conformity grace period from § 93.120(a)(2) in accordance with the court decision. Further, the conformity rule only provides requirements for finding budgets adequate and does not include any limitations on EPA's ability to approve SIPs.

EPA also disagrees with the commenter's position that SIPs that rely on enforceable commitments cannot be fully approved for the same reasons stated in Section XV.F.2. of this final rule. Furthermore, EPA does not believe the conformity regulations are the appropriate vehicle for specifying the criteria for approving SIP submissions. A more comprehensive response to this comment, including EPA's rationale, is included in the complete response to comments document in the public docket for this final rule. For information on how to access materials in the docket, see Section I.B. of this action.

XVIII. Safety Margins

A. Description of Final Rule

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

B. Rationale and Response to Comments

The court decision found that § 93.124(b) violated the Clean Air Act because it allowed a submitted but

[21] *See* 59 FR 39859, ''Selection of sequence of mandatory sanctions for findings made pursuant to section 179 of the Clean Air Act''—final rule.

unapproved SIP revision to supersede an approved SIP. The court ruled that EPA must fully approve these safety margin allocations into the SIP before they can be used for conformity, regardless of whether the SIP revision and safety margin was submitted before or after our November 1993 conformity rule.

Although the court eliminated § 93.124(b) for the use of safety margins in previously approved SIPs, the majority of areas that had allocated safety margins to their budgets after November 24, 1993, were not affected by the court's ruling. In general, areas that do not have approved SIPs can use submitted safety margins in conformity determinations once EPA finds the submitted SIP (and safety margin) adequate. Areas with approved SIPs that want to reallocate their safety margin for conformity purposes can do so once EPA has approved a SIP revision that specifically allocates all or a portion of the safety margin to a budget. Presently, no area is affected by the court's ruling, since SIP submissions with safety margins have either been approved by EPA or did not revise a previously approved SIP.

EPA received three comments on the elimination of this provision based on the court's decision. Two commenters supported EPA's proposal and highlighted the potential relationship between the allocation of a safety margin and an area's ability to allow for growth in emissions from other source categories. One of these commenters specifically requested clarification on the benefits and impacts of assigning safety margins to motor vehicle emissions budgets. EPA agrees that the allocation of a safety margin to an area's budget can be an effective means to facilitate future conformity determinations. However, EPA notes that the allocation of a safety margin to the on-road transportation sector could impact an area's ability to allow growth in emissions from other source sectors (*e.g.*, stationary sources). State and local transportation and air quality agencies and other affected parties should always consult on whether a safety margin is appropriate for conformity in a given area.

Another commenter requested that the conformity rule be amended to require that maintenance areas demonstrate that Prevention of Significant Deterioration (PSD) increments will not be exceeded if the area allocates a safety margin that would allow on-road motor vehicle emissions to grow up to the level that is consistent with attainment for the area. This comment is relevant only to NO_2 and PM_{10} maintenance areas, as EPA has not established PSD increments for carbon monoxide or ozone precursors. EPA has also established increments for sulfur dioxide (SO_2); however, transportation conformity does not apply in SO_2 nonattainment and maintenance areas because on-road motor vehicles are not significant contributors to SO_2 air quality problems in these areas.

EPA does not agree that the transportation conformity rule needs to be amended to address this comment. Rather, EPA believes that the Clean Air Act and existing guidance and regulations are sufficient to prevent PM_{10} and NO_2 maintenance areas from exceeding the amount of PM_{10} or NO_2 increment that is available when these areas allocated safety margins to their budgets and NO_2 and/or PM_{10} increments have been triggered. First, section 175A of the Clean Air Act requires that an area's maintenance plan must demonstrate that the area can maintain the relevant air quality standard for a period of 10 years. According to EPA's ''General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990'' the maintenance plan must either demonstrate that future emissions will not exceed emissions that existed at the time that the request for redesignation was made or conduct a modeling analysis that shows the future mix of sources, emissions rates and control strategies for the area will not result in any violations of the air quality standard. At a minimum, areas should provide for some growth in stationary source emissions in their maintenance plans, where applicable. Therefore, any safety margin available would be emissions over and above the total amount of expected emissions, including growth in sources affected by PSD requirements.

Second, the PSD program provides an opportunity for the permit applicant and the state to consult on how to address the allocation of a safety margin to the budgets while the PSD permit application is being prepared. Such consultation between the state and the potential source of NO_2 or PM_{10} emissions helps to ensure that maintenance of the relevant national ambient air quality standard(s) is still achieved. Safety margins are expressed as a tons per day emissions rate for the entire nonattainment or maintenance area. PSD increments are expressed as a concentration of the pollutant in the ambient air (*e.g.*, $\mu g/m^3$) in the area impacted by the emissions from the stationary source. States are encouraged to evaluate periodically whether an increment is available to be used by sources that are or will be applying for a PSD permit. If a state identifies a potential problem, the state could take timely action to address the problem. EPA's guidance [22] indicates that a source which is applying for a PSD permit should consult with state and local agencies to determine the parameters that should be used to model emissions from on-road sources in the area that will be impacted by emissions from the source. During the course of this consultation, the state or local air agency should advise the applicant on how to properly account for on-road motor vehicle emissions in the area including the use of any portion of a safety margin that has been established for conformity in the SIP. In the event that a permit applicant encounters difficulty in satisfying the requirements for an increment analysis, the air quality agency would have the option of appropriately revising its SIP to allow the source to receive a PSD permit and adjust the safety margin allocation, if necessary. Finally, EPA notes that neither the Clean Air Act nor EPA's regulations and guidance require areas to assess increment consumption in connection with conformity determinations; this assessment is conducted only in connection with PSD permitting and periodic updates.

XIX. Streamlining the Frequency of Conformity Determinations

A. Description of Final Rule

EPA is finalizing several revisions to the frequency requirements listed in § 93.104 of the conformity rule, consistent with the June 30, 2003 proposal. Specifically, we are eliminating § 93.104(c)(4) that required an MPO and DOT to determine conformity of the TIP within six months of the date that DOT determined conformity of the transportation plan. As a result of this rule revision, a TIP conformity determination will no longer be triggered upon DOT's conformity determination for the transportation plan. A conformity determination for the TIP will only be required when it is updated or amended, in accordance with § 93.104(c)(1) and (c)(2). In addition, a conformity determination and new regional emissions analysis for the TIP will be required no less frequently than every three years, per § 93.104(c)(3).

EPA is also finalizing several rule revisions to streamline § 93.104(e) of the rule. In particular, we are eliminating § 93.104(e)(1) that required all

[22] NSR Workshop Manual PSD and Nonattainment Area Permitting—Draft, October 1990, page C. 36.

nonattainment and maintenance areas to determine conformity within 18 months of November 24, 1993 (*i.e.,* the date that EPA originally promulgated the conformity rule, 58 FR 62188). At this point in time, § 93.104(e)(1) is no longer relevant for any area, and therefore, we are removing it from the rule.

In addition, EPA is finalizing two revisions to § 93.104(e)(3), which requires a conformity determination within 18 months of EPA's approval of a SIP. First, we are specifying that this 18-month clock begins on the effective date of EPA's approval of the SIP. This clarification will resolve any ambiguity in the current rule as to when this 18-month clock begins.

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

EPA is also eliminating § 93.104(e)(4), which required a conformity determination to be made within 18 months of EPA's approval of a SIP that adds, deletes, or changes a TCM. As stated in the June 30, 2003 proposal to this final rule, EPA believes that this requirement is redundant with the requirements in §§ 93.104(e)(2) and (3) relating to conformity determinations after other SIP approvals, and therefore, is unnecessary.

Finally, EPA is making two changes to § 93.104(e)(5), which requires a new conformity determination within 18 months of EPA's promulgation of a federal implementation plan (FIP). First, the final rule indicates that the clock for this requirement also starts on the effective date of EPA's promulgation of a FIP to be consistent with the start date of the other SIP triggers found in § 93.104(e). Second, EPA is deleting the phrase ''or adds, deletes, or changes TCMs,'' for the same reasons that we are deleting § 93.104(e)(4) discussed above. EPA believes that the purpose of § 93.104(e)(5) will be adequately served by the requirement to show conformity after EPA promulgates a FIP containing a budget.

B. Rationale and Response to Comments

In the first conformity rule proposal published in January 1993, we stated, ''EPA believes conformity determinations should be made frequently enough to ensure that the conformity process is meaningful. At the same time, EPA believes it is important to limit the number of triggers for conformity determinations in order to preserve the stability of the transportation planning process'' (58 FR 3775). As a result of these dual goals and based on experience gained through implementing the conformity rule to date, we are eliminating some of the frequency requirements found in § 93.104, and streamlining others. EPA believes that this final rule will simplify the current conformity requirements without compromising the environmental benefits of the conformity program.

Under today's rule, EPA concludes that conformity determinations will continue to be required frequently enough to ensure that the process is meaningful and consistent with the Clean Air Act. In this final rule, we have not made any changes to the requirement that new or revised plans, TIPs and projects must demonstrate conformity before they can be funded or approved. Furthermore, the final rule retains the requirement to determine conformity of transportation plans and TIPs at least every three years, as required by section 176(c) of the Clean Air Act. We are eliminating only those frequency requirements that are not expressly required by the Clean Air Act and that we now believe are either outdated or redundant with other requirements.

In general, commenters supported EPA's proposals to streamline the conformity frequency requirements. Most commenters agreed that these changes would improve the conformity rule and would serve to avoid confusion and simplify the overall conformity process. In addition, some commenters believed that these rule changes would reduce the number of required conformity determinations, and therefore, would conserve limited planning resources.

One commenter, however, opposed the elimination of the 6-month TIP clock in § 93.104(c)(4), stating that this rule change would result in MPOs having always to demonstrate conformity of the plan and TIP at the same time. This commenter believed that by eliminating the 6-month TIP clock, MPOs will lose the extra time and flexibility provided by the § 93.104(c)(4) provision that may be needed to update the TIP and demonstrate conformity after a conformity determination for the plan has been made.

EPA does not believe that the elimination of § 93.104(c)(4) and the 6-month TIP clock will result in the loss of time or flexibility for MPOs as this commenter has suggested. In contrast, EPA believes that this rule change will result in greater flexibility and less demands on planning resources to meet the conformity requirements.

As stated in the June 30, 2003 proposal, EPA believes that § 93.104(c)(4) is unnecessary because of other conformity and planning requirements that are in place. Therefore, the rule change will have no practical effect on the conformity process in most cases. According to the transportation planning statute (23 U.S.C. 134(h)(3)(C)), projects in the TIP must be consistent with the transportation plan to be federally funded or approved. Therefore, in cases where a plan is changed and a conformity determination is made, areas will continue to ensure that their TIPs also conform and are consistent with the plan to advance projects, regardless of whether the 6-month TIP trigger is part of the conformity regulation. If a plan changes in years also covered by the TIP, then the TIP would also be updated or amended to meet the planning regulations at the same time. Under today's final rule, conformity determinations will continue to be required for such plan and TIP changes. However, EPA's final rule and DOT's planning regulations would not require a TIP revision and conformity determination in the case where a plan is changed in a manner that does not affect the TIP.

Another commenter requested EPA to remove all TIP references and actions from the conformity rule, since the TIP is required to be consistent with a conforming transportation plan. The commenter believed that DOT's planning regulations and their originating legislation make EPA's TIP requirements and actions redundant and unnecessary, and that the removal of such requirements would improve the conformity rule.

EPA did not propose the removal of all TIP references and conformity requirements in this rulemaking, and therefore, cannot address the commenter's request in this final rule. Furthermore, EPA believes the current references and conformity requirements for TIPs are necessary to be consistent

with the Clean Air Act. The current Clean Air Act section 176(c)(2)(A) specifically states that ''no transportation plan or transportation improvement program may be adopted* * *'' until such plans and programs are shown to demonstrate conformity. Therefore, EPA believes that the corresponding regulations must reflect the statutory requirements for both the transportation plan and TIP.

XX. Latest Planning Assumptions

A. Change to Latest Planning Assumptions Requirement

1. Description of Final Rule

EPA is amending § 93.110(a) to change the point in the conformity process when the latest planning assumptions are determined. This final rule will allow conformity determinations to be based on the latest planning assumptions that are available at the time the conformity analysis begins, rather than at the time of DOT's conformity determination for a transportation plan, TIP, or project. Under today's final rule, the interagency consultation process should be used to determine the ''time the conformity analysis begins'' as described in B.1. and C.1 of this section.

2. Rationale and Response to Comments

EPA believes that today's final rule will make the conformity rule more workable for implementers while continuing to meet the basic Clean Air Act requirement that the latest planning assumptions be used in conformity determinations. Most commenters agreed and strongly supported EPA's proposed change to the latest planning assumptions requirement. Some of these commenters noted that the proposed changes to § 93.110(a) would provide more certainty to the process and conserve valuable state and local resources.

A few commenters, however, did not agree with EPA's proposed change. One commenter argued that the proposed rule violates the Clean Air Act by allowing conformity determinations to be based upon information other than ''the most recent population, employment, travel and congestion estimates.'' This same commenter also stated that the proposed change would undermine reasoned decision-making by making the most accurate and reliable information irrelevant since data developed after the time the analysis begins would not be required to be considered until the next conformity determination. Another commenter reiterated this concern by stating that the proposed rulemaking improperly locks-in the planning assumptions that exist at the start of the conformity determination process, even though the actual conformity determination is typically made months later when more recent information could be available.

EPA disagrees that today's proposal is inconsistent with the Clean Air Act. Section 176(c)(1) of the Clean Air Act requires conformity determinations to be based on the most recent data and emissions estimates that are available. However, the Clean Air Act does not explicitly define the point in the conformity process when the most recent estimates should be determined. Therefore, EPA believes that this ambiguity in the Clean Air Act allows for a procedural change in how the latest planning assumptions requirement is implemented.

As stated in the proposal to this final rule, when EPA originally wrote the conformity rule in 1993, we did not fully envision how the requirement for the use of latest planning assumptions would be implemented in practice. Under the previous conformity rule, if an MPO had completed a regional emissions analysis for its plan and TIP conformity determinations, and new information became available as late as the day before DOT was scheduled to make its conformity determination, DOT was not able to complete its action, as the MPO would have had to revise the conformity analysis to incorporate the new data. EPA does not believe this situation is appropriate or consistent with the overall intent of the Clean Air Act to coordinate air quality and transportation planning.

EPA also disagrees that the proposed rule revision would undermine decision-making and allow for the use of irrelevant information in the conformity process. Although EPA believes that conformity determinations should be based on the most recent data and planning information in accordance with the Clean Air Act, we also believe that the conformity rule should provide certainty in implementing the statute's requirements. In other words, EPA believes that a conformity determination that is based on the most recent information available when that analysis is conducted should be allowed to proceed even if more recent information becomes available later in the conformity process.

EPA believes it can provide this certainty, without compromising air quality, due to the iterative nature of the conformity process. A conformity determination based on the latest planning assumptions and emissions models is required at a minimum of every three years. In addition, the conformity rule (40 CFR 93.104) requires a conformity determination for plan and TIP updates and amendments and within 18 months of certain EPA SIP actions (*e.g.*, when EPA finds an initially submitted SIP budget adequate). In the case where new data becomes available after an analysis has started, such information would be required in the next conformity determination to ensure that appropriate decisions concerning transportation and air quality are being made. Therefore, EPA does not believe this rule change will provide for the general use of ''irrelevant'' data in the conformity process. Rather, EPA believes this rule change will provide a reasonable approach to ensuring that conformity is based on accurate and available information without causing unnecessary delays late in the transportation planning process. EPA concludes that today's final rule is consistent with the Clean Air Act, as it provides a reasonable time at which latest planning assumptions are determined for use in a conformity determination.

Two commenters also expressed concern about the proposed rule's potential to eliminate the public's involvement in the selection of latest planning assumptions used in conformity determinations. One of these commenters stated that the proposed rule change would defeat the ability of interested parties from playing a meaningful role in the decision-making process by making new information developed after public notice of the emissions analysis and conformity determination irrelevant. The other commenter requested clarification on the obligation of an MPO to revise a conformity determination to address public comment that questions an area's use of the most recent planning information in the conformity analysis.

EPA does not believe that today's rule change will eliminate the public's involvement in selecting the latest planning assumptions that are used in conformity determinations. For proposed transportation plan/TIP updates, amendments and conformity determinations, the public has an opportunity to comment on whether the conformity determination meets the conformity rule's requirements for using the latest planning information. Under today's rule, the public will still have this opportunity, as the amendment to § 93.110(a) makes no changes to the public involvement requirements under § 93.105(e).

EPA also does not believe that this rule change will effectively alter an MPO or other designated agency's

responsibility to respond to public comments in a manner consistent with the conformity rule's requirements. Under today's final rule, when an MPO or other designated agency conducts a conformity determination, it should document in its determination the ''time the conformity analysis begins'' as determined by interagency consultation, the date on which the analysis was started and the planning assumptions that were used. During the public process and comment period, the public will continue to have the opportunity to comment on all these aspects of the conformity analysis. If, for example, a member of the public expresses concern that planning information available before the beginning of the analysis was not used in the conformity determination, an MPO would have to address such concerns and explain why the information was not incorporated. If, when addressing this comment, the MPO and other interagency consultation partners determine that the information was available prior to the start date of the analysis, the MPO or other designated agency would be required to re-run its analysis to incorporate such data to meet the conformity rule's requirements.

In contrast to those commenters who favored the previous rule's more stringent requirement, some commenters did not believe that the proposed change to § 93.110(a) would provide enough flexibility in implementing the latest planning assumptions requirement. Specifically, these commenters requested that EPA amend the conformity rule to define the ''most recent planning assumptions available'' as those assumptions used to develop the most recent applicable SIP and motor vehicle emissions budget(s). Under the existing conformity rule, one commenter stated that the transportation sector can be unfairly forced to reduce emissions simply because planning assumptions have changed since the SIP was developed. Since the existing process can result in the use of different planning assumptions in SIPs and conformity, another commenter argued that the proposed rule still runs counter to Congressional intent and the Clean Air Act which is to provide for an integrated planning process. One commenter stated that both transportation and air quality agencies would benefit from using the same planning assumptions that were used for both conformity analyses and SIP development. Another commenter agreed with this approach, provided that the SIP was approved in the last five years.

The final rule has not been changed from the June 30, 2003 proposal in response to these comments. In the 1993 conformity rule (58 FR 62210), EPA stated that: ''It should be expected that conformity determinations will deviate from SIP assumptions regarding VMT, growth, demographics, trip generation, etc., because the conformity determinations are required by Clean Air Act section 176(c)(1) to use the most recent planning assumptions.'' For today's rulemaking, EPA did not propose to alter this aspect of § 93.110 as determined in the original conformity rule. Although EPA agrees that Congress intended for the integration of transportation and air quality planning through the conformity process, EPA believes that Congress also clearly intended for conformity to be based on the most recent planning information even if it differs from the assumptions used to develop the SIP and regardless of how recently a SIP was developed. The purpose of conformity is to ensure that emissions projected from planned transportation activities are consistent with the emissions level established in the SIP. If new planning assumptions introduced into the transportation and conformity processes result in an increase or decrease in projected emissions, EPA believes it is the responsibility of transportation and air quality agencies, along with other interagency consultation partners, to determine how best to consider the anticipated emissions change. In cases where projected emissions increase over the applicable SIP budget(s), the consultation process would be used to consider a revision to the transportation plan and TIP and/or the SIP to ensure that a conformity determination can be made and an area's air quality goals are achieved.

B. Defining the Time the Conformity Analysis Begins

1. Description of Final Rule

In the June 30, 2003 proposal, EPA requested comment on how MPOs, state departments of transportation, transit agencies, and air quality agencies would define the ''time the conformity analysis begins.'' Based on the comments received, EPA is finalizing our proposed clarification for the start of the regional conformity analysis in § 93.110(a) of today's final rule. Specifically, the final rule clarifies the time the conformity analysis begins as the point at which the MPO or other designated agency begins to model the impact of the proposed transportation plan, TIP or project on VMT and speeds and/or emissions for a conformity determination. This point should be determined through interagency consultation and used consistently for all future conformity determinations.

For example, the beginning of the analysis for a transportation plan or TIP conformity determination might be the point at which travel demand modeling begins to generate the VMT and speed data that will be used to calculate emissions estimates for the conformity determination. For smaller MPOs and rural areas that do not use a travel demand model, the beginning of the conformity analysis might be the point at which VMT projections necessary to run the emissions model are calculated based on the most recent Highway Performance Monitoring System (HPMS), population and employment data that are available at that time.

EPA does not, however, intend for the beginning of the analysis that will support a transportation plan or TIP conformity determination to be before VMT and emissions estimates have begun to be calculated. The following examples illustrate when the analysis has not yet begun:

- When the initial list of projects for the plan and TIP have been developed or before those projects have been coded into the transportation network;
- If travel or emissions modeling is conducted to preliminarily examine the impact of several potential projects or project alternatives on travel or emissions in the area; or
- When an initial schedule for completing an analysis is developed during an interagency consultation meeting.

Whatever the case, any information and assumptions that become available before actual modeling for a conformity determination has commenced would be required to be considered in that conformity determination.

2. Rationale and Response to Comments

EPA received a number of comments with suggestions for defining the time the conformity analysis begins. After thorough consideration of these comments, EPA believes this final rule adequately describes our intentions for what criteria constitute the time the analysis ''begins.''

Other suggested approaches that we received included defining the beginning of the analysis as the date on which state and local agencies submit their projects to be included in the plan and TIP; the point where model parameters and inputs have been incorporated into the travel demand model; and, the time at which a project is adopted for inclusion into a plan or TIP. EPA did not believe that these

suggestions were consistent with our intentions of having the start of the analysis represent a point in the process when actual modeling of the travel or emissions impacts of the planned transportation system on air quality has begun, since these activities can occur some time before modeling for the conformity determination occurs. EPA believes that all new planning assumptions available at the time the actual travel or emissions modeling begins, could be incorporated in a conformity determination, and therefore, it would be unreasonable to not require such data to be used.

One commenter suggested that the time the analysis begins should be necessarily after the interagency consultation process has been completed. EPA believes this approach for defining the start of the analysis could lead to confusion and is also inconsistent with our proposal, as the completion of the interagency consultation process could represent a point in time well after travel and/or emissions modeling have begun (*e.g.*, the point in time when the conformity determination is made).

Another commenter also suggested that determining the start of the analysis be the prerogative of the MPO, rather than determined through interagency consultation. EPA disagrees. EPA believes having the start of the analysis determined through interagency consultation is critical for ensuring that transportation and air quality planners work together to meet air quality goals. Several commenters also agreed that using the interagency consultation process to decide this issue is appropriate, as further discussed in C.2 of this section).

A few commenters requested that EPA provide further guidance in the final rule for defining the beginning of the analysis, as they interpreted the proposal to be ambiguous and the source of unintended consequences. EPA agrees with these commenters, and therefore, has defined the start of the conformity analysis in § 93.110(a) of today's rule based on concepts described in the preamble to the proposed rule. In addition, EPA has provided further explanation and examples in the description of this final rule of what we intend the beginning of the conformity analysis to be.

C. Implementation of Final Rule

1. Description of Final Rule

Today's final rule relies on the interagency consultation process required by § 93.105(c)(1)(i) to determine when a conformity analysis reasonably begins in a given area. Section 93.105(c)(1)(i) already requires the consultation process to be used to decide which planning assumptions and models are available for use by the MPO or other designated agencies responsible for conducting conformity analyses. The definition of when the conformity analysis begins for a given area should be well documented through the interagency consultation process. New information (*e.g.*, population or fleet data) that becomes available after the conformity analysis begins is not required to be incorporated into the current analysis if the analysis is on schedule, although an area could voluntarily include the new information at any time as appropriate. EPA encourages the MPO or other designated agency to use the interagency consultation process to inform other involved agencies of when a conformity emissions analysis has started for a given conformity determination.

To support a valid conformity determination, the MPO or other appropriate agency should also document the following information:

- How the ''time the conformity analysis begins'' has been defined through interagency consultation;
- The calendar date that the conformity analysis began; and,
- The planning assumptions used in the analysis.

Documenting this information in the actual conformity determination would inform the public of previous decisions regarding the use of latest planning assumptions, and will record when an analysis was begun, so that commenters can address any issues related to these decisions.

Today's final rule also clarifies that new data that becomes available after a conformity analysis has started is required to be used in the upcoming current conformity determination if a significant delay in the analysis has occurred before a substantial amount of work has been completed. For example, an MPO starts a conformity analysis and begins generating VMT estimates from the travel demand model. However, the MPO's analysis is then delayed for six months. In this case, EPA believes it is reasonable to expect that an MPO should incorporate new planning information that became available during the six-month delay period. Under today's final rule, the interagency consultation process would be used to determine whether a significant delay has occurred and whether new data that becomes available during a delay should be incorporated.

EPA intends that in cases where areas adhere to their conformity determination schedules and such delays do not occur, the incorporation of new information that becomes available after the conformity analysis has begun is not required. The final rule only requires the incorporation of new information when an area falls significantly behind in completing a conformity analysis, as determined through interagency consultation.

Areas should consider the availability of new planning assumptions when determining their conformity schedules. The consultation process should continue to be used to determine what are the most recent assumptions available for SIP development, so that they can be incorporated into the conformity process expeditiously. For example, if EPA is expected to find a new SIP budget adequate before the MPO or DOT's conformity determination, conformity to the new SIP budget would be required. In such a case, transportation planners should use the more recent assumptions in the submitted SIP and consider them at the start of the conformity analysis, since the more recent assumptions would have been available through the consultation process when the SIP was being developed. State and local air agencies should continue to inform their transportation counterparts of new assumptions as they become available.

This final rule addresses only when latest planning assumptions must be considered and does not change the requirement that DOT's conformity determination of the transportation plan and TIP must be based on an analysis that is consistent with the proposed transportation system. For example, if a regionally significant project is significantly changed after the start of the conformity analysis, such a change must be reflected in the conformity analysis for the current determination. Likewise, a significant change in the design concept and scope of an emissions reduction program would also have to be reflected before DOT makes its conformity determination.

Today's proposal also does not change the requirements of § 93.122(a) which describes when emissions reduction credit can be taken in regional emissions analyses. Section 93.122(a)(2) continues to require that analyses reflect the latest information regarding the implementation of TCMs or other control measures in an approved SIP, even if a measure is cancelled or changed after the conformity analysis begins. In addition, § 93.122(a)(3) continues to require that DOT's conformity determination be made only when regulatory control programs have been assured and will be implemented

as described in the SIP. However, consistent with the rule change on availability of latest planning assumptions, today's rule allows areas to rely upon the latest existing information as documented at the beginning of the conformity analysis regarding the effectiveness of SIP control programs that are being implemented as described in the SIP (§ 93.110(e)).

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

2. Rationale and Response to Comments

Many commenters agreed that the interagency consultation process should be central in determining the beginning of the conformity analysis. Given the unique circumstances of individual areas, some commenters believed that the interagency consultation process would provide a common sense approach to implementing the proposed § 93.110(a). One commenter also believed that EPA's approach for relying on interagency consultation for determining if an analysis is delayed and whether more recent data should be used is appropriate. This commenter argued that such an approach would provide for greater flexibility and local decisionmaking. EPA agrees with these comments to use the interagency consultation process to account for differences in the planning and conformity processes among individual nonattainment and maintenance areas.

One commenter, however, expressed concern over EPA's proposal to require the use of more recent data that has become available if an analysis is delayed. The commenter stated that this proposal lacked specificity and could potentially nullify the proposed flexibility provided by the revised § 93.110(a).

EPA believes that in cases where a significant delay in the start of the analysis has occurred and more recent data becomes available during that time, the new data must be included in the conformity determination. In response to this comment, EPA has clarified in the final rule that new data that becomes available after an analysis has begun is required to be used in the upcoming conformity determination if a significant delay in the analysis has occurred. As described above, EPA has provided further explanation and examples to more fully depict our intentions for this requirement in the description of this final rule. Interagency consultation would be used, following Section C.1. above, to decide whether a conformity analysis has been delayed and whether any new data has become available during the delay that would be incorporated into the conformity process.

Another commenter requested that the final rule require an MPO to incorporate new planning assumptions that become available after an analysis has started, if changes to other aspects of a conformity determination (*e.g.*, data, conclusions or assumptions) are made once the analysis has begun. In such cases, this commenter believed that the planning assumptions should again be reviewed, and if they have changed, such newer assumptions should be incorporated in the conformity determination along with any other changes the MPO is conducting.

As previously stated, EPA believes that once a conformity analysis begins, it is appropriate to allow that analysis to continue without requiring the incorporation of newer planning information, provided the conformity analysis and determination remain on schedule, as determined through interagency consultation. EPA does not believe that new planning information should be required if changes to the conformity analysis are made that do not cause a significant delay. However, in this case, EPA encourages areas to consider incorporating new information that has become available since the analysis began if other changes are initiated and new data can also be easily incorporated.

EPA believes it is appropriate to require the use of more recent planning assumptions that become available after a conformity analysis begins only if significant delays in completing the conformity analysis have occurred. Therefore, if an MPO or other designated agency initiates a change to the conformity analysis that causes a significant delay, EPA believes that any new planning information that has become available since the analysis began should be required in that conformity determination, as determined by the interagency consultation process.

Finally, several commenters requested clarification on various aspects of implementing the use of latest planning assumptions in conformity. Specifically, one commenter requested EPA to indicate in the final rule what newer information that becomes available will be required in a conformity determination even after the latest planning assumptions have been agreed upon through interagency consultation. This commenter stated that the final rule should specify those assumptions to avoid ambiguity.

EPA believes that § 93.110 of the current conformity rule provides a detailed description of the latest planning assumptions that must be incorporated in a conformity determination. For example, § 93.110(b) states that assumptions must be derived from the most recent estimates of current and future population, employment, travel, and congestion. Sections 93.110(c) and (d) require using the latest planning information on transit fares, service levels and ridership, as well as road and bridge tolls. In addition, § 93.110(e) specifies that conformity determinations must include the latest existing information regarding the effectiveness of transportation and other control measures that have been implemented. Under today's rule, an area's interagency consultation process would determine the most recent data and information available to meet § 93.110 requirements at the beginning of the conformity analysis. Provided the analysis starts on time and adheres to the conformity determination schedule, any updates to this information would not be required to be used until the next conformity determination.

However, this final rule does not change any other provision of the conformity rule. For example, this final rule does not change the requirement that DOT's conformity determination of the transportation plan and TIP be based on an analysis that is consistent with the proposed transportation system. In addition, the final rule does not change the existing requirements for determining regional transportation emissions under § 93.122. For example, as described above, § 93.122(a)(2) continues to require that analyses reflect the latest information regarding the implementation of TCMs or other control measures in an approved SIP, even if a measure is cancelled or changed after the beginning of the conformity analysis. EPA believes the requirements of both §§ 93.110 and 93.122 are clear and provide sufficient direction to implement today's final rule, and therefore, EPA has not made any further clarifications to these requirements in response to this comment.

Another commenter requested that EPA clarify in the final rule that MPOs may demonstrate conformity without being required to wait for changes in planning data that are not actually available. This commenter suggested that in some areas conformity determinations have been delayed to

incorporate anticipated data (*e.g.*, new Census data) that was not actually available at the time the determination was originally scheduled to be made.

The Clean Air Act and conformity rule do not require MPOs to delay their conformity analyses to incorporate anticipated data that is not yet available for conformity purposes under any circumstances. The conformity rule, as amended in today's action, only requires conformity determinations to incorporate the most recent planning information available at the time the conformity analysis begins. Under this final rule, areas should use the interagency consultation process to determine the start of the analysis and the planning assumptions that are available and will be used in that analysis.

Two commenters asked for clarification on the requirements of § 93.122(a)(6) as they relate to planning information used in regional emissions analyses. Section 93.122(a)(6) requires regional emissions analyses to include the same ambient temperatures and other applicable factors that were used to develop the SIP and budgets. However, since § 93.110 requires the use of the most recent planning assumptions available in conformity, one commenter requested clarification on the specific ''factors'' that § 93.122(a)(6) targets. One of these commenters also requested clarification on whether this provision of the rule should be applied to project level hot-spot analyses. This commenter argued that localized data can be more accurate than regional estimates in some cases, and therefore, should be used in hot-spot analyses.

In contrast to those planning assumptions described in § 93.110 (*e.g.*, population, employment, vehicle fleet composition), EPA intended § 93.122(a)(6) to apply to certain planning factors that would not be expected to change significantly over time in a given geographical area. For example, factors referred to in § 93.122(a)(6) would include environmental conditions such as ambient temperatures, humidity and altitude. Other factors subject to § 93.122(a)(6) could also include the fraction of travel in a hot stabilized engine mode and annual mileage accumulation rates over the time frame of the transportation plan. Since factors such as environmental conditions and certain vehicle use characteristics that do not typically change in future years could significantly impact emissions, EPA generally believes that it is appropriate to require such factors to be consistent between conformity analyses and the SIP budgets.

Under certain circumstances, however, it may be appropriate to use alternative factors instead of certain SIP assumptions, if it is determined through the interagency consultation process that these factors should be modified as provided for in § 93.122(a)(6). For example, such modifications in these types of factors may be appropriate where additional or more geographically specific information is incorporated or a logically estimated trend in such factors beyond the period considered in the SIP is represented. EPA does not expect changes in the SIP's factors to occur often, and they could occur only after interagency consultation. These factors, along with all other planning assumptions used in a conformity analysis, must be documented in the conformity determination that is released for public comment.

Finally, § 93.123(c)(3) of the conformity rule requires hot-spot analysis assumptions to be consistent with those assumptions used in the regional emissions analysis for those inputs which are required for both analyses. Therefore, the requirements of § 93.122(a)(6) also apply to hot-spot analyses; those factors covered by § 93.122(a)(6) used in regional emissions analyses generally need to be the same as those in hot-spot analyses. However, EPA believes the existing § 93.122(a)(6) provides flexibility to use different information for certain environmental and transportation-related factors (*e.g.*, temperature, cold-start vehicle travel) in hot-spot analyses, if it is determined through interagency consultation that there is a sound basis for using more localized geographic data. Areas should use the interagency consultation procedures established under § 93.105 to determine whether more localized data is appropriate in hot-spot analyses.

XXI. Horizon Years for Hot-Spot Analyses

A. Description of the Final Rule

Today's final rule clarifies § 93.116 of the conformity rule so that project-level hot-spot analyses in metropolitan nonattainment and maintenance areas must consider the full time frame of an area's transportation plan at the time the analysis is conducted.[23] Regional emissions analyses in isolated rural areas also cover a 20-year timeframe, consistent with the general requirements in metropolitan and donut areas. Alternatively, hot-spot analyses for new projects in isolated rural nonattainment and maintenance areas, as defined in today's rule, must consider the full time frame of the area's regional emissions analysis since these areas are not required to develop a transportation plan and TIP under DOT's statewide transportation planning regulations. All areas would use the interagency consultation process to select the specific methods and assumptions for conducting both quantitative and qualitative hot-spot analyses in accordance with § 93.123 of the conformity rule (§ 93.105(c)(1)(i)).

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

Today's final rule does not change the procedural requirements for hot-spot analyses outlined in § 93.123, nor the flexibility for areas to decide how best to meet these requirements through interagency consultation. We believe our clarification to § 93.116, in combination with the rule's existing consultation and modeling requirements, is sufficient to demonstrate that a project will not cause or contribute to new local violations or increase the severity of existing violations during the period of time covered by the transportation plan.

B. Rationale and Response to Comments

On May 26, 1994, Environmental Defense, Natural Resource Defense Council and Sierra Club collectively submitted to EPA a Petition for Reconsideration of the November 1993 conformity rule (58 FR 62188). In the preamble to an April 10, 2000 conformity rule (65 FR 18913), we addressed four remaining issues raised in this petition, one of which was the issue regarding horizon years for hot-spot analyses. Specifically, the petitioners requested that we alter the rule to ensure that areas examine the 20-year time frame of the transportation

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

plan when conducting hot-spot analyses. The existing transportation conformity rule does not clearly specify a time frame to be considered for hot-spot analyses.

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

EPA received a number of comments on our proposed clarification of § 93.116. One commenter believed that the transportation planning process should not be interrupted due to the inexact data on which the process is based.

Today's changes to § 93.116 do not impose any new requirements. Rather, this final rule clarifies that when a hot-spot analysis is performed, the year or years that are analyzed must be the year(s) when project emissions, in addition to background regional emissions in the project area, are expected to be the highest and violations are most likely to occur. We believe that most areas are already successfully complying with this hot-spot requirement, and consequently, changes to the existing planning process due to the final rule are not expected.

The remaining commenters requested additional guidance on implementing the clarification to § 93.116. Specifically, one commenter indicated that their state currently requires CO hot-spot analyses for new projects in nonattainment and maintenance areas to examine air quality impacts of the project over a period extending up to 20 years after the project opens. This commenter argued that this protocol for analyzing the year of project completion and a horizon year typically 20 years from project completion is very likely to capture the highest emissions expected from the project. However, the commenter was concerned that EPA's clarification to § 93.116 may not allow continued use of this protocol.

EPA does not believe that the hot-spot analysis procedures employed by this state are necessarily inconsistent with today's clarification. In fact, this protocol could be more conservative since it requires the analysis of years beyond the 20 year time frame of an area's transportation plan or regional emissions analysis. EPA does not believe that the clarification to § 93.116 would cause this state to revise its requirements for hot-spot analyses in most cases. EPA should note, however, that all hot-spot analyses performed in any nonattainment or maintenance areas should consider whether the combination of project emissions and background emissions could result in a violation occurring prior to the final year of the analysis period. Further, since areas are required to prevent hot-spot violations in years covered by the transportation plan, states should ensure that the use of the year of estimated highest projected emissions for a given project is sufficient to demonstrate that no violations would be expected during this time frame. Decisions regarding such analyses and year(s) chosen for hot-spot analyses should be determined through an area's interagency consultation process.

Another commenter requested clarification as to whether areas would be required to analyze more than one year if peak project emissions and peak background emissions are expected to occur in different years. EPA does not intend for the revised § 93.116 to require areas to analyze multiple years in all cases where peak project emissions and background emissions occur at different points in time. Instead, EPA intends for areas to analyze the year in which combined project and background emissions could most likely cause a violation or worsen an existing violation of the air quality standard. In some cases, however, a more conservative approach to meeting the conformity rule's requirements for hot-spot analyses would be to analyze more than one year within the time frame of the transportation plan or regional emissions analysis depending upon the local circumstances regarding peak project and background emissions. An area's interagency consultation process should be used to determine the appropriate year(s) for conducting hot-spot analyses in this type of situation.

One commenter requested that EPA revise the clarification to § 93.116 to take into account the situation where a project would not remain in place over a 20-year time period. This situation could occur if a project is scheduled to be built and opened for use in stages. Specifically, the commenter requested that the clarification be revised to require that the hot-spot analysis cover the time frame of the plan ''or time frame of the proposed project, whichever is shorter.''

EPA does not believe that this commenter's suggested clarification is necessary. In the case of a project that is being built and opened for use in stages, the conformity rule allows the area's interagency consultation process to select the appropriate hot-spot analysis years. EPA believes that in these cases the local consultation process provides the best forum for deciding how to model such projects appropriately. Furthermore, the clarification to § 93.116 allows areas to select an appropriate analysis year(s) to demonstrate that the project conforms over the entire time frame of an area's transportation plan or regional emissions analysis. It is likely that when a project is opened in stages, more than one analysis year may be necessary to satisfy the hot-spot requirements, as various years could produce significantly different emissions. For example, if a project were being opened in two stages and the entire two-stage project was being approved, the interagency consultation process may result in a decision to analyze two years. In this case, the first analysis year would be chosen to examine the impacts of the first stage of the project, such as a year between the opening of the first stage and the opening of the second stage of the project. The second analysis year would be chosen to examine the impacts of the complete project, such as a year between the opening of the second stage and the final year of the area's transportation plan or regional emissions analysis. Finally, EPA does not believe that the final rule is problematic with respect to projects that do not remain in effect for the entire time frame of the 20-year transportation plan. For example, if a project is only scheduled to be implemented for the first 10 years of the transportation plan, there would be no projected emissions from that project to consider for hot-spot analysis in the latter 10 years of the plan.

Another commenter encouraged EPA and DOT to issue hot-spot guidance that maintains and enforces significance thresholds and consider more stringent mitigation measures for exceedances of the thresholds. EPA does not believe that the requested guidance is needed or required to implement the Clean Air Act or conformity rule's requirements for ensuring that localized emissions from a new project do not cause or contribute to violations of the air quality standards. EPA believes that section 176(c)(3)(B)(ii)

of the Clean Air Act and § 93.116 of the conformity rule establish sufficient requirements for addressing localized air quality problems in CO and PM_{10} nonattainment and maintenance areas. Further, EPA does not believe that exceedances of significant threshold levels would necessarily contribute to increased violations of a given air quality standard.

Finally, one commenter asked when EPA intends to issue guidance on quantitative PM_{10} hot-spot analyses, as referred to in § 93.123(b)(4) of the conformity rule. As part of the November 5, 2003 proposal (68 FR 62690), EPA requested comment on the experience areas have had in applying the conformity rule's PM_{10} hot-spot analysis requirements and on the need to maintain or amend these requirements. As noted in Section XIII. of today's action, EPA intends to decide on the PM_{10} hot-spot analysis requirement, including needs for quantitative analysis guidance, based on our review of comments from the November 2003 proposal and a future supplemental proposal.

XXII. Relying on a Previous Regional Emissions Analysis

A. Description of Final Rule

EPA is finalizing three revisions to § 93.122(g), which describes when an area can rely on a previous regional emissions analysis for a new conformity determination. EPA notes that the provisions for relying on a previous analysis were located in § 93.122(e) of the former conformity rule, but are being moved to § 93.122(g) due to reorganization of this section. First, EPA is revising § 93.122(g) so that MPOs can rely on a previous regional emissions analysis for minor transportation plan revisions. Prior to today's final rule, § 93.122(g) (§ 93.122(e) of the previous conformity rule) allowed areas to rely on a previous emissions analysis only for conformity determinations made for minor TIP updates or amendments. To meet § 93.122(g) requirements, minor revisions to the transportation plan may include no additions or deletions of regionally significant projects, no significant changes in the design concept and scope of existing regionally significant projects, and no changes to the time frame of the transportation plan. Further, minor plan revisions under § 93.122(g) would not include revisions that delay or accelerate the completion of regionally significant projects across conformity analysis years.

EPA's second revision adds § 93.122(g)(3) to clarify that a conformity determination that relies on a previous analysis does not satisfy the three-year frequency requirement for plans and TIPs. The conformity rule continues to require a new regional emissions analysis that incorporates the latest planning assumptions and emissions models at least every three years. In response to comments EPA received on this proposed rule change, EPA is also clarifying the three-year regional emissions analysis requirement in § 93.104(b) and (c) of the rule.

EPA's third revision adds § 93.122(g)(1)(iv) and amends § 93.122(g)(2) to clarify that conformity determinations that rely on a previous regional emissions analysis must be based on all adequate and approved SIP budgets that apply at the time that DOT makes its conformity determination. Like all conformity determinations, a determination that relies on a previous emissions analysis must satisfy the emissions test requirements of § 93.118 (or of § 93.119, if no applicable budgets exist), and must do so over the time frame of the transportation plan. Therefore, EPA believes that pursuant to § 93.118(a) of the current rule, any conformity determination that relies on a previous emissions analysis must show consistency with all applicable adequate or approved budgets that are available for conformity purposes at the time the determination is made, including those budgets that have become applicable since the previous conformity determination. In other words, in cases where new adequate or approved budgets become available after the most recent conformity determination, the previous regional emissions analysis could be used for a subsequent determination if the emissions estimates from that analysis are at or below the emissions levels established by the new budgets for relevant years and all other § 93.122(g) requirements are met. In this case, the conformity determination that includes the new budgets would also satisfy any applicable 18-month conformity requirement, pursuant to § 93.104(e) that is triggered by EPA's adequacy finding and/or approval action of the new SIP budgets.

This final rule applies to conformity determinations for plans, TIPs, and projects not from a conforming plan and TIP. EPA expects that most conformity implementers already consider new budgets when they rely on a previous emissions analysis. Today's final rule simply clarifies existing requirements and ensures that the conformity regulation continues to be correctly implemented in the future.

EPA also notes that we are not altering the existing § 93.122(g)(2)(i) and (ii) provisions in today's final rule, as the June 30, 2003 proposed regulatory text may have been confusing with regard to the specific changes that were proposed. In the preamble to the June 30, 2003 proposed regulatory text, we stated that we were amending § 93.122(g)(2) to clarify that a conformity determination that relies on a previous emissions analysis must be based on all adequate and approved budgets that apply when the determination is made. However, we only intended to amend the introductory text for § 93.122(g)(2) and did not intend to delete the existing subparagraphs § 93.122(g)(2)(i) and (ii) for this provision, as may have appeared from the printed regulatory text. Therefore, we are now clarifying that subparagraphs § 93.122(g)(2)(i) and (ii) still apply. That is, a project that is not from a conforming plan and TIP may be demonstrated to conform without a new regional emissions analysis if the project is either not regionally significant, or is included in the currently conforming transportation plan (even if it is not included in the currently conforming TIP) and its design concept and scope have not significantly changed and are sufficient for determining regional emissions. EPA believes that a reproposal is not necessary to make this correction in today's final rule, as this clarification is consistent with EPA's original intentions and stakeholders' understanding of the proposed revision to the § 93.122(g)(2) provision.

B. Rationale and Response to Comments

EPA believes that relying on a previous emissions analysis for minor transportation plan changes is appropriate, since such changes do not impact regional air quality and usually occur in tandem with minor TIP updates and amendments. The purpose of § 93.122(g) is to allow areas to use a previous emissions analysis when no significant changes to the transportation system are being made. Through implementing § 93.122(g) over the years (as § 93.122(e)), EPA has concluded that because plan and TIP updates often occur together, the purpose of this provision has been frustrated due to the rule's past applicability only to TIPs, but not plans.

Most commenters supported EPA's proposal to allow areas to rely on a previous emissions analysis for minor transportation plan revisions. As stated in the June 30, 2003 proposal, the purpose of this final rule is to require a new regional emissions analysis only for transportation actions that involve

significant air quality impacts and at least every three years. One commenter, however, requested clarification on whether changes or additions to a plan and TIP would be determined ''significant'' through the interagency consultation process.

EPA articulates its intentions for when transportation planners can rely on a previous emissions analysis in the existing conformity rule and the preamble to the November 24, 1993 conformity rule. Specifically, in the 1993 final rule, we stated that a new regional analysis would not be required ''if the only changes to the TIP involve either projects which are not regionally significant and which were not or could not be modeled in a regional emissions analysis, or changes to project design concept and scope which are not significant * * * '' (58 FR 62202). Today's final rule clarifies that a previous analysis can only be used under similar circumstances for the plan, and when the time frame of the transportation plan has not changed. Under the consultation provisions of the conformity rule, the interagency consultation process should be used to determine which projects are ''regionally significant'' for the purposes of regional emissions analyses, and which projects have a significant change in design concept and scope (§ 93.105(c)(2)(ii)). Therefore, EPA believes that the conformity rule clearly specifies that an area's interagency consultation process should be used for determining whether any changes or additions to a plan and/or TIP are not ''significant'' for the purposes of relying on a previous emissions analysis in accordance with § 93.122(g).

Another commenter requested EPA to identify comprehensively the circumstances when reliance on a previous regional emissions analysis would not be appropriate. Specifically, this commenter asked EPA to clarify that an area cannot rely on a previous analysis if new or revised planning assumptions and/or emissions models become available after the previous conformity determination. The commenter also requested that EPA clarify that an area cannot rely on a previous emissions analysis when new SIP budgets have become available for conformity purposes since the last determination. The commenter argued that since the Clean Air Act requires conformity determinations to be based on the most recent planning assumptions and emissions estimates, the conformity rule should require a new regional emissions analysis for all minor plan and TIP changes if new planning information becomes available after the previous analysis and conformity determination are made.

In general, EPA agrees that Clean Air Act section 176(c)(1)(B)(iii) requires conformity determinations to be based on the most recent estimates of emissions. However, we also believe that Clean Air Act section 176(c)(4)(B)(ii) gives EPA discretion in establishing the requirements for a new regional emissions analysis when a minor change to a transportation plan and/or TIP is made. Specifically, section 176(c)(4)(B)(ii) requires EPA to promulgate conformity rules that ''address the appropriate frequency for making conformity determinations, but in no case shall such determinations for transportation plans and programs be less frequent than every three years, * * *.'' To satisfy this statutory requirement, EPA promulgated rules in 1993 (58 FR 62188) that require a new regional emissions analysis and conformity determination to be conducted at a minimum of every three years and when a significant change to the TIP is made between the three-year conformity frequency requirement.

EPA does not believe that the Clean Air Act requires a new regional analysis to be triggered between three-year conformity updates in the case when minor project changes are made to the plan or TIP that would not affect regional emissions. Since the original November 24, 1993 conformity rule, EPA has held that only the three-year conformity frequency requirement and transportation actions that involve significant air quality impacts should drive the necessity for a new regional emissions analysis that incorporates the most recent planning information. EPA does not believe, however, that a new emissions analysis should be required for the sole purposes of incorporating new planning information or models in between the three-year minimum conformity requirement. The conformity rule has never required a new emissions analysis in this case and EPA is not reopening this aspect of § 93.122(g) in this rulemaking.

As we have stated elsewhere in this final rule, conducting conformity determinations and regional emissions analyses to satisfy the conformity rule requires a significant amount of state and local resources. In the January 11, 1993 conformity proposal, we stated that ''conformity determinations should be made frequently enough to ensure that the conformity process is meaningful. At the same time, EPA believes it is important to limit the number of triggers for conformity determinations in order to preserve the stability of the transportation planning process'' (58 FR 3775). EPA believes that requiring a new regional emissions analysis to incorporate new data and models for minor changes to transportation systems would essentially result in another conformity trigger whenever planning assumptions or models are updated. EPA believes such a trigger would be overly burdensome and in contrast with our stated goals of implementing a meaningful conformity process that limits disruption to the transportation planning process.

In the 1993 conformity rule, EPA concluded that areas should be granted flexibility for meeting the conformity requirements for minor interim TIP updates and amendments under § 93.122(g), even if new planning information becomes available after the previous analysis and conformity determination are made. See the January 11, 1993 proposal to the November 24, 1993 rule (58 FR 3778) for further background. EPA continues to believe such flexibility is appropriate and consistent with statutory requirements, and is not re-proposing nor re-opening the existing § 93.122(g) requirement for minor TIP changes in this rulemaking. This final rule simply extends § 93.122(g) requirements to minor plan revisions for consistency purposes. EPA believes this rule change will not have a significant impact on air quality, as the rule's existing frequency requirements will ultimately ensure that timely emissions analyses are conducted so that air quality is not worsened over the time frame of the long range transportation plan.

In addition, EPA has always believed that requiring a new regional emissions analysis simply because new SIP budgets have become available since the last conformity determination is also unnecessary. In our 1993 proposed conformity rule, we specifically stated, ''If the existing emissions analysis for the current transportation plan demonstrates that the current plan is consistent with the new implementation plan budget, a conformity finding can be made for the current plan. The transportation plan would not need to be revised and a new regional emissions analysis would not be necessary'' (58 FR 3775). Today's rule ensures that any adequate or approved budgets that have become available since the previous conformity determination are incorporated in subsequent determinations. However, EPA believes that it is unnecessary to require a new regional emissions analysis when new budgets are incorporated, if a minor revision to the plan/TIP meets the current requirements of § 93.122(g) and

conforms to the new budgets for relevant years. Again, EPA has not reopened this previous conclusion in today's rulemaking.

A few commenters also disagreed with the new provision, § 93.122(g)(3), that clarifies that a conformity determination that relies on a previous regional emissions analysis does not satisfy the three-year frequency requirement for plans and TIPs. These commenters believe that conformity determinations that rely on a previous analysis should not be treated differently from any other determination. One of these commenters argued that since the frequency requirements in § 93.104 do not specifically include a requirement to perform a new regional emissions analysis, a conformity determination that relies on a previous analysis meets all the applicable conformity criteria and should satisfy the three-year conformity frequency requirement. The commenter also stated that requiring a conformity determination with a new analysis to meet the three-year conformity requirement shortly after making a conformity determination that relies on § 93.122(g), would place an inappropriate burden on states and MPOs with no significant air quality benefit.

As previously stated, EPA has always interpreted the Clean Air Act as requiring a conformity determination with a new regional emissions analysis that incorporates the latest planning information and models at a minimum of every three years. In our 1993 conformity proposal, we specifically stated that an ''emissions analysis must occur at least every three years'' (58 FR 3775), and we believe this requirement is necessary to fulfill the Clean Air Act's three-year conformity frequency requirement. Further, EPA has concluded that a new emissions analysis every three years will provide significant air quality benefits that justify the additional effort. As a result of this interpretation, we believe that Clean Air Act section 176(c)(4)(B)(ii) precludes a conformity determination that is based on a previous regional emissions analysis from satisfying the three-year requirement. EPA believes that the existing rule's requirements for a new regional emissions analysis that incorporates the latest planning information and models every three years, and for plan/TIP updates and amendments that include significant changes, are important for ensuring that transportation activities are consistent with an area's clean air goals. Thus, EPA cannot agree with these commenters' request.

However, EPA agrees that the requirement for a new regional emissions analysis every three years could be clarified. Therefore, in response to this comment EPA is clarifying in § 93.104(b)(3) and (c)(3) of today's action that MPOs and DOT must make a conformity determination that includes a new regional emissions analysis for transportation plans and TIPs no less frequently than every three years. This minor revision to § 93.104 will not change existing requirements or implementation practices, as EPA expects that all metropolitan nonattainment and maintenance areas already conduct a new regional emissions analysis at a minimum of every three years. This rule revision simply clarifies existing requirements and ensures that the conformity regulation continues to be correctly implemented in the future.

Finally, one commenter requested that EPA expand § 93.122(g) so that a minimal number of new projects and/or project revisions could be added to a plan or TIP without having to do a new conformity determination at all. Such an approach, as suggested by this commenter, could be considered as a ''de minimis test'' for triggering a new determination.

EPA does not believe that the Clean Air Act permits minor plan and TIP changes to occur without a conformity determination. Clean Air Act section 176(c) states that no approval or funding of any transportation plan, TIP or project can be granted unless that plan, TIP or project conforms. Therefore, the statute does not support the addition of a minimal number of new non-exempt projects and/or project revisions to the transportation plan or TIP without a conformity determination. In addition, the existing conformity rule already includes a list of exempt projects that never need conformity determinations due to their minimal air quality impact (§ 93.126). EPA believes that only plan and TIP updates involving these exempt projects should be allowed to proceed without a conformity determination.

Furthermore, § 93.122(g) of the conformity rule already provides a streamlined process for meeting the conformity requirement for minor plan and TIP changes in between the three-year conformity requirement by eliminating the need for a new regional emissions analysis. EPA believes this provision provides appropriate flexibility in meeting the statute's requirements, as well as a necessary ''check'' to ensure through the interagency consultation and public processes that such plan/TIP changes are indeed insignificant with regard to air quality. In addition, such determinations ensure that other requirements of the Clean Air Act and conformity rule (*e.g.*, timely implementation of TCMs) are satisfied.

XXIII. Miscellaneous Revisions

A. Definitions

In today's rulemaking, EPA is clarifying the conformity rule's definitions for ''control strategy implementation plan revision,'' ''milestone,'' ''donut areas,'' and ''isolated rural nonattainment and maintenance areas'' in § 93.101. Today's clarifications to these definitions should not impose any new requirements on nonattainment and maintenance areas; these rule revisions simply clarify EPA's original intent and current implementation of the existing conformity rule.

Control Strategy Implementation Plan Revision

The final rule clarifies that any implementation plan revisions that are submitted to fulfill any of the following Clean Air Act requirements are considered control strategy SIPs for conformity purposes: section 172(c) and 187(g) or 189(d), in addition to the currently listed sections 182(b)(1), 182(c)(2)(A), and 182(c)(2)(B) for ozone areas; section 187(a)(7) for CO areas; sections 189(a)(1)(B) and 189(b)(1)(A) for PM_{10} areas; and sections 192(a) and 192(b) for NO_2 areas. We are also clarifying that any SIP that is established to demonstrate reasonable further progress and/or attainment should be considered a control strategy SIP.

Several commenters supported EPA's clarification to the definition since it did not change the conformity frequency requirements in § 93.104(e). Specifically, these commenters understood that the definition change would not alter how initial submissions of control strategy SIPs or approvals of control strategy SIPs would trigger the 18-month frequency requirement for a new conformity determination. EPA agrees with these comments.

Another commenter believed that maintenance plans required under section 175A also constitute control strategy SIPs and suggested that this type of SIP be added to the definition. EPA disagrees with this comment. Control strategy implementation plans are plans developed by nonattainment areas for reasonable further progress or attainment purposes, as indicated by the above referenced Clean Air Act sections. In contrast, maintenance plans are developed by areas once they have

attained the applicable standard and, as such, would not fit this definition. Maintenance plans are already defined in § 93.101 of the conformity rule, and § 93.118 distinguishes between how control strategy SIPs and maintenance plans are applied when regional emissions analyses are completed with SIPs. For these reasons, EPA will not expand the definition of control strategy SIP to include maintenance plans.

Milestone

Similarly, EPA is expanding the current definition of milestone to more adequately reflect EPA's original intent and implementation of this term. The final rule expands this definition so that it includes any year for which a motor vehicle emissions budget has been established to satisfy Clean Air Act requirements for demonstrating reasonable further progress. This definition includes all years in the applicable SIP for which emissions targets showing progress towards attainment are established in any nonattainment area.

Several commenters supported EPA's clarification to the milestone definition and further urged EPA to encourage states to eliminate old motor vehicle emission budgets when submitting new SIPs or SIP revisions with new budgets. Commenters believed that eliminating old budgets would alleviate some confusion over which budgets and which milestones apply when more than one SIP is in place for the same pollutant.

EPA does not agree with this comment. SIPs are legal documents which establish air quality control strategies and measures required for attaining and maintaining the standard. SIPs are developed for more than one Clean Air Act purpose, and each SIP is developed with different planning assumptions and could, thus, generate a different budget as well as potentially address different years. These SIPs and their associated budgets each play a role in an area's attainment strategy and cannot be eliminated simply for convenience in the conformity process. However, there may be some cases where budgets were developed for a Clean Air Act purpose for a year that is no longer applicable for future conformity determinations. Previously established SIPs can only be revised after satisfying applicable Clean Air Act requirements through the SIP process.

EPA believes that there are already mechanisms for clarifying which SIP budgets apply for a given conformity determination. Section 93.118(b) of the conformity rule clarifies which budgets are to be used and under what conditions. In addition, areas should use the interagency consultation process to ensure that § 93.118 is being met and to determine which SIP budgets are applicable for conformity determinations where multiple SIPs are established. For these reasons, EPA believes that no further clarifications or changes to the regulations are necessary.

Donut Areas and Isolated Rural Nonattainment and Maintenance Areas

In this final rule, ''donut areas'' are defined as geographic areas outside a metropolitan planning area boundary as designated under 23 U.S.C. 134 and 49 U.S.C. 5303, but inside the boundary of a designated nonattainment/maintenance area that contains any part of a metropolitan area(s). ''Isolated rural nonattainment and maintenance areas'' are defined as any nonattainment or maintenance area that does not contain or is not part of any metropolitan planning area as designated under 23 U.S.C. 134 and 49 U.S.C. 5303. Isolated rural areas do not have metropolitan transportation plans or TIPs required under 23 U.S.C. 134 and 49 U.S.C. 5303 and 5304 and do not have projects that are part of the emissions analysis of any MPO's metropolitan transportation plan or TIP. Projects in such areas are instead included in statewide transportation improvement programs. EPA notes, however, that some isolated rural areas may also include projects in the statewide transportation plan. Whatever the case, projects in isolated rural areas that are included in both the statewide plan and statewide TIP would be included in regional emissions analyses for the area consistent with § 93.109(l)(2)(i) of the final rule (formerly § 93.109(g)(2)(i)). Emissions analyses for these areas would also include any existing or planned regionally significant non-federal projects in the nonattainment or maintenance area.

EPA is finalizing these definitions to clarify how areas that are designated nonattainment or maintenance, but that are not within the planning boundary of any MPO's jurisdiction, should be considered for conformity purposes. In general, commenters agreed with these definitions. Two commenters, however, raised concerns about the proposed definition of ''donut areas.'' These commenters believed that the phrase ''that is dominated by a metropolitan area(s)'' that was included in the June 30, 2003 proposal to this final rule was confusing and ambiguous. For example, one commenter stated that this phrase introduces uncertainty about how rural areas that are in a separate nonattainment area, but adjacent to an MPO in a different nonattainment or maintenance area for the same pollutant, would be treated. The commenter claimed that the phrase ''is dominated by'' raises an unnecessary question about the status of such rural areas, and to address this issue, EPA should revise its definition to more closely follow standard practice.

After consideration of these comments, EPA agrees that the proposed definition for donut areas did not accurately reflect our intentions for how these areas should be defined. Therefore, in this final rule we have replaced the phrase ''is dominated by'' with the phrase ''contains any part of'' to clarify our intentions. Historically, EPA has always regarded donut areas as rural areas that are located in a nonattainment or maintenance area that also contains all or part of a metropolitan area. In contrast, isolated rural areas are located in nonattainment or maintenance areas that do not contain any part of a metropolitan area. We believe this simple change to the final rule definition better reflects how donut areas have been defined, in practice, and will ensure that rural areas are appropriately classified under the conformity regulations. EPA believes that a reproposal is not necessary to incorporate this minor change in today's final rule, as this clarification is consistent with EPA's original intentions and stakeholder's understanding of the proposed regulatory definitions.

B. Areas With Insignificant Motor Vehicle Emissions

EPA is finalizing two rule revisions to incorporate our existing insignificance policy in the conformity rule. First, we are adding a new provision, § 93.109(k), which applies to nonattainment and maintenance areas where EPA finds that the SIP's motor vehicle emissions for a pollutant or precursor for a given standard are an insignificant contributor to an area's regional air quality problem. This provision waives the regional emissions analysis requirements in §§ 93.118 and 93.119 for an insignificant pollutant or precursor in these areas upon the effective date of EPA's adequacy finding or approval of such a SIP. In addition, this provision waives the hot-spot requirements in §§ 93.116 and 93.123 in CO and PM_{10} areas if EPA also determines that the SIP demonstrates that potential localized hot-spot emissions are not a concern. Section 93.109(k) also establishes the minimum criteria that are necessary to demonstrate that motor vehicle emissions are insignificant, as described below.

Second, EPA is adding a new § 93.121(c) to the rule to address regionally significant non-federal projects in areas where EPA has found a pollutant or precursor to be regionally insignificant. The new § 93.121(c) allows regionally significant non-federal projects to be approved without being included in a regional emissions analysis for a pollutant or precursor that EPA has found insignificant, since such analyses will no longer be conducted. Sections 93.121(a) and (b) require that the emissions impacts of regionally significant non-federal projects be considered prior to project approval. However, a regional analysis is not required for a pollutant or precursor for a given standard that EPA has found insignificant. Consistent with the new § 93.109(k) for federal projects, the new § 93.121(c) provision allows a non-federal project to be approved, without a regional emissions analysis otherwise required per §§ 93.118 and/or 93.119, for a regionally insignificant pollutant or precursor.

Under this final rule and the existing policy, areas with insignificant regional motor vehicle emissions for a pollutant or precursor are still required to make a conformity determination that satisfies other relevant requirements including: timely implementation of TCMs in an approved SIP, interagency and public consultation, hot-spot requirements including the use of latest planning assumptions and emissions models in CO and PM_{10} areas (if EPA has not made a finding that such emissions are also not a concern), and compliance with SIP control measures in PM_{10} and $PM_{2.5}$ areas. Areas are also required to satisfy the regional emissions analysis requirements in §§ 93.118 and/or 93.119 for pollutants or precursors for which EPA has not made a finding of insignificance. For non-federal regionally significant projects, the requirements in either § 93.121(a) or (b) apply for any other pollutants or precursors for which the area is designated nonattainment or maintenance that are considered significant (*i.e.*, those pollutants or precursors that EPA has not determined to be insignificant at the regional level).

Rationale and Response to Comments

As described in the preamble to the November 5, 2003 proposal, EPA developed the insignificance policy to provide flexibility for areas where motor vehicle emissions had little to no impact on an area's air quality problem. EPA believes that requiring these areas to perform a regional emissions analysis is not necessary to meet Clean Air Act section 176(c) requirements that transportation actions not worsen air quality, since the overall contribution of motor vehicle emissions in these areas is small and thus any significant change in such emissions over time would be unlikely. To date, approximately a dozen areas have taken advantage of the insignificance policy, consisting mainly of PM_{10} areas with air quality problems caused primarily by stationary or area sources. This current universe of areas has not changed significantly since 1993, and we do not anticipate the number of areas that could demonstrate insignificance of regional motor vehicle emissions to substantially increase in the future. Therefore, the final rule waives the regional emissions analysis requirement in these areas without compromising air quality, since state and local resources could then be directed toward reducing emissions from those sources that do contribute the most to an area's air quality problem.

All who commented on insignificance supported incorporating our insignificance policy into the conformity rule. Commenters thought including the policy would help a limited number of areas, and one commenter specifically stated it would reduce burden without endangering air quality. One commenter requested that requirements for federal and non-federal projects be consistent in areas where EPA has found a pollutant or precursor to be insignificant. These requirements are in fact consistent under the final rule as explained above, because no regional emissions analysis is required for either type of project to be approved in these areas.

A few commenters suggested that the insignificance provisions should be expanded to apply with respect to the $PM_{2.5}$ standard. We want to clarify that they in fact do apply for the $PM_{2.5}$ standard. These insignificance provisions could apply to any standard for which conformity is determined, including $PM_{2.5}$.

Furthermore, the new §§ 93.109(k) and 93.121(c) are consistent with the provisions of the rule in §§ 93.102 and 93.119 that address insignificance of pollutants before and after a SIP is submitted. See Section IX. for final rule amendments that address when re-entrained road dust emissions are considered significant for $PM_{2.5}$ analyses.

A few commenters suggested EPA include additional elements in the conformity rule. One commenter, for example, asked that EPA provide a definition of insignificance, and guidance on how such a determination would be made. However, EPA believes that the final rule is sufficient to implement the insignificance provisions in that it incorporates our existing guidance from the proposal to the 1997 rule (July 9, 1996, 61 FR 36118) into § 93.109(k). Rather than a ''one-size-fits-all'' definition, EPA's existing policy as articulated in this and previous conformity rulemakings and the new § 93.109(k) gives EPA and the states the ability to examine whether motor vehicles are a significant contributor to regional and hot-spot air quality on a case-by-case basis, while still providing a framework for EPA's action. Another commenter suggested that the criteria for determining insignificance be expanded to include an area's impact on downwind areas. EPA does not believe a rule change is necessary to accommodate the concern of this commenter and thus is not changing the final rule in response to this comment. Again, EPA will look at SIPs that claim insignificance on a case-by-case basis consistent with the guidance provided in § 93.109(k), including their effects on downwind areas.

A third commenter expressed concern that motor vehicle emissions could go from insignificant to significant simply because a reduction of emissions from other source sectors results in motor vehicle emissions comprising a greater percentage of the area's total inventory. EPA recognizes that this may occur. Initial inventories and strategies to attain or maintain air quality standards may change over time. Any changes to the significance of motor vehicle emissions must be discussed through interagency consultation in SIP development.

This example also illustrates the reason EPA believes it is important to have flexibility in implementing this provision. Although the commenter specifically mentions 10% as the threshold for finding motor vehicle emissions insignificant, EPA clarifies that this figure is a general guideline only. Depending on the circumstances, we may find that motor vehicle emissions that make up less than 10% of an area's total inventory are still significant. Conversely, we may also find that motor vehicle emissions in excess of 10% are still insignificant, under certain circumstances relating to the overall composition of the air quality situation. In general, the percentage of motor vehicle emissions in the area's total inventory is an important criterion for determining whether motor vehicles are a significant or insignificant contributor to an area's air quality problem, yet there are other criteria that EPA will examine when

making this finding, as described in the regulatory text for § 93.109(k).

Another comment we received on this section was with respect to hot-spot analyses. The commenter suggested that if motor vehicles are found to be an insignificant contributor to regional PM_{10}, then hot-spot analyses should no longer be required in all cases. EPA disagrees with this comment, because a project could still cause a PM_{10} hot-spot even when motor vehicle emissions of PM_{10} are not regionally significant. For example, the projects listed in § 93.127 of the conformity rule are exempt from regional emissions analysis because it is recognized that these projects are unlikely to affect emissions on a regional scale, but the local effects of these projects with respect to CO or PM_{10} concentrations must still be considered to determine if a hot-spot analysis is required.

Finally, we received several comments that insignificance should be addressed during the SIP development process with full opportunity for interagency consultation. EPA agrees with these commenters: as we said in the preamble to the November 5, 2003 proposal, it is appropriate that the claim of insignificance be reviewed via the interagency consultation process during the development of the SIP. If it is determined that regional and/or hot-spot motor vehicle emissions are insignificant, such a finding should be clearly stated and well supported in a SIP that is subsequently submitted to EPA for adequacy review and/or approval. We anticipate that interagency consultation regarding insignificance will occur as a result of the requirement for consultation on the development of the SIP in § 93.105(b) of the conformity rule. Further, the public will have appropriate opportunities to comment on proposed findings of insignificance in the process of both state adoption, EPA SIP approval and adequacy finding of submitted SIPs.

C. Limited Maintenance Plans

EPA is finalizing three rule revisions that would make the conformity rule consistent with EPA's existing limited maintenance plan policies for the 1-hour ozone, CO, and PM_{10} standards. Today's rule revisions also allow for any future limited maintenance plan policies for other standards to be considered in the conformity process. In general, a limited maintenance plan policy allows a nonattainment area with air quality that is significantly below a standard to request redesignation through a more streamlined maintenance plan. EPA received no comments on its proposed conformity revisions for limited maintenance plan areas.

First, EPA is adding a basic definition for ''limited maintenance plan'' to § 93.101 of the conformity rule. Second, we are including a new paragraph § 93.109(j) that states that a regional emissions analysis is not required to satisfy §§ 93.118 and/or 93.119 for pollutants in areas that have an adequate or approved limited maintenance plan for a given pollutant and standard. However, a conformity determination that meets other applicable criteria, including the hot-spot requirements for projects in CO and PM_{10} nonattainment and maintenance areas, interagency and public consultation, and timely implementation of TCMs in an approved SIP, is still required in these areas. A regional analysis also is required for any other pollutants or standards that otherwise apply but which are not the subject of a limited maintenance plan. The new § 93.109(j) requires a limited maintenance plan recognized under the conformity rule to have demonstrated that it would be unreasonable to expect that an area would experience enough motor vehicle emissions growth to cause a violation. The interagency consultation process should be used to discuss the development of a limited maintenance plan SIP (40 CFR 93.105(b)).

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

Based on the criteria for approving limited maintenance plans, EPA believes that violations of a standard for a pollutant due to unexpected regional growth would be highly unlikely in limited maintenance plan areas, although hot-spot violations could still occur. Furthermore, EPA considers it a reasonable assumption that motor vehicle emissions in an area that qualifies for a limited maintenance plan could increase to any realistic level during the maintenance period without causing or contributing to a violation of the standard. As a result, the budgets in limited maintenance plans are treated as essentially not constraining for the length of the maintenance period, and EPA believes that the Clean Air Act requirements to not worsen air quality are met presumptively without a regional conformity analysis. While this policy does not exempt an area from the need to determine conformity, it does eliminate the need for the regional emission analysis since EPA would be concluding through our adequacy review or approval of the limited maintenance plan that limits on motor vehicle emissions during the maintenance period are unnecessary, as long as the area maintains the standard.

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

For more information on transportation conformity and limited maintenance plans, see the preamble to the July 9, 1996 proposed conformity rule (61 FR 36118) and EPA's existing limited maintenance plan policies, which are available in the docket for this rulemaking as listed in Section I.B.1. For a discussion on EPA's adequacy review of limited maintenance plans, see the preamble to the June 30, 2003 proposal (68 FR 38974).

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

EPA is finalizing three changes to the conformity rule to clarify when more rigorous transportation modeling and plan content requirements apply when circumstances change in certain ozone and CO areas. Today's rule revisions do not make any changes to the existing transportation plan content and modeling requirements.

First, EPA is providing a two-year grace period in § 93.122(c) before the more advanced transportation modeling requirements in § 93.122(b) are required in the following types of nonattainment areas or portions of such areas that are

not already required to meet these provisions:

- Ozone and CO areas that have an urbanized area population over 200,000 and are reclassified to a serious or higher classification (*e.g.,* such a moderate ozone area that is reclassified to serious);
- Serious and above ozone and CO areas in which the urbanized area population increases to over 200,000; and
- Newly designated ozone and CO nonattainment areas that are classified as serious or above in which the urbanized area population is over 200,000.

EPA is clarifying in the final rule that the grace period covers areas or portions of areas that need additional start-up time to meet new requirements, as described further below.

Second, EPA is expanding the types of areas covered by the current rule's grace period for transportation plan content requirements. Under the previous rule, § 93.106(b) provided a two-year grace period before the more specific transportation plan requirements in § 93.106(a) applied in moderate ozone and CO areas that were reclassified to serious and had urbanized populations over 200,000. EPA crafted the rule that way because it believed at the time that only such areas would need additional time to implement the more sophisticated transportation planning requirements. Today's final rule provides that same flexibility to nonattainment areas or portions of areas that are not already required to meet these requirements and are:

- Ozone areas that have an urbanized area population over 200,000 that are reclassified to a serious or higher classification (*e.g.,* such a moderate ozone area that is reclassified to serious),
- Serious and above ozone and CO areas in which the urbanized area population increases to over 200,000; and
- Newly designated ozone and CO nonattainment areas that are classified as serious or above in which the urbanized area population is over 200,000.

EPA is clarifying the final rule so that these types of areas and portions of such areas which will also need time to implement newly applicable planning requirements are explicitly covered by the grace period, as originally intended.

Third, EPA is clarifying in both §§ 93.106(b) and 93.122(c) that the two-year grace periods begins upon either the:

- Effective date of EPA's action that reclassifies an ozone or CO area with an urbanized area population over 200,000, to a serious or higher classification,
- Official notice by the Census Bureau that the urbanized area population is over 200,000, or
- Effective date of EPA's action that initially designates an area as a serious or above ozone or CO nonattainment area.

An example of an official notice by the Census Bureau would be an announcement in the **Federal Register** that the urbanized population in a metropolitan area has increased to over 200,000.

Rationale and Response to Comments

In general, several commenters supported the two-year grace period as proposed, because it will allow additional time to meet new requirements when applicable. EPA is promulgating these rule revisions to provide flexibility as originally intended. For the reasons stated in the November 5, 2003 proposal (68 FR 62717–8), EPA believes the final rule achieves the appropriate flexibility by providing the grace period to all areas or portions of areas that become newly subject to these requirements, but need start-up time because they have not previously been subject to these requirements. In addition, EPA originally intended §§ 93.106 and 93.122 of the conformity rule to work together to provide start-up time when circumstances change, and providing a two-year grace period for both the plan content and modeling requirements achieves this goal.

EPA is clarifying that the grace period will apply in portions of nonattainment areas, rather than entire areas, that are newly affected and are then required to meet the more rigorous requirements. For example, if a serious 8-hour nonattainment area is designated and includes additional counties to those within the previous serious 1-hour nonattainment area, the grace period would only apply to those additional counties.

In addition, the final rule clarifies how the grace period applies in newly designated 8-hour ozone nonattainment areas, or portions of such areas, that are initially classified as serious or above with an urbanized area population over 200,000, and that have not previously been subject to §§ 93.106(a) and 93.122(b) requirements. EPA believes that it has good cause to finalize a grace period for these newly designated areas, even though the proposal did not specifically propose to provide the grace period to such areas. EPA intended the grace period to apply to these newly designated areas as well, since it is reasonable that such an area, or portion of such an area, would also need additional time to specify its networks and gather additional data to develop a more specific plan and conduct more advanced transportation modeling. Requesting further public comment on this detail is unnecessary, since EPA believes it has already received any comments that would have been submitted on such a minor clarification. Consistent with the intention and spirit of the proposal, EPA has clarified the final regulatory language to provide the grace period in these areas.

One commenter believed that allowing a two-year grace period for the development of regional transportation plans is not reasonable for areas that were already subject to this requirement because they have previously been designated serious or above. An example of this case would be an 8-hour ozone area classified as moderate that was previously classified as serious under the 1-hour ozone standard. The commenter argued that Clean Air Act section 176(c)(6) requires that these areas continue to be subject to the requirements that applied under the ''preexisting'' air quality standard.

EPA agrees with the commenter that areas that were previously subject to more rigorous transportation plan content and modeling requirements should continue to meet them. EPA did not intend to change this aspect of the existing rule with the proposal. Sections 93.106(c) and 93.122(d) (formerly § 93.122(c)) already require that if it had been the previous practice of MPOs to meet these requirements, they must continue to do so. In response, EPA has revised the final rule language to clarify that the grace period does not apply to those areas, or portions of such areas, that are already required to meet these requirements for an existing NAAQS.

Another commenter supported EPA's proposal, but noted that some transportation legislative proposals may change the transportation plan and TIP update intervals. This commenter suggested that EPA synchronize the grace period with the plan and TIP update periods to reduce the overall workload for planning agencies.

EPA recognizes that Congress is currently considering various proposals for surface transportation reauthorization, which may amend transportation planning and/or transportation conformity provisions. However, EPA cannot promulgate regulations now against possible future statutory changes. We must promulgate regulations in light of the current law.

If changes to the transportation planning and conformity processes are passed into law, and those changes necessitate a regulatory change, EPA will propose and promulgate appropriate amendments to the rule at that time.

In a similar light, a few other commenters stated that they opposed EPA's proposal because they believed that the grace period should be aligned with the transportation plan 3-year update cycle. They believed that such a grace period would be more adequate.

EPA did not propose to change the length of the grace period, which was originally finalized as part of the November 24, 1993 conformity rule (58 FR 62188). EPA continues to believe that two years is an adequate time to meet applicable requirements. EPA must balance the benefits achieved by meeting the plan and modeling requirements, with the time needed to specify networks and perform the other data and collection activities necessary to develop network models and specific plans. See the preamble in the proposal for that rulemaking (January 11, 1993, 58 FR 3776) for a discussion on the length of the two-year grace period. EPA continues to believe that a two-year period is an appropriate time span to accommodate these dual goals.

EPA also intends to provide a full two-year grace period in all cases. The commenters' suggestion would result in a shorter grace period in cases where an area is covered by the new regulation in the middle of the plan update cycle. For example, suppose an area updates its plan in 2009, and receives official notice in 2011 from the Census Bureau that its population has increased above 200,000, based on the 2010 census. Under commenters' suggestion that the grace period correspond to the plan update cycle, this area would have only one year to implement the transportation plan content and modeling requirements because its plan update and conformity determination, required every three years, would be due in 2012. EPA does not believe this would provide sufficient time for such an area to implement the plan content and modeling requirements.

In cases of areas increasing in population, several commenters believed that the grace period should begin when DOT notifies an area of the change in population, rather than upon the Census Bureau's official notification in the **Federal Register**. They believed that such a change would allow for a more stable planning process and a more reliable start to the grace period.

EPA disagrees with this approach for the following reasons. First, DOT does not issue formal notifications for all urbanized area definitions and changes. This is a Census Bureau function, and only the Census Bureau issues these notices. Although DOT issues a formal notice on the designation of transportation management areas (TMAs), this notification does not necessarily mean that the transportation plan content and modeling requirements in the conformity rule apply. Although most TMAs correspond to urbanized areas over 200,000 in population, DOT may also designate TMAs for certain areas under 200,000 population, at the request of the Governor of a State. As described above, the current rule is based on urbanized area population, rather than TMA status. Therefore, changing the plan and modeling requirements to align with TMA designations may unintentionally apply these requirements to additional areas. Therefore, EPA is finalizing the rule as proposed, utilizing the Census Bureau's notification as the starting date for the grace period.

Finally, one commenter who also supported the proposal requested further information regarding the selection of 200,000 as the threshold population. The 200,000 population threshold was finalized as part of the August 15, 1997 conformity rule (62 FR 43780). The preamble in the proposal for that rulemaking (July 9, 1996, 61 FR 36122) discussed EPA's rationale to limiting these requirements to areas with urbanized area populations over 200,000. In general, EPA chose the 200,000 population level because it is also the population level used to delineate transportation management areas (TMAs), and because this limitation would ensure that smaller urban or rural areas would not be subject to more rigorous network modeling procedures and methods. EPA continues to believe that the 200,000 level in urbanized areas is appropriate for the plan content and modeling requirements. EPA did not propose any changes to the 200,000 urbanized population level in this rulemaking, and this final rule does not amend this threshold established in the 1997 rulemaking.

E. Minor Clarification to the List of PM_{10} Precursors

Today's final rule clarifies the list of PM_{10} precursors in §§ 93.102(b)(2)(iii) and 93.119(f)(5) of the conformity rule. Under the revised § 93.102(b)(2)(iii), only VOC and NO_X are identified as PM_{10} precursors; *i.e.*, PM_{10} is deleted from the list of PM_{10} precursors in this paragraph. We are finalizing this clarification because § 93.102(b)(1) already requires that direct PM_{10} emissions be addressed in conformity analyses in PM_{10} nonattainment and maintenance areas. Therefore, inclusion of direct PM_{10} as a PM_{10} precursor in § 93.102(b)(2)(iii) is duplicative.

The revisions to § 93.119(f)(5) provide consistency with other pollutants and precursors discussed in this paragraph. Neither of these rule changes will affect conformity determinations in PM_{10} nonattainment and maintenance areas.

EPA received two comments on this clarification to the rule. Both commenters supported the change because it eliminates a source of confusion in the rule's references to PM_{10} and clarifies the requirements of the rule. One of these commenters requested that EPA further clarify a number of additional terms. EPA does not agree that further changes to the rule are required, since these terms are not used in the proposal for this final rule. Please see a more detailed response in the response-to-comments document for this rulemaking in our docket.

F. Clarification of Requirements for Non-Federal Projects in Isolated Rural Areas

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

Today's revision to 93.121(b)(1) is intended to clarify that conformity determinations in isolated rural nonattainment and maintenance areas should not be ''for'' the statewide transportation plan or STIP, as written in the previous rule. In the proposal for the original 1993 conformity rule, we explained that ''STIPs are not TIPs as the latter term is meant in Clean Air Act section 176(c), and that conformity therefore does not apply to [STIPs] directly'' (January 11, 1993, 58 FR 62206). However, isolated rural areas do not develop metropolitan transportation plans and TIPs per DOT's planning regulations. Instead, conformity determinations in isolated rural nonattainment and maintenance areas should include those existing and planned projects that are within the area and that are reflected in the statewide

transportation plan and STIP, as well as any other regionally significant projects. This rule change simply clarifies the conformity requirements for isolated rural nonattainment and maintenance areas and should not have a practical impact on how conformity is demonstrated in these areas.

EPA received one comment on this clarification to the rule. The commenter stated that as written the rule would allow regionally significant non-federal projects to be approved even if the most recent conformity determination for a plan and TIP was not approved. The commenter also indicated that EPA must change the rule to require that such approvals only occur when non-federal projects are included in a conformity determination for a conforming plan and TIP.

EPA agrees that regionally significant non-federal projects in isolated rural areas can only be approved if they have been included in a regional emissions analysis supporting the most recent conformity determination for the nonattainment or maintenance area or if they have been included in a regional emissions analysis showing that the area would continue to conform consistent with the requirements of §§ 93.118 and/or 93.119 for projects not from a conforming transportation plan and TIP. We agree that the term ''most recent conformity determination'' refers to the most recent conformity determination that has been made by U.S. DOT. However, we do not agree that the rule needs to be revised to address the commenter's concern that a regionally significant non-federal project could be approved even if the most recent conformity determination has not been approved. EPA promulgated this part of the regulatory text for isolated rural areas in 1997, and EPA did not propose a change through this rulemaking. EPA understands that in practice, areas have always interpreted this provision to refer to approved conformity determinations. Therefore, we believe that the regulated community understands that ''most recent conformity determination'' applies to the most recent approved determination since we are not aware that language in the rule has resulted in any issues or problems.

The commenter also asserted that non-federal projects can only be approved if they are included in a conformity determination for a conforming TIP and plan. We disagree with the commenter's assertion as it pertains to the approval of regionally significant non-federal projects in isolated rural areas. Isolated rural areas are not required to prepare TIPs and plans. Only metropolitan areas are required to prepare these documents. Therefore, regionally significant non-federal projects in isolated rural projects may be approved as long as they meet the requirements of § 93.121(b)(1) or (2), which are described above. That is, although emissions from the project would be included in emissions analyses, the projects themselves would not require conformity determinations.

G. Use of Adequate and Approved Budgets in Conformity

As described in the June 30, 2003 and November 5, 2003 proposals to this final rule, EPA proposed to clarify in § 93.109 for each criteria pollutant and standard that the budget test must be satisfied as required by § 93.118 for conformity determinations made on or after any one of the following:

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

Under this final rule change, the budget would be used in any conformity determination conducted after the first time one of these three EPA actions occurs. See Section XV. for further information.

H. Budget Test Requirements for the Attainment Year

In this final rule, EPA is clarifying how § 93.118(b) and (d) should be implemented when a budget is established for a year prior to the attainment year (*e.g.,* a reasonable further progress budget). Specifically, we are amending § 93.118(b) so that once an area has any control strategy SIP budget available for conformity purposes, conformity must be demonstrated using the ''budget test'' for the attainment year if the attainment year is within the time frame of the transportation plan. EPA believes that it is always appropriate to conduct a budget test for the attainment year if it is within the time frame of the transportation plan and an applicable control strategy budget is established, as explained in the June 30, 2003 proposal. Areas should use the interagency consultation process to determine the appropriate years for which the budget test must be performed. EPA received no comments on this proposed revision to the conformity rule.

I. Budget Test Requirements Once a Maintenance Plan Is Submitted

EPA is also finalizing two minor changes to § 93.118(b)(2) to clarify which budgets apply when an area has both control strategy SIP and maintenance plan budgets. First, EPA is clarifying § 93.118(b)(2)(iii) so that when a maintenance plan has been submitted, the budget test is also completed for a submitted adequate control strategy SIP budget that is established for any year within the time frame of the transportation plan. The previous § 93.118(b)(2)(iii) explicitly required areas with submitted maintenance plans to show consistency only to approved control strategy SIPs, but not adequate control strategy SIPs. Today's action will ensure that new transportation plans and TIPs conform to all adequate and approved budgets that are established for years within the time frame of the transportation plan.

Second, we are adding § 93.118(b)(2)(iv) to clarify that the budget(s) established for the most recent prior year must be used for any analysis years that are selected before the last year of the maintenance plan to meet the requirements of § 93.118(d)(2). The previous conformity rule did not explicitly cover the situation where an analysis year is selected before the last year of the maintenance plan. The final rule provides consistency between the budget test requirements for control strategy SIPs and maintenance plans, since today's § 93.118(b)(2) language for maintenance plans mirrors language that already exists in § 93.118(b)(1) for control strategy SIPs. If an area analyzes a year for which no applicable budgets exist (*e.g.,* an intermediate year between an area's attainment year and the first maintenance budget year), the area should always use the most recent prior adequate or approved budget to demonstrate conformity. This rationale also applies in areas that are submitting their second required 10-year maintenance plan.

EPA received several comments requesting further clarification of our proposed revisions to § 93.118(b)(2). First, one commenter believed that the addition of § 93.118(b)(2)(iv) that requires conformity to prior budgets preempted the requirements for a qualitative finding under § 93.118(b)(2)(i). This commenter asked that the preamble explain under what circumstances a qualitative finding would be appropriate.

Section 93.118(b)(2)(i) states that when a maintenance plan is submitted that does not establish budgets for any years other than the last year of the

maintenance plan, a qualitative finding must be made to ensure that there are no factors which would cause or contribute to a new violation or exacerbate an existing violation in the years before the last year of the maintenance plan. In our July 9, 1996 proposal, we stated our conclusion that a ''qualitative finding is necessary if the budget only addresses the last year of the maintenance plan, because the budget test alone is not sufficient to determine, as required by the Clean Air Act, that the transportation action will not cause a new violation. The emissions impacts in the initial ten years of the maintenance plan must be considered in some manner in order to determine conformity.''

EPA still believes that a qualitative finding is necessary in all cases where a maintenance plan establishes budgets only for the last year of the 10-year maintenance period. However, we also believe that a regional emissions analysis and budget test using a previously established budget for a year prior to the last year of a maintenance plan, pursuant to § 93.118(b)(2)(iv), may fulfill the requirement for a qualitative finding in certain cases where the analysis is done for a year early in the term of the maintenance plan. Areas should use the interagency consultation process to determine the specific basis and necessary level of analysis to meet the qualitative finding requirement under § 93.118(b)(2)(i) as described in the June 1996 rulemaking.

Another commenter stated that the proposed revisions to § 93.118(b)(2) do not clearly reflect their understanding that a budget established for a year beyond the time frame of a SIP (*i.e.,* an ''outyear'' budget) may be greater than the budgets established for a reasonable further progress, attainment or maintenance year. This commenter appears to have misinterpreted § 93.118(b)(2)(iii) and (iv), as EPA did not intend for these provisions to mean that budgets established for any years within the time frame of the transportation plan (*e.g.,* outyear budgets) must be less than or equal to a control strategy or maintenance plan budget. EPA intended for the phrase ''emissions * * * must be less than or equal'' to refer to the emissions projected from planned and existing transportation activities in a specific analysis year for the conformity analysis that would be compared to an applicable control strategy or maintenance plan budget. EPA agrees that budgets apply only for the year they are established and for any future analysis years up until the next future budget year. Areas may submit larger budgets for outyears so long as they demonstrate that the SIP continues to provide for attainment or maintenance of the relevant air quality standard in those years.

Finally, one commenter requested that EPA clarify the regional emissions analysis requirements in § 93.118(b) and (d) so that conformity to the applicable motor vehicle emissions budgets will continue to be affirmatively demonstrated during each of the years between budget years and not just for years in which the budget test is required. The commenter suggested that if regional emissions analyses are conducted for a budget year and a subsequent year during the time frame of the transportation plan, and both analyses are consistent with the SIP, then emissions in intervening years can be assumed to conform. However, if such analyses are not conducted and shown to conform in this manner (*e.g.,* when the first analysis year is chosen for a year some time after the first applicable budget), the commenter believed a more targeted analysis is required to ensure conformity in intervening years. By not addressing this alleged deficiency in the rule, the commenter believed that EPA has failed to include the clarification in § 93.118(b) and (d) most needed to serve the purposes of the Clean Air Act.

EPA disagrees with this commenter and believes that the current rule's budget test and regional emissions analysis requirements in § 93.118(b) and (d) are adequate for ensuring that transportation plans, programs and projects meet the conformity requirements of the Clean Air Act. Clean Air Act section 176(c) specifically requires emissions from transportation activities to be consistent with the motor vehicle emissions limits established in the SIP. However, the Clean Air Act is ambiguous about the specific time frame or years in which emissions tests or analyses must be conducted. In the 1993 conformity rule (58 FR 62188), EPA concluded as a legal matter that a demonstration of conformity for specific budget test years reasonably spaced over the time frame of the transportation plan is sufficient for meeting the Clean Air Act requirements and ensuring that emissions from transportation activities do not cause violations, worsen existing violations or delay timely attainment of the air quality standards.

Furthermore, conducting conformity determinations and regional emissions analyses in accordance with the current rule's requirements demands a significant amount of time and state and local resources. EPA believes it would be impractical and overly burdensome to require MPOs and state DOTs to conduct a budget test and regional emissions analysis for additional years within the time frame of a 20-year transportation plan than are already required. Based on EPA's interpretation of the Clean Air Act since 1993, we believe that the current rule's budget test and emissions analysis year requirements are consistent with the statute, reasonable to implement, and protective of public health. Moreover, EPA did not propose to alter this interpretation and thus, has not re-opened this aspect of the conformity rule in this rulemaking.

J. Exempt Projects

Finally, we are making a minor revision to the list of exempt projects in § 93.126 of the conformity rule. On December 21, 1999, DOT published a rule revision to its right-of-way regulation (64 FR 71284) that changed the citation for emergency or hardship advance land acquisitions (revised citation: 23 CFR 710.503) — activities that are currently exempt from the conformity process. As a result, we are revising § 93.126 to make the conformity rule fully consistent with DOT's December 1999 rulemaking. This proposed revision in no way expands or reduces the types of land acquisitions that are exempt from transportation conformity; it merely updates the conformity rule's reference to be consistent with DOT's regulations.

Commenters supported EPA's proposal to make the conformity regulations consistent with DOT's right-of-way regulations. However, one commenter asked EPA to broaden its revisions to the conformity rule's list of exempt projects. This commenter believed that the current list of exempt projects does not fully reflect all the types of projects that should be exempt from conformity, given the progress over the last decade in understanding the real-world air quality impacts of different types of transportation projects.

EPA did not propose amendments or clarifications to the list of exempt projects in §§ 93.126, 93.127 and 93.128, and therefore, cannot address the changes this commenter has suggested. Areas should use the interagency consultation process, including consultation with EPA, FHWA and FTA, to determine which projects in the area's transportation plan and TIP should be considered exempt under §§ 93.126, 93.127 and 93.128 of the rule.

XXIV. Comments Not Related to Rulemaking

Several commenters offered suggestions or raised concerns about aspects of the transportation conformity program that are not germane to this specific rulemaking. These aspects included the process for revising outyear SIP budgets; implementation of EPA and DOT's April 9, 2000 Memorandum of Understanding; reauthorization of the Surface Transportation Act, currently entitled Transportation Equity Act for the 21st Century (or TEA–21), and other topics. These comments do not affect whether EPA should proceed with this final action. Because these comments are not germane to this action, EPA has not responded substantively to them.

In addition, two commenters urged EPA to publish the entire conformity regulatory text when we issued today's final rule. These commenters stated that publication of the entire rule would make the regulation easier to understand and implement. In response to this comment, EPA will provide a complete version of the conformity regulations that includes today's final rule on our transportation conformity website listed in Section I.B.2. of this notice. Individuals can also obtain a copy of the conformity regulations that incorporate today's rule amendments from the next codification of the *U.S. Code of Federal Regulations* after this final rule is published in the **Federal Register**. A complete response to comments document is in the docket for this rulemaking. See Section I.B.2. of this final rule for more information regarding the relevant dockets and how to access additional information associated with this final rule.

XXV. How Does Today's Final Rule Affect Conformity SIPs?

Clean Air Act section 176(c)(4)(C) currently requires states to submit revisions to their SIPs to reflect all of the federal criteria and procedures for determining conformity. States can choose to develop conformity SIPs as a memorandum of understanding (MOU), memorandum of agreement (MOA), or state rule. However, a state must have and use its authority to make an MOU or MOA enforceable as a matter of state law, if such mechanisms are used. Section 51.390(b) of the conformity rule specifies that after EPA approves any conformity SIP revision, the federal conformity rule no longer governs conformity determinations (for the sections of the federal conformity rule that are covered by the approved conformity SIP).

EPA would like to clarify when provisions of today's final rule apply in nonattainment and maintenance areas with and without EPA-approved conformity SIPs:

- All provisions relating to the new standards apply immediately in all nonattainment and maintenance areas upon the effective date of today's action because no prior conformity rules (or approved conformity SIPs) address these new standard requirements.
- All amendments that address provisions directly impacted by the March 2, 1999 court decision apply immediately in all nonattainment and maintenance areas upon the effective date of today's action. Although some areas have conformity SIPs that were approved prior to March 1999, provisions included in these SIPs that the court subsequently remanded to EPA for further rulemaking are no longer enforceable by law. As a result, all areas, including those with a previously approved conformity SIPs, have been operating under EPA and DOT's guidance that implements the court decision and will be governed by the relevant court-related provisions of today's action when they become effective.
- In some areas, EPA has already approved conformity SIPs that include other provisions from previous conformity rulemakings that EPA is revising in this final rule. In these areas, the Clean Air Act prohibits today's federal rule amendments that are not a direct result of the March 1999 court decision or specifically related to the new standards (*e.g.*, streamlining the frequency of conformity determinations; revision to the latest planning assumptions requirement) from superceding the previously approved state rules. Therefore, these specific rule amendments will be effective in areas with approved conformity SIPs that include related rule provisions only when the state includes them in a SIP revision and EPA approves that SIP revision. EPA has no authority to disregard this statutory requirement for those portions of today's final rule.
- Areas without any approved conformity SIPs will be able to use immediately all of the conformity amendments that are included in today's final rule.

EPA will provide further guidance on when sections of the conformity rule can be used in the conformity process in areas with approved conformity SIPs to assist states in implementing these provisions. This guidance will be posted on EPA's transportation conformity Web site listed in Section I.B.2. of today's final rule.

One commenter did not agree that areas with approved conformity SIPs should have to revise their SIP before provisions of the final rule become effective. The commenter argued that this requirement penalizes areas with approved conformity SIPs and poses an undue burden on these areas to develop and gain EPA's approval of a SIP revision.

EPA believes that this commenter misunderstood the proposal which stated that amendments that address specific conformity requirements for the new standards can be used by all areas upon the effective date of today's final rule, whether or not an area currently has an approved conformity SIP addressing pre-existing standards. This is possible since specific conformity requirements for the new standards should not be included in any currently approved conformity SIPs.

However, amendments in today's final rule that are for sections of the federal rule that are not specifically related to the new standards and that are not affected by a March 1999 court decision finding certain provisions illegal become effective in states with approved conformity SIPs only when the state includes the amended section in a conformity SIP revision and EPA approves that SIP revision. This is because such provisions of the federal rule that are being changed no longer apply directly in states with approved conformity SIPs covering those provisions. EPA will work with states to approve such revisions as expeditiously as possible through flexible administrative techniques, such as parallel processing or direct final rulemaking. EPA's further guidance, as described above, will assist in conformity SIP revisions for today's final rule.

This same commenter supported a process such as that proposed in the Administration's SAFETEA legislation that would streamline the conformity SIP requirement so that only interagency consultation requirements would need to be included in such SIP revisions. EPA supports this legislation, and if it becomes law, EPA agrees that the conformity SIP requirement will be significantly streamlined without practically affecting the conformity process. However, until such legislation is adopted, EPA is bound by the current Clean Air Act, and § 51.390 of the conformity rule continues to apply for conformity SIP revisions for this final rule.

One commenter requested that EPA coordinate the finalization of the rulemakings that address the new standards and the March 1999 court

decision so that area's will only need to revise their conformity SIPs once. Coordinating the release of the two final rules will assist in using state resources most efficiently and avoid duplication. EPA agrees with this commenter, and recommends that state and local air agencies should address both rulemakings in the same conformity SIP revision, since today's final rule combines the majority of the conformity provisions from the previously separate rulemakings.

XXVI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

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

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities;

(2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Under the terms of Executive Order 12866, it has been determined that amendments in this rule that are related to conformity under the new air quality standards are a ''significant regulatory action.'' As such, this action was submitted to OMB for E.O. 12866 review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

B. Paperwork Reduction Act

The information collection requirements for this final rule will be submitted for approval to the Office of Management and Budget (OMB) under the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* and as ICR 2130.02. The information collection requirements are not enforceable until OMB approves them.

Transportation conformity determinations are required under Clean Air Act section 176(c) (42 U.S.C. 7506(c)) to ensure that federally supported highway and transit project activities are consistent with (''conform to'') the purpose of the SIP. Conformity to the purpose of the SIP means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment of the relevant air quality standards. Transportation conformity applies under EPA's conformity regulations at 40 CFR 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.

Amendments in today's final rule that are related to conformity requirements in existing nonattainment and maintenance areas do not impose any new information collection requirements from EPA that require approval by OMB under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* An agency may not conduct or sponsor, and a person is not required to respond to a collection of information, unless it displays a currently valid OMB control number. The information collection requirements of EPA's existing transportation conformity rule and any revisions in today's action for existing areas are covered under the DOT information collection request (ICR) entitled, ''Metropolitan and Statewide Transportation Planning,'' with the OMB control number of 2132–0529.

EPA provided two opportunities for public comment on the incremental burden estimates for transportation conformity determinations under the new 8-hour ozone and $PM_{2.5}$ standards. First, the November 5, 2003 proposal contained an initial annual burden estimate for conducting conformity determinations of $6,750 and 275 hours for each metropolitan area designated nonattainment for the first time for the 8-hour ozone and $PM_{2.5}$ standards (*e.g.*, areas that have never been subject to transportation conformity for any standard). EPA refined this burden estimate in the ICR that it released for public comment on January 5, 2004 (69 FR 336). As described in the January 2004 ICR (ICR 2130.01), the estimated annual state and local burden for conformity activities in each metropolitan nonattainment area that is expected to incur additional burden under the new ozone and $PM_{2.5}$ standards is estimated at 325 hours/year at a cost of $16,320/year. Additional federal burden associated with conformity for each of these metropolitan nonattainment areas is approximately 127 hours/year at a cost of $6,400/year. Average state and local burden associated with conformity for each isolated rural nonattainment area that incurs new burden under the new standards is 42 hours/year at a cost of $2,111/year. New federal burden associated with each of these areas is calculated to be 10 hours/year at a cost of $503/year.

EPA received comments on both the initial burden estimates provided in the November 5, 2003 proposal and on the revised estimates in the January 2004 ICR. EPA will respond to all of these comments in the final ICR that will be submitted to OMB for approval (ICR 2130.02).

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

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. When ICR 2130.02 is approved by OMB, the Agency will publish a technical amendment to 40 CFR part 9 in the **Federal Register** to display the OMB control number for the approved information collection requirements contained in this final rule.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires the Agency to conduct a regulatory flexibility analysis of any significant impact a rule will have on a substantial number of small entities. Small entities include small businesses,

small not-for-profit organizations and small government jurisdictions.

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 which 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 to state, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this final rule does not contain a federal mandate that may result in expenditures of $100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year. The primary purpose of this rulemaking is to amend the existing federal conformity regulations to cover areas newly designated nonattainment under the recently promulgated 8-hour ozone and $PM_{2.5}$ air quality standards. Clean Air Act section 176(c)(5) requires the applicability of conformity to such areas as a matter of law one year after nonattainment designations. Thus, although this rule explains how conformity should be conducted, it merely implements already established law that imposes conformity requirements and does not itself impose requirements that may result in expenditures of $100 million or more in any year.

This rulemaking also formalizes what the U.S. Court of Appeals for the District of Columbia Circuit has already decided as a legal matter, and that is currently being implemented in practice. Additional rule amendments also addressed in this final rule simply serve to improve the conformity regulation by implementing the rule in a more practicable manner and/or to clarify conformity requirements that already exist. None of these rule amendments impose any additional burdens beyond that already imposed by applicable federal law; thus, today's final rule is not subject to the requirements of sections 202 and 205 of the UMRA and EPA has not prepared a statement with respect to budgetary impacts.

E. Executive Order 13132: Federalism

Executive Order 13132, Federalism (64 FR 43255, August 10, 1999), revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with state and local officials early in the process of developing the regulation. EPA also may not issue a regulation that has federalism implications and that preempts state law unless the Agency consults with state and local officials early in the process of developing the proposed regulation.

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

This final rule, that amends a regulation that is required by statute, will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The Clean Air Act requires conformity to apply in certain nonattainment and maintenance areas as a matter of law, and this final rule merely establishes and revises procedures for transportation planning entities in subject areas to follow in meeting their existing statutory obligations.

In addition, the U.S. Court of Appeals for the District of Columbia Circuit has determined that projects requiring federal approval and funding are affected when a nonattainment or

maintenance area is unable to demonstrate conformity. Specifically, under Clean Air Act section 176(c) those phases (NEPA approval, right-of-way acquisition, final design, or construction) in a federal project's development that have not received federal approval or funding prior to a conformity lapse cannot be granted approval or funding, and thus proceed during a conformity lapse. Furthermore, the court directed EPA to establish new procedures for determining the adequacy of motor vehicle emissions estimates before such estimates can be used in conformity determinations to comply with Clean Air Act requirements. Similarly, other amendments included in this final rule are the result of either the court's order concerning the proper interpretation of the Clean Air Act and other related administrative matters, or have been proposed simply to make the rule more workable and/or to clarify requirements that already exist under the current conformity regulation.

In summary, this final rule is required primarily by the statutory requirements imposed by the Clean Air Act, and the final rule by itself will not have a substantial impact on states. Thus, the requirements of section 6 of the Executive Order do not apply to this final rule.

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

Executive Order 13175: ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 6, 2000) requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.''

Today's amendments to the conformity rule do not significantly or uniquely affect the communities of Indian tribal governments, as the Clean Air Act requires transportation conformity to apply in any area that is designated nonattainment or maintenance by EPA. Specifically, this final rule incorporates into the conformity rule provisions addressing newly designated nonattainment areas subject to conformity requirements under the Act, the court's interpretation of the Act, as well as several other clarifications and improvements, that have no substantial direct effects on tribal governments, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes, as specified in Executive Order 13175. Accordingly, the requirements of Executive Order 13175 are not applicable to this rulemaking.

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 final rule is not subject to Executive Order 13045 because it is not economically significant within the meaning of Executive Order 12866 and does not involve the consideration of relative environmental health or safety risks.

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

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

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law No. 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

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

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. The EPA will submit this final 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 final rule in the **Federal Register**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective on August 2, 2004.

K. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by August 30, 2004. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review, nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such a rule or action. This action may not be challenged later in proceeding to enforce its requirements. (*See* section 307(b)(2) of the Administrative Procedures Act.)

List of Subjects in 40 CFR Part 93

Environmental protection, Administrative practice and procedure, Air pollution control, Carbon monoxide, Inter governmental relations, Nitrogen Dioxide, Ozone, Particulate matter, Transportation, Volatile organic compounds.

Dated: June 14, 2004.

Michael O. Leavitt,

Administrator.

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

PART 93—[AMENDED]

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

Authority: 42 U.S.C. 7401–7671q.

■ 2. Section 93.101 is amended by adding, in alphabetical order, new definitions for ''1-hour ozone NAAQS,'' ''8-hour ozone NAAQS,'' ''Donut areas,'' ''Isolated rural nonattainment and maintenance areas,'' and ''Limited maintenance plan,'' and by revising definitions for ''Control strategy implementation plan revision'' and ''Milestone'' to read as follows:

§ 93.101 Definitions.

* * * * *

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

* * * * *

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

* * * * *

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

* * * * *

Donut areas are 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). These areas are not isolated rural nonattainment and maintenance areas.

* * * * *

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

* * * * *

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

* * * * *

Milestone has the meaning given in CAA sections 182(g)(1) and 189(c) for serious and above ozone nonattainment areas and PM_{10} nonattainment areas, respectively. For all other nonattainment areas, a milestone consists of an emissions level and the date on which that level is to be achieved as required by the applicable CAA provision for reasonable further progress towards attainment.

* * * * *

■ 3. Section 93.102 is amended by:
■ a. Revising paragraphs (b)(1), (b)(2) introductory text and (b)(2)(iii);
■ b. Redesignating paragraph (b)(3) as paragraph (b)(4);
■ c. Adding a new paragraph (b)(3);
■ d. Revising paragraph (c); and
■ e. Revising paragraph (d).

The revisions and additions read as follows:

§ 93.102 Applicability.

* * * * *

(b) * * *

(1) The provisions of this subpart apply with respect to emissions of the following criteria pollutants: ozone, carbon monoxide (CO), nitrogen dioxide (NO_2), particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM_{10}); and particles with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers ($PM_{2.5}$).

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

* * * * *

(iii) VOC and/or NO_X in PM_{10} areas if the EPA Regional Administrator or the director of the State air agency has made a finding that transportation-related emissions of one or both of these precursors within the nonattainment area are a significant contributor to the PM_{10} nonattainment problem and has so notified the MPO and DOT, or if the applicable implementation plan (or implementation plan submission) establishes an approved (or adequate) budget for such emissions as part of the reasonable further progress, attainment or maintenance strategy.

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

* * * * *

(c) *Limitations.* In order to receive any FHWA/FTA approval or funding actions, including NEPA approvals, for a project phase subject to this subpart, a currently conforming transportation plan and TIP must be in place at the time of project approval as described in § 93.114, except as provided by § 93.114(b).

(d) *Grace period for new nonattainment areas.* For areas or portions of areas which have been continuously designated attainment or not designated for any NAAQS for ozone, CO, PM_{10}, $PM_{2.5}$ or NO_2 since 1990 and are subsequently redesignated to nonattainment or designated nonattainment for any NAAQS for any of these pollutants, the provisions of this subpart shall not apply with respect to that NAAQS for 12 months following the effective date of final designation to nonattainment for each NAAQS for such pollutant.

■ 4. Section 93.104 is amended by:
■ a. Revising the first sentence in paragraph (b)(3);
■ b. Revising the first sentence in paragraph (c)(3), and removing paragraph (c)(4);
■ c. Revising paragraph (d); and
■ d. Removing paragraphs (e)(1) and (e)(4) and redesignating paragraphs (e)(2), (e)(3) and (e)(5) as paragraphs (e)(1), (e)(2) and (e)(3), and by revising newly redesignated paragraphs (e)(2) and (e)(3).

The revisions read as follows:

§ 93.104 Frequency of conformity determinations.

* * * * *

(b) * * *

(3) The MPO and DOT must determine the conformity of the transportation plan (including a new regional emissions analysis) no less frequently than every three years. * * *

(c) * * *

(3) The MPO and DOT must determine the conformity of the TIP (including a new regional emissions analysis) no less frequently than every three years. * * *

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

(e) * * *

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

(3) The effective date of EPA promulgation of an implementation plan which establishes or revises a motor vehicle emissions budget.

■ 5. Section 93.105(c)(1)(vii) is amended by revising the reference ''§ 93.109(g)(2)(iii)'' to read ''§ 93.109(l)(2)(iii).''

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

§ 93.106 Content of transportation plans.

* * * * *

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

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

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

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

* * * * *

■ 7. Section 93.109 is amended by:

■ a. Revising the paragraph (b) introductory text;

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

■ c. Revising paragraph (c);

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

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

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

■ g. Revising newly redesignated paragraphs (g) introductory text, (g)(2), and (g)(3);

■ h. Revising newly redesignated paragraph (h); and

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

The revisions and additions read as follows:

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

* * * * *

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

TABLE 1.—CONFORMITY CRITERIA

* * * * * * *	
Transportation Plan:	
* * * * * * *	
§ 93.118 and/or § 93.119	Emissions budget and/or Interim emissions.
* * * * * * *	
TIP:	
* * * * * * *	
§ 93.118 and/or § 93.119	Emissions budget and/or Interim emissions.
* * * * * * *	
Project (From a Conforming Plan and TIP):	
* * * * * * *	
§ 93.117	PM_{10} and $PM_{2.5}$ control measures.

TABLE 1.—CONFORMITY CRITERIA—Continued

* * * * * * *	
Project (Not From a Conforming Plan and TIP):	
* * * * * * *	
§ 93.117	PM_{10} and $PM_{2.5}$ control measures.
§ 93.118 and/or § 93.119	Emissions budget and/or Interim emissions.
* * * * * * *	

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

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

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

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

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

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

(3) An ozone nonattainment area must satisfy the interim emissions test for NO_X, as required by § 93.119, if the implementation plan or plan submission that is applicable for the purposes of conformity determinations is a 15% plan or Phase I attainment demonstration that does not include a motor vehicle emissions budget for NO_X. The implementation plan for the 1-hour ozone NAAQS will be considered to establish a motor vehicle emissions budget for NO_X if the implementation plan or plan submission contains an explicit NO_X motor vehicle emissions budget that is intended to act as a ceiling on future NO_X emissions, and the NO_X motor vehicle emissions budget is a net reduction from NO_X emissions levels in 1990.

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) Such an 8-hour ozone nonattainment area must satisfy the interim emissions test for NO_X, as required by § 93.119, if the implementation plan or plan submission that is applicable for the purposes of conformity determinations is a 15% plan or other control strategy SIP that addresses reasonable further progress that does not include a motor vehicle emissions budget for NO_X. The implementation plan for the 8-hour ozone NAAQS will be considered to establish a motor vehicle emissions budget for NO_X if the implementation plan or plan submission contains an explicit NO_X motor vehicle emissions budget that is intended to act as a ceiling on future NO_X emissions, and the NO_X motor vehicle emissions budget is a net reduction from NO_X emissions levels in 2002.

(4) Ozone nonattainment areas that have not submitted a maintenance plan and that are not required to submit a control strategy implementation plan revision for the 8-hour ozone NAAQS (usually marginal and certain Clean Air Act, part D, subpart 1 areas) must satisfy one of the following requirements:

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) If the 8-hour ozone nonattainment area covers a smaller geographic area within the 1-hour ozone nonattainment or maintenance area(s), the budget test as required by § 93.118 for either:

(A) The 8-hour nonattainment area using corresponding portion(s) of the approved or adequate motor vehicle emissions budgets in the 1-hour ozone applicable implementation plan or implementation plan submission where such portion(s) can reasonably be identified through the interagency consultation process required by § 93.105; or

(B) The 1-hour nonattainment area using the approved or adequate motor vehicle emissions budgets in the 1-hour ozone applicable implementation plan or implementation plan submission. If additional emissions reductions are necessary to meet the budget test for the 8-hour ozone NAAQS in such cases, these emissions reductions must come from within the 8-hour nonattainment area;

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

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

(B) The interim emissions tests as required by § 93.119 for either: the portion of the 8-hour ozone nonattainment area not covered by the approved or adequate budgets in the 1-hour ozone implementation plan, the entire 8-hour ozone nonattainment area, or the entire portion of the 8-hour ozone nonattainment area within an individual state, in the case where separate 1-hour SIP budgets are established for each state of a multi-state 1-hour nonattainment or maintenance area;

(iv) If the 8-hour ozone nonattainment area partially covers a 1-hour ozone nonattainment or maintenance area(s):

(A) The budget test as required by § 93.118 for the portion of the 8-hour

ozone nonattainment area covered by the corresponding portion of the approved or adequate motor vehicle emissions budgets in the 1-hour ozone applicable implementation plan or implementation plan submission where they can be reasonably identified through the interagency consultation process required by § 93.105; and

(B) The interim emissions tests as required by § 93.119, when applicable, for either: the portion of the 8-hour ozone nonattainment area not covered by the approved or adequate budgets in the 1-hour ozone implementation plan, the entire 8-hour ozone nonattainment area, or the entire portion of the 8-hour ozone nonattainment area within an individual state, in the case where separate 1-hour SIP budgets are established for each state in a multi-state 1-hour nonattainment or maintenance area.

(v) Notwithstanding paragraphs (e)(2)(i), (ii), (iii), or (iv) of this section, the interim emissions tests as required by § 93.119, where the budget test using the approved or adequate motor vehicle emissions budgets in the 1-hour ozone applicable implementation plan(s) or implementation plan submission(s) for the relevant area or portion thereof is not the appropriate test and the interim emissions tests are more appropriate to ensure that the transportation plan, TIP, or project not from a conforming plan and TIP will not create new violations, worsen existing violations, or delay timely attainment of the 8-hour ozone standard, as determined through the interagency consultation process required by § 93.105.

(3) Such an 8-hour ozone nonattainment area must satisfy the interim emissions test for NO_X, as required by § 93.119, if the only implementation plan or plan submission that is applicable for the purposes of conformity determinations is a 15% plan or other control strategy SIP that addresses reasonable further progress that does not include a motor vehicle emissions budget for NO_X. The implementation plan for the 8-hour ozone NAAQS will be considered to establish a motor vehicle emissions budget for NO_X if the implementation plan or plan submission contains an explicit NO_X motor vehicle emissions budget that is intended to act as a ceiling on future NO_X emissions, and the NO_X motor vehicle emissions budget is a net reduction from NO_X emissions levels in 2002. Prior to an adequate or approved NO_X motor vehicle emissions budget in the implementation plan submission for the 8-hour ozone NAAQS, the implementation plan for the 1-hour ozone NAAQS will be considered to establish a motor vehicle emissions budget for NO_X if the implementation plan contains an explicit NO_X motor vehicle emissions budget that is intended to act as a ceiling on future NO_X emissions, and the NO_X motor vehicle emissions budget is a net reduction from NO_X emissions levels in 1990.

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

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

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

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

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

* * * * *

(2) In CO nonattainment and maintenance areas the budget test must be satisfied as required by § 93.118 for conformity determinations made on or after:

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

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

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

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

(4) * * *

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

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

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

(1) * * *

(2) In PM_{10} nonattainment and maintenance areas the budget test must be satisfied as required by § 93.118 for conformity determinations made on or after:

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

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

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

(3) In PM_{10} nonattainment areas the interim emissions tests must be satisfied as required by § 93.119 for conformity determinations made:

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

implementation plan revision or maintenance plan; or

(ii) If the submitted implementation plan revision is a demonstration of impracticability under CAA section 189(a)(1)(B)(ii) and does not demonstrate attainment.

(h) *NO_2 nonattainment and maintenance areas.* In addition to the criteria listed in Table 1 in paragraph (b) of this section that are required to be satisfied at all times, in NO_2 nonattainment and maintenance areas conformity determinations must include a demonstration that the budget and/or interim emissions tests are satisfied as described in the following:

(1) In NO_2 nonattainment and maintenance areas the budget test must be satisfied as required by § 93.118 for conformity determinations made on or after:

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

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

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

(2) In NO_2 nonattainment areas the interim emissions tests must be satisfied as required by § 93.119 for conformity determinations made when there is no approved motor vehicle emissions budget from an applicable implementation plan and no adequate motor vehicle emissions budget from a submitted control strategy implementation plan revision or maintenance plan.

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

(1) In $PM_{2.5}$ nonattainment and maintenance areas the budget test must be satisfied as required by § 93.118 for conformity determinations made on or after:

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

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

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

(2) In $PM_{2.5}$ nonattainment areas the interim emissions tests must be satisfied as required by § 93.119 for conformity determinations made if there is no approved motor vehicle emissions budget from an applicable implementation plan and no adequate motor vehicle emissions budget from a submitted control strategy implementation plan revision or maintenance plan.

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

(k) *Areas with insignificant motor vehicle emissions.* Notwithstanding the other paragraphs in this section, an area is not required to satisfy a regional emissions analysis for § 93.118 and/or § 93.119 for a given pollutant/precursor and NAAQS, if EPA finds through the adequacy or approval process that a SIP demonstrates that regional motor vehicle emissions are an insignificant contributor to the air quality problem for that pollutant/precursor and NAAQS. The SIP would have to demonstrate that it would be unreasonable to expect that such an area would experience enough motor vehicle emissions growth in that pollutant/precursor for a NAAQS violation to occur. Such a finding would be based on a number of factors, including the percentage of motor vehicle emissions in the context of the total SIP inventory, the current state of air quality as determined by monitoring data for that NAAQS, the absence of SIP motor vehicle control measures, and historical trends and future projections of the growth of motor vehicle emissions. A conformity determination that meets other applicable criteria in Table 1 of paragraph (b) of this section is still required, including regional emissions analyses for § 93.118 and/or § 93.119 for other pollutants/precursors and NAAQS that apply. Hot-spot requirements for projects in CO and PM_{10} areas in § 93.116 must also be satisfied, unless EPA determines that the SIP also demonstrates that projects will not create new localized violations and/or increase the severity or number of existing violations of such NAAQS. If EPA subsequently finds that motor vehicle emissions of a given pollutant/precursor are significant, this paragraph would no longer apply for future conformity determinations for that pollutant/precursor and NAAQS.

(l) * * *

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

* * * * *

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

§ 93.110 Criteria and procedures: Latest planning assumptions.

(a) Except as provided in this paragraph, the conformity determination, with respect to all other applicable criteria in §§ 93.111 through 93.119, must be based upon the most recent planning assumptions in force at the time the conformity analysis begins. The conformity determination must satisfy the requirements of paragraphs (b) through (f) of this section using the planning assumptions available at the time the conformity analysis begins as determined through the interagency consultation process required in § 93.105(c)(1)(i). The ''time the conformity analysis begins'' for a transportation plan or TIP determination is the point at which the MPO or other designated agency begins to model the impact of the proposed transportation plan or TIP on travel and/or emissions. New data that becomes available after an analysis begins is required to be used in the conformity determination only if a significant delay in the analysis has occurred, as determined through interagency consultation.

* * * * *

■ 9. Section 93.116 is revised to read as follows:

§ 93.116 Criteria and procedures: Localized CO and PM_{10} violations (hot spots).

(a) This paragraph applies at all times. The FHWA/FTA project must not cause or contribute to any new localized CO

or PM_{10} violations or increase the frequency or severity of any existing CO or PM_{10} violations in CO and PM_{10} nonattainment and maintenance areas. This criterion is satisfied if it is demonstrated that during the time frame of the transportation plan (or regional emissions analysis) no new local violations will be created and the severity or number of existing violations will not be increased as a result of the project. The demonstration must be performed according to the consultation requirements of § 93.105(c)(1)(i) and the methodology requirements of § 93.123.

(b) This paragraph applies for CO nonattainment areas as described in § 93.109(f)(1). Each FHWA/FTA project must eliminate or reduce the severity and number of localized CO violations in the area substantially affected by the project (in CO nonattainment areas). This criterion is satisfied with respect to existing localized CO violations if it is demonstrated that during the time frame of the transportation plan (or regional emissions analysis) existing localized CO violations will be eliminated or reduced in severity and number as a result of the project. The demonstration must be performed according to the consultation requirements of § 93.105(c)(1)(i) and the methodology requirements of § 93.123.

■ 10. Section 93.117 is revised to read as follows:

§ 93.117 Criteria and procedures: Compliance with PM_{10} and $PM_{2.5}$ control measures.

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

■ 11. Section 93.118 is amended by:

■ a. Revising the reference ''§ 93.109(c) through (g)'' in paragraph (a) to read ''§ 93.109(c) through (l)'';

■ b. Revising paragraphs (b) introductory text and (b)(2)(iii), adding paragraph (b)(2)(iv), and removing the word ''and'' at the end of paragraph (b)(2)(ii);

■ c. Revising paragraphs (e)(1), (e)(2) and (e)(3); and

■ d. Adding new paragraph (f).

The revisions and additions read as follows:

§ 93.118 Criteria and procedures: Motor vehicle emissions budget.

* * * * *

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

* * * * *

(2) * * *

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

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

* * * * *

(e) * * *

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

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

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

* * * * *

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

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

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

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

(iii) After the public comment period closes, EPA will inform the State in writing whether EPA has found the submission adequate or inadequate for use in transportation conformity, including response to any comments submitted directly and review of comments submitted through the State process, or EPA will include the determination of adequacy or inadequacy in a proposed or final action approving or disapproving the implementation plan under paragraph (f)(2)(iii) of this section.

(iv) EPA will publish a **Federal Register** notice to inform the public of EPA's finding. If EPA finds the submission adequate, the effective date of this finding will be 15 days from the date the notice is published as established in the **Federal Register** notice, unless EPA is taking a final approval action on the SIP as described in paragraph (f)(2)(iii) of this section.

(v) EPA will announce whether the implementation plan submission is

adequate or inadequate for use in transportation conformity on EPA's website. The website will also include EPA's response to comments if any comments were received during the public comment period.

(vi) If after EPA has found a submission adequate, EPA has cause to reconsider this finding, EPA will repeat actions described in paragraphs (f)(1)(i) through (v) or (f)(2) of this section unless EPA determines that there is no need for additional public comment given the deficiencies of the implementation plan submission. In all cases where EPA reverses its previous finding to a finding of inadequacy under paragraph (f)(1) of this section, such a finding will become effective immediately upon the date of EPA's letter to the State.

(vii) If after EPA has found a submission inadequate, EPA has cause to reconsider the adequacy of that budget, EPA will repeat actions described in paragraphs (f)(1)(i) through (v) or (f)(2) of this section.

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

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

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

(iii) EPA will indicate whether the implementation plan submission is adequate and thus can be used for conformity either in EPA's final rulemaking or through the process described in paragraphs (f)(1)(iii) through (v) of this section. If EPA makes an adequacy finding through a final rulemaking that approves the implementation plan submission, such a finding will become effective upon the publication date of EPA's approval in the **Federal Register**, or upon the effective date of EPA's approval if such action is conducted through direct final rulemaking. EPA will respond to comments received directly and review comments submitted through the State process and include the response to comments in the applicable docket.

■ 12. Section 93.119 is amended by:

■ a. Revising the section heading and paragraphs (a) and (b);

■ b. Redesignating paragraphs (c), (d), (e), (f), (g) and (h) as paragraphs (d), (f), (g), (h), (i) and (j);

■ c. Adding new paragraphs (c) and (e);

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

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

■ f. Revising newly redesignated paragraph (g);

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

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

The revisions and additions read as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) *PM_{10} and NO_2 areas.* This criterion may be met in PM_{10} and NO_2 nonattainment areas if a regional emissions analysis that satisfies the requirements of § 93.122 and paragraphs (g) through (j) of this section demonstrates that for each analysis year and for each of the pollutants described

in paragraph (f) of this section, one of the following requirements is met:

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

* * * * *

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

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

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

(f) * * *

(5) VOC and/or NO_x in PM_{10} areas if the EPA Regional Administrator or the director of the State air agency has made a finding that one or both of such precursor emissions from within the area are a significant contributor to the PM_{10} nonattainment problem and has so notified the MPO and DOT;

(6) * * *

(7) $PM_{2.5}$ in $PM_{2.5}$ areas; and

(8) Reentrained road dust in $PM_{2.5}$ areas only if the EPA Regional Administrator or the director of the State air agency has made a finding that emissions from reentrained road dust within the area are a significant contributor to the $PM_{2.5}$ nonattainment problem and has so notified the MPO and DOT.

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

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

* * * * *

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

§ 93.120 Consequences of control strategy implementation plan failures.

(a) * * *

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

* * * * *

■ 14. Section 93.121 is amended by:

■ a. Revising paragraph (a)(1), redesignating paragraph (a)(2) as (a)(3), adding a new paragraph (a)(2) and revising newly redesignated paragraph (a)(3);

■ b. Amending paragraph (b) introductory text by removing the reference ''§ 93.109(g)'' and adding in its place a reference for ''§ 93.109(l)'', and revising paragraph (b)(1); and

■ c. Adding new paragraph (c).

The revisions and additions read as follows:

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

(a) * * *

(1) The project comes from the currently conforming transportation plan and TIP, and the project's design concept and scope have not changed significantly from those which were included in the regional emissions analysis for that transportation plan and TIP;

(2) The project is included in the regional emissions analysis for the currently conforming transportation plan and TIP conformity determination (even if the project is not strictly included in the transportation plan or TIP for the purpose of MPO project selection or endorsement) and the project's design concept and scope have not changed significantly from those which were included in the regional emissions analysis; or

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

(b) * * *

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

* * * * *

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

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

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

■ 15. Section 93.122 is amended by:

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

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

■ (c) Revising newly redesignated paragraphs (g)(1) and (g)(2) introductory text, and adding new paragraph (g)(3).

The revisions and additions read as follows:

§ 93.122 Procedures for determining regional transportation-related emissions.

* * * * *

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

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

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

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

* * * * *

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

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

(g) * * *

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

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

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

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

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

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

* * * * *

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

§ 93.124 [Amended]

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

§ 93.125 [Amended]

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

§ 93.126 [Amended]

■ 18. In § 93.126, Table 2 is amended under the heading ''Other'' by revising the entry for ''Emergency or hardship advance land acquisitions (23 CFR 712.204(d))'' to read ''Emergency or hardship advance land acquisitions (23 CFR 710.503).''

[FR Doc. 04–14213 Filed 6–30–04; 8:45 am]

BILLING CODE 6560–50–P