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TITLE **40**--PROTECTION OF ENVIRONMENT

CHAPTER I--ENVIRONMENTAL PROTECTION AGENCY (CONTINUED)

PART **93**_DETERMINING CONFORMITY OF FEDERAL ACTIONS TO STATE OR FEDERAL IMPLEMENTATION PLANS

Subpart A_Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit Laws

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Authority: 42 U.S.C. 7401-7671q.

Source: 58 FR 62235, Nov. 24, 1993, unless otherwise noted.

## Subpart A_Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit Laws

Source: 62 FR 43801, Aug. 15, 1997, unless otherwise noted.

### Sec. **93**.100 Purpose.

The purpose of this subpart is to implement section 176(c) of the Clean Air Act (CAA), as amended (42 U.S.C. 7401 et seq.), and the related requirements of 23 U.S.C. 109(j), with respect to the conformity of transportation plans, programs, and projects which are developed, funded, or approved by the United States Department of Transportation

(DOT), and by metropolitan planning organizations (MPOs) or other recipients of funds under title 23 U.S.C. or the Federal Transit Laws (49 U.S.C. Chapter 53). This subpart sets forth policy, criteria, and procedures for demonstrating and assuring conformity of such activities to an applicable implementation plan developed pursuant to section 110 and Part D of the CAA.

Sec. **93**.101 Definitions.

Terms used but not defined in this subpart shall have the meaning given them by the CAA, titles 23 and 49 U.S.C., other Environmental Protection Agency (EPA) regulations, or other DOT regulations, in that order of priority.

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

CAA means the Clean Air Act, as amended (42 U.S.C. 7401 et seq.).

Cause or contribute to a new violation for a project means:

(1) To cause or contribute to a new violation of a standard in the area substantially affected by the project or over a region which would otherwise not be in violation of the standard during the future period in question, if the project were not implemented; or

(2) To contribute to a new violation in a manner that would increase the frequency or severity of a new violation of a standard in such area.

Clean data means air quality monitoring data determined by EPA to meet the requirements of **40 CFR** part 58 that indicate attainment of the national ambient air quality standard.

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 (CAA sections 182(b)(1), 182(c)(2)(A), 182(c)(2)(B), 187(a)(7), 189(a)(1)(B), and 189(b)(1)(A); and sections 192(a) and 192(b), for nitrogen dioxide).

Design concept means the type of facility identified by the project, e.g., freeway, expressway, arterial highway, grade-separated highway, reserved right-of-way rail transit, mixed-traffic rail transit, exclusive busway, etc.

Design scope means the design aspects which will affect the proposed facility's impact on regional emissions, usually as they relate to vehicle or person carrying capacity and control, e.g., number of lanes or tracks to be constructed

or added, length of project, signalization, access control including approximate number and location of interchanges, preferential treatment for high-occupancy vehicles, etc.

DOT means the United States Department of Transportation.

EPA means the Environmental Protection Agency.

FHWA means the Federal Highway Administration of DOT.

FHWA/FTA project, for the purpose of this subpart, is any highway or transit project which is proposed to receive funding assistance and approval through the Federal-Aid Highway program or the Federal mass transit program, or requires Federal Highway Administration (FHWA) or Federal Transit Administration (FTA) approval for some aspect of the project, such as connection to an interstate highway or deviation from applicable design standards on the interstate system.

Forecast period with respect to a transportation plan is the period covered by the transportation plan pursuant to 23 **CFR** part 450.

FTA means the Federal Transit Administration of DOT.

Highway project is an undertaking to implement or modify a highway facility or highway-related program. Such an undertaking consists of all required phases necessary for implementation. For analytical purposes, it must be defined sufficiently to:

(1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;

(2) Have independent utility or significance, i.e., be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and

(3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

Horizon year is a year for which the transportation plan describes the envisioned transportation system according to Sec. **93**.106.

Hot-spot analysis is an estimation of likely future localized CO and PM<INF>10</INF> pollutant concentrations and a comparison of those concentrations to the national ambient air quality standards. Hot-spot analysis assesses impacts on a scale smaller than the entire nonattainment or maintenance area, including, for example, congested roadway intersections and highways or transit terminals, and uses an air quality dispersion model to determine the effects of emissions on air quality.

Increase the frequency or severity means to cause a location or region to exceed a standard more often or to cause a violation at a greater concentration than previously existed and/or would otherwise exist during the future period in question, if the project were not implemented.

Lapse means that the conformity determination for a transportation plan or TIP has expired, and thus there is no currently conforming transportation plan and TIP.

Maintenance area means any geographic region of the United States

previously designated nonattainment pursuant to the CAA Amendments of 1990 and subsequently redesignated to attainment subject to the requirement to develop a maintenance plan under section 175A of the CAA, as amended.

Maintenance plan means an implementation plan under section 175A of the CAA, as amended.

Metropolitan planning organization (MPO) is that organization designated as being responsible, together with the State, for conducting the continuing, cooperative, and comprehensive planning process under 23 U.S.C. 134 and 49 U.S.C. 5303. It is the forum for cooperative transportation decision-making.

Milestone has the meaning given in sections 182(g)(1) and 189(c) of the CAA. A milestone consists of an emissions level and the date on which it is required to be achieved.

Motor vehicle emissions budget is that portion of the total allowable emissions defined in the submitted or approved control strategy implementation plan revision or maintenance plan for a certain date for the purpose of meeting reasonable further progress milestones or demonstrating attainment or maintenance of the NAAQS, for any criteria pollutant or its precursors, allocated to highway and transit vehicle use and emissions.

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

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NEPA means the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.).

NEPA process completion, for the purposes of this subpart, with respect to FHWA or FTA, means the point at which there is a specific action to make a determination that a project is categorically excluded, to make a Finding of No Significant Impact, or to issue a record of decision on a Final Environmental Impact Statement under NEPA.

Nonattainment area means any geographic region of the United States which has been designated as nonattainment under section 107 of the CAA for any pollutant for which a national ambient air quality standard exists.

Project means a highway project or transit project.

Protective finding means a determination by EPA that a submitted control strategy implementation plan revision contains adopted control measures or written commitments to adopt enforceable control measures that fully satisfy the emissions reductions requirements relevant to the statutory provision for which the implementation plan revision was submitted, such as reasonable further progress or attainment.

Recipient of funds designated under title 23 U.S.C. or the Federal Transit Laws means any agency at any level of State, county, city, or regional government that routinely receives title 23 U.S.C. or Federal

Transit Laws funds to construct FHWA/FTA projects, operate FHWA/FTA projects or equipment, purchase equipment, or undertake other services or operations via contracts or agreements. This definition does not include private landowners or developers, or contractors or entities that are only paid for services or products created by their own employees.

Regionally significant project means a transportation project (other than an exempt project) that is on a facility which serves regional transportation needs (such as access to and from the area outside of the region, major activity centers in the region, major planned developments such as new retail malls, sports complexes, etc., or transportation terminals as well as most terminals themselves) and would normally be included in the modeling of a metropolitan area's transportation network, including at a minimum all principal arterial highways and all fixed guideway transit facilities that offer an alternative to regional highway travel.

Safety margin means the amount by which the total projected emissions from all sources of a given pollutant are less than the total emissions that would satisfy the applicable requirement for reasonable further progress, attainment, or maintenance.

Standard means a national ambient air quality standard.

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

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

(1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;

(2) Have independent utility or independent significance, i.e., be a reasonable expenditure even if no additional transportation improvements in the area are made; and

(3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

Transportation control measure (TCM) is any measure that is specifically identified and committed to in the applicable implementation plan that is either one of the types listed in section 108 of the CAA, or any other measure for the purpose of reducing emissions or concentrations of air pollutants from transportation sources by reducing vehicle use or changing traffic flow or congestion conditions. Notwithstanding the first sentence of this definition, vehicle technology-based, fuel-

based, and maintenance-based measures which control the emissions from vehicles under fixed traffic conditions are not TCMs for the purposes of this subpart.

Transportation improvement program (TIP) means a staged, multiyear, intermodal program of transportation projects covering a metropolitan planning area which is consistent with the metropolitan transportation plan, and developed pursuant to 23 **CFR** part 450.

Transportation plan means the official intermodal metropolitan transportation plan that is developed through the metropolitan planning process for the metropolitan planning area, developed pursuant to 23 **CFR** part 450.

Transportation project is a highway project or a transit project.

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

Effective Date Note: At 69 FR 44072, July 1, 2004, Sec. **93**.101 was 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'', effective Aug. 2, 2004. For the convenience of the user, the added and revised text is set forth as follows:

Sec. **93**.101 Definitions.

* * * * *

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

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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<INF>10</INF> 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.

* * * * *

Sec. **93**.102 Applicability.

(a) Action applicability.

(1) Except as provided for in paragraph (c) of this section or Sec. **93**.126, conformity determinations are required for:

(i) The adoption, acceptance, approval or support of transportation plans and transportation plan amendments developed pursuant to 23 **CFR** part 450 or 49 **CFR** part 613 by an MPO or DOT;

(ii) The adoption, acceptance, approval or support of TIPs and TIP amendments developed pursuant to 23 **CFR** part 450 or 49 **CFR** part 613 by an MPO or DOT; and

(iii) The approval, funding, or implementation of FHWA/FTA projects.

(2) Conformity determinations are not required under this subpart for individual projects which are not FHWA/FTA projects. However, Sec. **93**.121 applies to such projects if they are regionally significant.

(b) Geographic applicability. The provisions of this subpart shall apply in all nonattainment and maintenance areas for transportation-related criteria pollutants for which the area is designated nonattainment or has a maintenance plan.

(1) The provisions of this subpart apply with respect to emissions of the following criteria pollutants: ozone, carbon monoxide (CO), nitrogen dioxide (NO<INF>2</INF>), and particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM<INF>10</INF>).

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

(i) Volatile organic compounds (VOC) and nitrogen oxides (NO<INF>X</INF>) in ozone areas;

(ii) NO<INF>X</INF> in NO<INF>2</INF> areas; and

(iii) VOC, NO<INF>X,</INF> and PM<INF>10</INF> in PM<INF>10</INF> areas if the EPA Regional Administrator or the director of the State air agency has made a finding that transportation-related precursor emissions within the nonattainment area are a significant contributor to the PM<INF>10</INF> nonattainment problem and has so notified the MPO and DOT, or if the applicable implementation plan (or implementation plan submission) establishes a budget for such emissions as part of the reasonable further progress, attainment or maintenance strategy.

(3) The provisions of this subpart apply to maintenance areas for 20 years from the date EPA approves the area's request under section 107(d) of the CAA for redesignation to attainment, unless the applicable implementation plan specifies that the provisions of this subpart shall apply for more than 20 years.

(c) Limitations. (1) Projects subject to this subpart for which the NEPA process and a conformity determination have been completed by DOT

may proceed toward implementation without further conformity determinations unless more than three years have elapsed since the most recent major step (NEPA process completion; start of final design; acquisition of a significant portion of the right-of-way; or approval of the plans, specifications and estimates) occurred. All phases of such projects which were considered in the conformity determination are also included, if those phases were for the purpose of funding final design, right-of-way acquisition, construction, or any combination of these phases.

(2) A new conformity determination for the project will be required if there is a significant change in project design concept and scope, if a supplemental environmental document for air quality purposes is initiated, or if three years have elapsed since the most recent major step to advance the project occurred.

(d) Grace period for new nonattainment areas. For areas or portions of areas which have been continuously designated attainment or not designated for any standard for ozone, CO, PM<INF>10</INF> or NO<INF>2</INF> since 1990 and are subsequently redesignated to nonattainment or designated nonattainment for any standard for any of these pollutants, the provisions of this subpart shall not apply with respect to that standard for 12 months following the effective date of final designation to nonattainment for each standard for such pollutant.

[62 FR 43801, Aug. 15, 1997, as amended at 65 FR 18918, Apr. 10, 2000; 67 FR 50817, Aug. 6, 2002]

Effective Date Note: At 69 FR 44072, July 1, 2004, Sec. **93**.102 was amended by revising paragraphs (b)(1), (b)(2) introductory text and

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(b)(2)(iii);redesignating paragraph (b)(3) as paragraph (b)(4); adding a new paragraph (b)(3); revising paragraph (c); and revising paragraph (d), effective Aug. 2, 2004. For the convenience of the user, the added and revised text is set forth as follows:

Sec. **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<INF>2</INF>), particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM<INF>10</INF>); and particles with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers (PM<INF>2.5</INF>).

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

* * * * *

(iii) VOC and/or NO<INF>X</INF> in PM<INF>10</INF> 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<INF>10</INF> 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<INF>2.5</INF> nonattainment and maintenance areas with respect to PM<INF>2.5</INF> 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<INF>2.5</INF> 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 Sec. **93**.114, except as provided by Sec. **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<INF>10</INF>, PM<INF>2.5</INF> or NO<INF>2</INF> 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.

Sec. **93**.103 Priority.

When assisting or approving any action with air quality-related

consequences, FHWA and FTA shall give priority to the implementation of those transportation portions of an applicable implementation plan prepared to attain and maintain the NAAQS. This priority shall be consistent with statutory requirements for allocation of funds among States or other jurisdictions.

Sec. **93**.104 Frequency of conformity determinations.

(a) Conformity determinations and conformity redeterminations for transportation plans, TIPs, and FHWA/FTA projects must be made according to the requirements of this section and the applicable implementation plan.

(b) Frequency of conformity determinations for transportation plans. (1) Each new transportation plan must be demonstrated to conform before the transportation plan is approved by the MPO or accepted by DOT.

(2) All transportation plan revisions must be found to conform before the transportation plan revisions are approved by the MPO or accepted by DOT, unless the revision merely adds or deletes exempt projects listed in Sec. **93**.126 or Sec. **93**.127. The conformity determination must be based on the transportation plan and the revision taken as a whole.

(3) The MPO and DOT must determine the conformity of the transportation plan no less frequently than every three years. If more than three years elapse after DOT's conformity determination without the MPO and DOT determining conformity of the



transportation plan, the existing conformity determination will lapse.

(c) Frequency of conformity determinations for transportation improvement programs. (1) A new TIP must be demonstrated to conform before the TIP is approved by the MPO or accepted by DOT.

(2) A TIP amendment requires a new conformity determination for the entire TIP before the amendment is approved by the MPO or accepted by DOT, unless the amendment merely adds or deletes exempt projects listed in Sec. **93**.126 or Sec. **93**.127.

(3) The MPO and DOT must determine the conformity of the TIP no less frequently than every three years. If more than three years elapse after DOT's conformity determination without the MPO and DOT determining conformity of the TIP, the existing conformity determination will lapse.

(4) After an MPO adopts a new or revised transportation plan, conformity of the TIP must be redetermined by the MPO and DOT within six months from the date of DOT's conformity determination for the transportation plan, unless the new or revised plan merely adds or deletes exempt projects listed in Sec. Sec. **93**.126 and **93**.127. Otherwise, the existing conformity determination for the TIP will lapse.

(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 three years have elapsed since the most recent major step to advance the project (NEPA process completion; start of final design; acquisition of a significant portion of the right-of-way; or approval of the plans, specifications and estimates) occurred.

(e) Triggers for transportation plan and TIP conformity determinations. Conformity of existing transportation plans and TIPs must be redetermined within 18 months of the following, or the existing conformity determination will lapse, and no new project-level conformity determinations may be made until conformity of the transportation plan and TIP has been determined by the MPO and DOT:

(1) November 24, 1993;

(2) The effective date of EPA's finding that motor vehicle emissions budgets from an initially submitted control strategy implementation plan or maintenance plan are adequate pursuant to Sec. **93**.118(e) and can be used for transportation conformity purposes;

(3) EPA approval of a control strategy implementation plan revision or maintenance plan which establishes or revises a motor vehicle emissions budget;

(4) EPA approval of an implementation plan revision that adds, deletes, or changes TCMs; and

(5) EPA promulgation of an implementation plan which establishes or revises a motor vehicle emissions budget or adds, deletes, or changes TCMs.

[62 FR 43801, Aug. 15, 1997, as amended at 67 FR 50817, Aug. 6, 2002]

Effective Date Note: At 69 FR 44072, July 1, 2004, Sec. **93**.104 was amended by revising the first sentence in paragraph (b)(3); revising the first sentence in paragraph (c)(3), and removing paragraph (c)(4); revising paragraph (d); and 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), effective Aug. 2, 2004. For the convenience of the user, the revised text is set forth as follows:

Sec. **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;

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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.

Sec. **93**.105 Consultation.

(a) General. The implementation plan revision required under Sec. **51**.390 of this chapter shall include procedures for interagency consultation (Federal, State, and local), resolution of conflicts, and public consultation as described in paragraphs (a) through (e) of this section. Public consultation procedures will be developed in accordance with the requirements for public involvement in 23 **CFR** part 450.

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

(2) Before EPA approves the conformity implementation plan revision required by Sec. **51**.390 of this chapter, MPOs and State departments of transportation must provide reasonable opportunity for consultation with State air agencies, local air quality and transportation agencies, DOT, and EPA, including consultation on the issues described in paragraph (c)(1) of this section, before making conformity determinations.

(b) Interagency consultation procedures: General factors. (1) States shall provide well-defined consultation procedures in the implementation plan whereby representatives of the MPOs, State and local air quality planning agencies, State and local transportation agencies, and other

organizations with responsibilities for developing, submitting, or implementing provisions of an implementation plan required by the CAA must consult with each other and with local or regional offices of EPA, FHWA, and FTA on the development of the implementation plan, the transportation plan, the TIP, and associated conformity determinations.

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

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

(ii) The organizational level of regular consultation;

(iii) A process for circulating (or providing ready access to) draft documents and supporting materials for comment before formal adoption or publication;

(iv) The frequency of, or process for convening, consultation meetings and responsibilities for establishing meeting agendas;

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

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

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

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

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

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

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concept and scope from the transportation plan or TIP;

(iii) Evaluating whether projects otherwise exempted from meeting the requirements of this subpart (see Sec. Sec. **93**.126 and **93**.127) should be treated as non-exempt in cases where potential adverse emissions impacts may exist for any reason;

(iv) Making a determination, as required by Sec. **93**.113(c)(1), whether past obstacles to implementation of TCMs which are behind the

schedule established in the applicable implementation plan have been identified and are being overcome, and whether State and local agencies with influence over approvals or funding for TCMs are giving maximum priority to approval or funding for TCMs. This process shall also consider whether delays in TCM implementation necessitate revisions to the applicable implementation plan to remove TCMs or substitute TCMs or other emission reduction measures;

(v) Identifying, as required by Sec. **93**.123(b), projects located at sites in PM<INF>10</INF> nonattainment areas which have vehicle and roadway emission and dispersion characteristics which are essentially identical to those at sites which have violations verified by monitoring, and therefore require quantitative PM<INF>10</INF> hot-spot analysis;

(vi) Notification of transportation plan or TIP revisions or amendments which merely add or delete exempt projects listed in Sec. **93**.126 or Sec. **93**.127; and

(vii) Choosing conformity tests and methodologies for isolated rural nonattainment and maintenance areas, as required by Sec. **93**.109(g)(2)(iii).

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

(i) Evaluating events which will trigger new conformity determinations in addition to those triggering events established in Sec. **93**.104; and

(ii) Consulting on emissions analysis for transportation activities which cross the borders of MPOs or nonattainment areas or air basins.

(3) Where the metropolitan planning area does not include the entire nonattainment or maintenance area, a process involving the MPO and the State department of transportation for cooperative planning and analysis for purposes of determining conformity of all projects outside the metropolitan area and within the nonattainment or maintenance area.

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

(5) A process involving the MPO and other recipients of funds designated under title 23 U.S.C. or the Federal Transit Laws for assuming the location and design concept and scope of projects which are disclosed to the MPO as required by paragraph (c)(4) of this section but whose sponsors have not yet decided these features, in sufficient detail to perform the regional emissions analysis according to the requirements of Sec. **93**.122.

(6) A process for consulting on the design, schedule, and funding of research and data collection efforts and regional transportation model

development by the MPO (e.g., household/ travel transportation surveys).

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

(d) Resolving conflicts. Conflicts among State agencies or between State agencies and an MPO shall be escalated to the Governor if they cannot be resolved by the heads of the involved agencies. The State air agency has 14 calendar days to appeal to the Governor after the State DOT or MPO has notified the State air agency head of the resolution of his or her comments. The implementation plan revision required by Sec. **51**.390 of this chapter shall define the procedures for starting the 14-day clock. If the State air agency

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appeals to the Governor, the final conformity determination must have the concurrence of the Governor. If the State air agency does not appeal to the Governor within 14 days, the MPO or State department of transportation may proceed with the final conformity determination. The Governor may delegate his or her role in this process, but not to the head or staff of the State or local air agency, State department of transportation, State transportation commission or board, or an MPO.

(e) Public consultation procedures. Affected agencies making conformity determinations on transportation plans, programs, and projects shall establish a proactive public involvement process which provides opportunity for public review and comment by, at a minimum, providing reasonable public access to technical and policy information considered by the agency at the beginning of the public comment period and prior to taking formal action on a conformity determination for all transportation plans and TIPs, consistent with these requirements and those of 23 **CFR** 450.316(b). Any charges imposed for public inspection and copying should be consistent with the fee schedule contained in 49 **CFR** 7.95. In addition, these agencies must specifically address in writing all public comments that known plans for a regionally significant project which is not receiving FHWA or FTA funding or approval have not been properly reflected in the emissions analysis supporting a proposed conformity finding for a transportation plan or TIP. These agencies shall also provide opportunity for public involvement in conformity determinations for projects where otherwise required by law.

Effective Date Note: At 69 FR 44073, July 1, 2004, Sec. **93**.105 was amended by revising the reference ``Sec. **93**.109(g)(2)(iii)'' to read ``Sec. **93**.109(l)(2)(iii).'', effective Aug. 2, 2004.

Sec. **93**.106 Content of transportation plans.

(a) Transportation plans adopted after January 1, 1997 in serious, severe, or extreme ozone nonattainment areas and in serious CO nonattainment areas. If the metropolitan planning area contains an urbanized area population greater than 200,000, the transportation plan must specifically describe the transportation system envisioned for certain future years which shall be called horizon years.

(1) The agency or organization developing the transportation plan may choose any years to be horizon years, subject to the following restrictions:

(i) Horizon years may be no more than 10 years apart;

(ii) The first horizon year may be no more than 10 years from the base year used to validate the transportation demand planning model;

(iii) If the attainment year is in the time span of the transportation plan, the attainment year must be a horizon year; and

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

(2) For these horizon years:

(i) The transportation plan shall quantify and document the demographic and employment factors influencing expected transportation demand, including land use forecasts, in accordance with implementation plan provisions and the consultation requirements specified by Sec. **93**.105;

(ii) The highway and transit system shall be described in terms of the regionally significant additions or modifications to the existing transportation network which the transportation plan envisions to be operational in the horizon years. Additions and modifications to the highway network shall be sufficiently identified to indicate intersections with existing regionally significant facilities, and to determine their effect on route options between transportation analysis zones. Each added or modified highway segment shall also be sufficiently identified in terms of its design concept and design scope to allow modeling of travel times under various traffic volumes, consistent with the modeling methods for area-wide transportation analysis in use by the MPO. Transit facilities, equipment, and services envisioned for the future shall be identified in terms of design concept, design scope, and operating policies that are sufficient for modeling of their transit ridership. Additions and modifications to the transportation network shall be described

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sufficiently to show that there is a reasonable relationship between expected land use and the envisioned transportation system; and

(iii) Other future transportation policies, requirements, services, and activities, including intermodal activities, shall be described.

(b) Moderate areas reclassified to serious. Ozone or CO nonattainment areas which are reclassified from moderate to serious and have an urbanized population greater than 200,000 must meet the requirements of paragraph (a) of this section within two years from the date of reclassification.

(c) Transportation plans for other areas. Transportation plans for other areas must meet the requirements of paragraph (a) of this section at least to the extent it has been the previous practice of the MPO to prepare plans which meet those requirements. Otherwise, the transportation system envisioned for the future must be sufficiently described within the transportation plans so that a conformity determination can be made according to the criteria and procedures of Sec. Sec. **93**.109 through **93**.119.

(d) Savings. The requirements of this section supplement other requirements of applicable law or regulation governing the format or content of transportation plans.

Effective Date Note: At 69 FR 44073, July 1, 2004, Sec. **93**.106 was amended by revising paragraph (b), effective Aug. 2, 2004. For the convenience of the user, the revised text is set forth as follows:

Sec. **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.

* * * * *

Sec. **93**.107 Relationship of transportation plan and TIP conformity with the NEPA process.

The degree of specificity required in the transportation plan and the specific travel network assumed for air quality modeling do not

preclude the consideration of alternatives in the NEPA process or other project development studies. Should the NEPA process result in a project with design concept and scope significantly different from that in the transportation plan or TIP, the project must meet the criteria in Sec. Sec. **93**.109 through **93**.119 for projects not from a TIP before NEPA process completion.

Sec. **93**.108 Fiscal constraints for transportation plans and TIPs.

Transportation plans and TIPs must be fiscally constrained consistent with DOT's metropolitan planning regulations at 23 **CFR** part 450 in order to be found in conformity.

Sec. **93**.109 Criteria and procedures for determining conformity of transportation plans, programs, and projects: General.

(a) In order for each transportation plan, program, and FHWA/FTA project to be found to conform, the MPO and DOT must demonstrate that the applicable criteria and procedures in this subpart are satisfied, and the MPO and DOT must comply with all applicable conformity requirements of implementation plans and of court orders for the area which pertain specifically to conformity. The criteria for making conformity determinations differ based on the action under review (transportation plans, TIPs, and FHWA/FTA projects), the relevant pollutant(s), and the status of the implementation plan.

(b) Table 1 in this paragraph indicates the criteria and procedures in Sec. Sec. **93**.110 through **93**.119 which apply for transportation plans, TIPs, and FHWA/FTA projects. Paragraphs (c) through (f) of this section explain when the



budget, emission reduction, and hot spot tests are required for each pollutant. Paragraph (g) of this section addresses isolated rural nonattainment and maintenance areas. Table 1 follows:

Table 1--Conformity Criteria

| | |
|---|---|
| All Actions at all times: | |
| Sec. **93**.110 | Latest planning assumptions |
| Sec. **93**.111 | Latest emissions model |
| Sec. **93**.112 | Consultation |
| Transportation Plan: | |
| Sec. **93**.113(b) | TCMs |
| Sec. **93**.118 or Sec. **93**.119 | Emissions budget or Emission |

| | |
|---|---|
| | reduction |
| TIP: | |
| Sec. **93**.113(c) | TCMs |
| Sec. **93**.118 or Sec. **93**.119 | Emissions budget or Emission reduction |
| Project (From a Conforming Plan and TIP): | |
| Sec. **93**.114 | Currently conforming plan and TIP |
| Sec. **93**.115 | Project from a conforming plan and TIP |
| Sec. **93**.116 | CO and PM10 hot spots |
| Sec. **93**.117 | PM10 control measures |
| Project (Not From a Conforming Plan and TIP): | |
| Sec. **93**.113(d) | TCMs |
| Sec. **93**.114 | Currently conforming plan and TIP |
| Sec. **93**.116 | CO and PM10 hot spots |
| Sec. **93**.117 | PM10 control measures |
| Sec. **93**.118 or Sec. **93**.119 | Emissions budget or Emission reduction |

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(c) Ozone 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 ozone nonattainment and maintenance areas conformity determinations must include a demonstration that the budget and/or emission reduction tests are satisfied as described in the following:

(1) In ozone nonattainment and maintenance areas the budget test must be satisfied as required by Sec. **93**.118 for conformity determinations made:

(i) 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared the motor vehicle emissions budget inadequate for transportation conformity purposes; or

(ii) After EPA has declared that the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan is adequate for transportation conformity purposes.

(2) In ozone nonattainment areas that are required to submit a control strategy implementation plan revision (usually moderate and above areas), the emission reduction tests must be satisfied as required by Sec. **93**.119 for conformity determinations made:

(i) During the first 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared a motor vehicle emissions budget adequate for

transportation conformity purposes; or

(ii) If EPA has declared the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan inadequate for transportation conformity purposes, and there is no previously established motor vehicle emissions budget in the approved implementation plan or a previously submitted control strategy implementation plan revision or maintenance plan.

(3) An ozone nonattainment area must satisfy the emission reduction test for NO<INF>X</INF>, as required by Sec. **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<INF>X</INF>. The implementation plan will be considered to establish a motor vehicle emissions budget for NO<INF>X</INF> if the implementation plan or plan submission contains an explicit NO<INF>X</INF> motor vehicle emissions budget that is intended to act as a ceiling on future NO<INF>X</INF> emissions, and the NO<INF>X</INF> motor vehicle emissions budget is a net reduction from NO<INF>X</INF> 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 (usually marginal and below areas) must satisfy one of the following requirements:

(i) The emission reduction tests required by Sec. **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,

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and the budget test required by Sec. **93**.118 must be satisfied using the submitted motor vehicle emissions budget(s) (as described in paragraph (c)(1) of this section).

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

(i) The emission reduction tests as required by Sec. **93**.119;

(ii) The budget test as required by Sec. **93**.118, using the motor vehicle emissions budgets in the submitted control strategy implementation plan (subject to the timing requirements of paragraph (c)(1) of this section); or

(iii) The budget test as required by Sec. **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.

(d) 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 emission reduction tests are satisfied as described in the following:

(1) FHWA/FTA projects in CO nonattainment or maintenance areas must satisfy the hot spot test required by Sec. **93**.116(a) at all times. Until a CO attainment demonstration or maintenance plan is approved by EPA, FHWA/FTA projects must also satisfy the hot spot test required by Sec. **93**.116(b).

(2) In CO nonattainment and maintenance areas the budget test must be satisfied as required by Sec. **93**.118 for conformity determinations made:

(i) 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared the motor vehicle emissions budget inadequate for transportation conformity purposes; or

(ii) After EPA has declared that the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan is adequate for transportation conformity purposes.

(3) Except as provided in paragraph (d)(4) of this section, in CO nonattainment areas the emission reduction tests must be satisfied as required by Sec. **93**.119 for conformity determinations made:

(i) During the first 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared a motor vehicle emissions budget adequate for transportation conformity purposes; or

(ii) If EPA has declared the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan inadequate for transportation conformity purposes, and there is no previously established motor vehicle emissions budget in the approved implementation plan or a previously submitted control strategy implementation plan revision or maintenance plan.

(4) CO nonattainment areas that have not submitted a maintenance plan and that are not required to submit an attainment demonstration (e.g., moderate CO areas with a design value of 12.7 ppm or less or not classified CO areas) must satisfy one of the following requirements:

(i) The emission reduction tests required by Sec. **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 Sec. **93**.118 must be satisfied using the submitted motor vehicle emissions budget(s) (as described in paragraph (d)(2) of this section).

(e) PM10 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<INF>10</INF> nonattainment and maintenance areas conformity determinations must include a

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demonstration that the hot spot, budget and/or emission reduction tests are satisfied as described in the following:

(1) FHWA/FTA projects in PM<INF>10</INF> nonattainment or maintenance areas must satisfy the hot spot test required by Sec. **93**.116(a).

(2) In PM<INF>10</INF> nonattainment and maintenance areas the budget test must be satisfied as required by Sec. **93**.118 for conformity determinations made:

(i) 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared the motor vehicle emissions budget inadequate for transportation conformity purposes; or

(ii) After EPA has declared that the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan is adequate for transportation conformity purposes.

(3) In PM<INF>10</INF> nonattainment areas the emission reduction tests must be satisfied as required by Sec. **93**.119 for conformity determinations made:

(i) During the first 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared a motor vehicle emissions budget adequate for transportation conformity purposes;

(ii) If EPA has declared the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan inadequate for transportation conformity purposes, and there is no previously established motor vehicle emissions budget in the approved implementation plan or a previously submitted control strategy implementation plan revision or maintenance plan; or

(iii) If the submitted implementation plan revision is a demonstration of impracticability under CAA section 189(a)(1)(B)(ii) and does not demonstrate attainment.

(f) NO2 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<INF>2</INF> nonattainment and maintenance areas conformity determinations must include a demonstration that the budget and/or emission reduction tests are satisfied as described in the following:

(1) In NO<INF>2</INF> nonattainment and maintenance areas the budget test must be satisfied as required by Sec. **93**.118 for conformity determinations made:

(i) 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared the

motor vehicle emissions budget inadequate for transportation conformity purposes; or

(ii) After EPA has declared that the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan is adequate for transportation conformity purposes.

(2) In NO<INF>2</INF> nonattainment areas the emission reduction tests must be satisfied as required by Sec. **93**.119 for conformity determinations made:

(i) During the first 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared a motor vehicle emissions budget adequate for transportation conformity purposes; or

(ii) If EPA has declared the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan inadequate for transportation conformity purposes, and there is no previously established motor vehicle emissions budget in the approved implementation plan or a previously submitted control strategy implementation plan revision or maintenance plan.

(g) Isolated rural nonattainment and maintenance areas. This paragraph applies to any nonattainment or maintenance area (or portion thereof) which does not have a metropolitan transportation plan or TIP and whose projects are not part of the emissions analysis of any MPO's metropolitan transportation plan or TIP. This paragraph does not apply to ``donut'' areas which are outside the metropolitan planning boundary and inside the nonattainment/maintenance area boundary.

(1) FHWA/FTA projects in all isolated rural nonattainment and maintenance areas must satisfy the requirements of Sec. Sec. **93**.110, **93**.111, **93**.112, **93**.113(d), **93**.116,



and **93**.117. Until EPA approves the control strategy implementation plan or maintenance plan for a rural CO nonattainment or maintenance area, FHWA/FTA projects must also satisfy the requirements of Sec. **93**.116(b) (``Localized CO and PM<INF>10</INF> violations (hot spots)'').

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

(i) When the requirements of Sec. Sec. **93**.118 and **93**.119 apply to isolated rural nonattainment and maintenance areas, references to ``transportation plan'' or ``TIP'' should be taken to mean those projects in the statewide transportation plan or statewide TIP which are in the rural nonattainment or maintenance area.

(ii) In isolated rural nonattainment and maintenance areas that are subject to Sec. **93**.118, FHWA/FTA projects must be consistent with motor vehicle emissions budget(s) for the years in the timeframe of the attainment demonstration or maintenance plan. For years after the

attainment year (if a maintenance plan has not been submitted) or after the last year of the maintenance plan, FHWA/FTA projects must satisfy one of the following requirements:

(A) Sec. **93**.118;

(B) Sec. **93**.119 (including regional emissions analysis for NO<INF>X</INF> in all ozone nonattainment and maintenance areas, notwithstanding Sec. **93**.119(d)(2)); or

(C) As demonstrated by the air quality dispersion model or other air quality modeling technique used in the attainment demonstration or maintenance plan, the FHWA/FTA project, in combination with all other regionally significant projects expected in the area in the timeframe of the statewide transportation plan, must not cause or contribute to any new violation of any standard in any areas; increase the frequency or severity of any existing violation of any standard in any area; or delay timely attainment of any standard or any required interim emission reductions or other milestones in any area. Control measures assumed in the analysis must be enforceable.

(iii) The choice of requirements in paragraph (g)(2)(ii) of this section and the methodology used to meet the requirements of paragraph (g)(2)(ii)(C) of this section must be determined through the interagency consultation process required in Sec. **93**.105(c)(1)(vii) through which the relevant recipients of title 23 U.S.C. or Federal Transit Laws funds, the local air quality agency, the State air quality agency, and the State department of transportation should reach consensus about the option and methodology selected. EPA and DOT must be consulted through this process as well. In the event of unresolved disputes, conflicts may be escalated to the Governor consistent with the procedure in Sec. **93**.105(d), which applies for any State air agency comments on a conformity determination.

Effective Date Note: At 69 FR 44073, July 1, 2004, Sec. **93**.109 was amended by:

a. Revising the paragraph (b) introductory text;

b. In Table 1 of paragraph (b), revising the entry for ``Sec. **93**.118 or Sec. **93**.119'' under ``Transportation Plan:'' and the entry for ``Sec. **93**.118 or Sec. **93**.119'' under ``TIP:'', and revising the entry for ``Sec. **93**.117'' under ``Project (From a Conforming Plan and TIP):'' and the entries for ``Sec. **93**.117'' and ``Sec. **93**.118 or Sec. **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 ``Sec. **93**.119(d)(2)'' to read ``Sec. **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., effective Aug. 2, 2004. For the convenience of the user, the added and revised text is set forth as follows:

Sec. **93**.109 Criteria and procedures for determining conformity of transportation plans, programs, and projects: General.

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(b) Table 1 in this paragraph indicates the criteria and procedures in Sec. Sec. **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

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Transportation Plan:

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| | |
|---|---|
| Sec. **93**.118 and/or **93**.119. | Emissions budget and/or Interim emissions. |

* * * * * * *

TIP:

* * * * * * *

| | |
|---|---|
| Sec. **93**.118 and/or **93**.119. | Emissions budget and/or Interim emissions. |

| | |
|---|---|
| * * * * * * * | |
| Project (From a Conforming Plan and TIP): | |
| * * * * * * * | |
| Sec. **93**.117..... | PM10 and PM2.5 control measures. |
| * * * * * * * | |
| Project (Not From a Conforming Plan and TIP): | |
| * * * * * * * | |
| Sec. **93**.117..... | PM10 and PM2.5 control measures. |
| Sec. **93**.118 and/or Sec. **93**.119. | Emissions budget and/or Interim emissions. |
| * * * * * * * | |

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(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 Sec. **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 Sec. **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<INF>X</INF>, as required by Sec. **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<INF>X</INF>. The implementation plan for the 1-hour ozone NAAQS will be considered to establish a motor vehicle emissions budget for NO<INF>X</INF> if the implementation plan or plan submission contains an explicit NO<INF>X</INF> motor vehicle emissions budget that is intended to act as a ceiling on future NO<INF>X</INF>

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emissions, and the NO<INF>X</INF> motor vehicle emissions budget is a net reduction from NO<INF>X</INF> 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 Sec. **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 Sec. **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 Sec. **93**.119;

(ii) The budget test as required by Sec. **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 Sec. **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 Sec. **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 Sec. **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 Sec. **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<INF>X</INF>, as required by Sec. **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<INF>X</INF>. The implementation plan for the 8-hour ozone NAAQS will be considered to establish a motor vehicle emissions budget for NO<INF>X</INF> if the implementation plan or plan submission contains an explicit NO<INF>X</INF> motor vehicle emissions budget that is intended to act as

a ceiling on future NO<INF>X</INF> emissions, and the NO<INF>X</INF> motor vehicle emissions budget is a net reduction from NO<INF>X</INF> 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 Sec. **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

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progress or attainment demonstration, and the budget test required by Sec. **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 Sec. **93**.119;

(ii) The budget test as required by Sec. **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 Sec. **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 Sec. **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 Sec. **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 Sec. **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 Sec. **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 Sec. **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 Sec. **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 Sec. **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 Sec. **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 Sec. **93**.105; and

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(B) The interim emissions tests as required by Sec. **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 Sec. **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 Sec. **93**.105.

(3) Such an 8-hour ozone nonattainment area must satisfy the interim emissions test for NO<INF>X</INF>, as required by Sec. **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<INF>X</INF>. The implementation plan for the 8-hour ozone NAAQS will be considered to establish a motor vehicle emissions budget for NO<INF>X</INF> if the implementation plan or plan submission contains an explicit NO<INF>X</INF> motor vehicle emissions budget that is intended to act as a ceiling on future NO<INF>X</INF> emissions, and the NO<INF>X</INF> motor vehicle emissions budget is a net reduction from NO<INF>X</INF> emissions levels in 2002. Prior to an adequate or approved NO<INF>X</INF> 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<INF>X</INF> if the implementation plan contains

an explicit NO<INF>X</INF> motor vehicle emissions budget that is intended to act as a ceiling on future NO<INF>X</INF> emissions, and the NO<INF>X</INF> motor vehicle emissions budget is a net reduction from NO<INF>X</INF> 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 Sec. Sec. **93**.118 and **93**.119 and as described in paragraph (e)(2) of this section;

(ii) The budget test as required by Sec. **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 Sec. **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 Sec. **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 Sec. **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 Sec. **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 Sec. **93**.118 must be satisfied using

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the adequate or approved motor vehicle emissions budget(s) (as described in paragraph (f)(2) of this section).

(g) PM10 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<INF>10</INF> 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<INF>10</INF> nonattainment and maintenance areas the budget test must be satisfied as required by Sec. **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<INF>10</INF> nonattainment areas the interim emissions tests must be satisfied as required by Sec. **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) NO2 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<INF>2</INF> 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<INF>2</INF> nonattainment and maintenance areas the budget test must be satisfied as required by Sec. **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<INF>2</INF> nonattainment areas the interim emissions tests must be satisfied as required by Sec. **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<INF>2.5</INF> 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<INF>2.5</INF> nonattainment and maintenance areas the budget test must be satisfied as required by Sec. **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<INF>2.5</INF> nonattainment areas the interim emissions tests must be satisfied as required by Sec. **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 Sec. **93**.118 and/or Sec. **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<INF>10</INF> areas.

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(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 Sec. **93**.118 and/or Sec. **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 Sec. **93**.118 and/or Sec. **93**.119 for other pollutants/precursors and NAAQS that apply. Hot-spot requirements for projects in CO and PM<INF>10</INF> areas in Sec. **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:

* * * * *

Sec. **93**.110 Criteria and procedures: Latest planning assumptions.

(a) The conformity determination, with respect to all other applicable criteria in Sec. Sec. **93**.111 through **93**.119, must be based upon the most recent planning assumptions in force at the time of the conformity determination. The conformity determination must satisfy the requirements of paragraphs (b) through (f) of this section.

(b) Assumptions must be derived from the estimates of current and future population, employment, travel, and congestion most recently developed by the MPO or other agency authorized to make such estimates and approved by the MPO. The conformity determination must also be based on the latest assumptions about current and future background concentrations.

(c) The conformity determination for each transportation plan and TIP must discuss how transit operating policies (including fares and service levels) and assumed transit ridership have changed since the previous conformity determination.

(d) The conformity determination must include reasonable assumptions about transit service and increases in transit fares and road and bridge tolls over time.

(e) The conformity determination must use the latest existing information regarding the effectiveness of the TCMs and other implementation plan measures which have already been implemented.

(f) Key assumptions shall be specified and included in the draft documents and supporting materials used for the interagency and public consultation required by Sec. **93**.105.

Effective Date Note: At 69 FR 44077, July 1, 2004, Sec. **93**.110 was amended by revising paragraph (a), effective Aug. 2, 2004. For the convenience of the user, the revised text is set forth as follows:

Sec. **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 Sec. Sec. **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 Sec. **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.

* * * * *

Sec. **93**.111 Criteria and procedures: Latest emissions model.

(a) The conformity determination must be based on the latest emission estimation model available. This criterion is satisfied if the most current version of the motor vehicle emissions model specified by EPA for use in the preparation or revision of implementation plans in that State or area is used for the conformity analysis. Where EMFAC is the motor vehicle emissions model used in preparing or revising the applicable implementation plan, new versions must be approved by EPA before they are used in the conformity analysis.

(b) EPA will consult with DOT to establish a grace period following the specification of any new model.

(1) The grace period will be no less than three months and no more than 24 months after notice of availability is published in the Federal Register.

(2) The length of the grace period will depend on the degree of change in the model and the scope of re-planning likely to be necessary by MPOs in order to assure conformity. If the grace period will be longer than three months, EPA will announce the appropriate grace period in the Federal Register.

(c) Transportation plan and TIP conformity analyses for which the emissions analysis was begun during the grace period or before the Federal Register notice of availability of the latest emission model may continue to use the previous version of the model. Conformity determinations for projects may also be based on the previous model if the analysis was begun during the grace period or before the Federal Register notice of availability, and if the final environmental document for the project is issued no more than three years after the issuance of the draft environmental document.

Sec. **93**.112 Criteria and procedures: Consultation.

Conformity must be determined according to the consultation procedures in this subpart and in the applicable implementation plan, and according to the public involvement procedures established in compliance with 23 **CFR** part 450. Until the implementation plan revision required by Sec. **51**.390 of this chapter is fully approved by EPA, the conformity determination must be made according to Sec. **93**.105 (a)(2) and (e) and the requirements of 23 **CFR** part 450.

Sec. **93**.113 Criteria and procedures: Timely implementation of TCMs.

(a) The transportation plan, TIP, or any FHWA/FTA project which is not from a conforming plan and TIP must provide for the timely implementation of TCMs from the applicable implementation plan.

(b) For transportation plans, this criterion is satisfied if the following two conditions are met:

(1) The transportation plan, in describing the envisioned future transportation system, provides for the timely completion or implementation of all TCMs in the applicable implementation plan which are eligible for funding under title 23 U.S.C. or the Federal Transit Laws, consistent with schedules included in the applicable implementation plan.

(2) Nothing in the transportation plan interferes with the implementation of any TCM in the applicable implementation plan.

(c) For TIPs, this criterion is satisfied if the following conditions are met:

(1) An examination of the specific steps and funding source(s) needed to fully implement each TCM indicates that TCMs which are eligible for funding under title 23 U.S.C. or the Federal Transit Laws are on or ahead of the schedule established in the applicable implementation plan, or, if such TCMs are behind the schedule established in the applicable implementation plan, the MPO and DOT have determined that past obstacles to implementation of the TCMs have been identified and have been or are being overcome, and that all State and local agencies with influence over approvals or funding for TCMs are giving maximum priority to approval or funding of TCMs over other projects within their control, including



projects in locations outside the nonattainment or maintenance area.

(2) If TCMs in the applicable implementation plan have previously been programmed for Federal funding but the funds have not been obligated and the TCMs are behind the schedule in the implementation plan, then the TIP cannot be found to conform if the funds intended for those TCMs are reallocated to projects in the TIP other than TCMs, or if there are no other TCMs in the TIP, if the funds are reallocated to projects in the TIP other than projects which are eligible for Federal funding intended for air quality improvement projects, e.g., the Congestion Mitigation and Air Quality Improvement Program.

(3) Nothing in the TIP may interfere with the implementation of any TCM in the applicable implementation plan.

(d) For FHWA/FTA projects which are not from a conforming transportation plan and TIP, this criterion is satisfied if the project does not interfere with the implementation of any TCM in the applicable implementation plan.

Sec. **93**.114 Criteria and procedures: Currently conforming transportation plan and TIP.

There must be a currently conforming transportation plan and currently conforming TIP at the time of project approval.

(a) Only one conforming transportation plan or TIP may exist in an area at any time; conformity determinations of a previous transportation plan or TIP expire once the current plan or TIP is found to conform by DOT. The conformity determination on a transportation plan or TIP will also lapse if conformity is not determined according to the frequency requirements specified in Sec. **93**.104.

(b) This criterion is not required to be satisfied at the time of project approval for a TCM specifically included in the applicable implementation plan, provided that all other relevant criteria of this subpart are satisfied.

Sec. **93**.115 Criteria and procedures: Projects from a plan and TIP.

(a) The project must come from a conforming plan and program. If this criterion is not satisfied, the project must satisfy all criteria in Table 1 of Sec. **93**.109(b) for a project not from a conforming transportation plan and TIP. A project is considered to be from a conforming transportation plan if it meets the requirements of paragraph (b) of this section and from a conforming program if it meets the requirements of paragraph (c) of this section. Special provisions for TCMs in an applicable implementation plan are provided in paragraph (d) of this section.

(b) A project is considered to be from a conforming transportation plan if one of the following conditions applies:

(1) For projects which are required to be identified in the transportation plan in order to satisfy Sec. **93**.106 (``Content of transportation plans''), the project is specifically included in the conforming transportation plan and the project's design concept and scope have not changed significantly from those which were described in the transportation plan, or in a manner which would significantly impact use of the facility; or

(2) For projects which are not required to be specifically identified in the transportation plan, the project is identified in the conforming transportation plan, or is consistent with the policies and purpose of the transportation plan and will not interfere with other projects specifically included in the transportation plan.

(c) A project is considered to be from a conforming program if the following conditions are met:

(1) The project is included in the conforming TIP and the design concept and scope of the project were adequate at the time of the TIP conformity determination to determine its contribution to the TIP's regional emissions, and the project design concept and scope have not

changed significantly from those which were described in the TIP; and

(2) If the TIP describes a project design concept and scope which includes project-level emissions mitigation or control measures, written commitments to implement such measures must be obtained from the project sponsor and/or operator as required by Sec. **93**.125(a) in order for the project to be considered from a conforming program.

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Any change in these mitigation or control measures that would significantly reduce their effectiveness constitutes a change in the design concept and scope of the project.

(d) TCMs. This criterion is not required to be satisfied for TCMs specifically included in an applicable implementation plan.

Sec. **93**.116 Criteria and procedures: Localized CO and PM<INF>10</INF> 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<INF>10</INF> violations or increase the frequency or severity of any existing CO or PM<INF>10</INF> violations in CO and PM<INF>10</INF> nonattainment and maintenance areas. This criterion is satisfied if it is demonstrated that 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 Sec. **93**.105(c)(1)(i) and the methodology requirements of Sec. **93**.123.

(b) This paragraph applies for CO nonattainment areas as described in Sec. **93**.109(d)(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 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 Sec. **93**.105(c)(1)(i) and the methodology requirements of Sec. **93**.123.

Effective Date Note: At 69 FR 44077, July 1, 2004, Sec. **93**.116 was revised, effective Aug. 2, 2004. For the convenience of the user, the revised text is set forth as follows:

Sec. **93**.116 Criteria and procedures: Localized CO and PM<INF>10</INF> 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<INF>10</INF> violations or increase the frequency or severity of any existing CO or PM<INF>10</INF> violations in CO and PM<INF>10</INF> 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 Sec. **93**.105(c)(1)(i) and the methodology requirements of Sec. **93**.123.

(b) This paragraph applies for CO nonattainment areas as described in Sec. **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 Sec. **93**.105(c)(1)(i) and the methodology requirements of Sec. **93**.123.

Sec. **93**.117 Criteria and procedures: Compliance with PM<INF>10</INF> control measures.

The FHWA/FTA project must comply with PM<INF>10</INF> 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<INF>10</INF> emissions from the construction activities and/or normal use and operation associated with the project) that are contained in the applicable implementation plan.

Effective Date Note: At 69 FR 44078, July 1, 2004, Sec. **93**.117 was revised, effective Aug. 2, 2004. For the convenience of the user, the revised text is set forth as follows:

Sec. **93**.117 Criteria and procedures: Compliance with PM<INF>10</INF> and PM<INF>2.5</INF> control measures.

The FHWA/FTA project must comply with any PM<INF>10</INF> and PM<INF>2.5</INF> 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<INF>10</INF> and

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PM<INF>2.5</INF> emissions from the construction activities and/or normal use and operation associated with the project) that are contained in the applicable implementation plan.

Sec. **93**.118 Criteria and procedures: Motor vehicle emissions budget.

(a) The transportation plan, TIP, and project not from a conforming transportation plan and TIP must be consistent with the motor vehicle emissions budget(s) in the applicable implementation plan (or implementation plan submission). This criterion applies as described in Sec. **93**.109 (c) through (g). This criterion is satisfied if it is demonstrated that emissions of the pollutants or pollutant precursors described in paragraph (c) of this section are less than or equal to the motor vehicle emissions budget(s) established in the applicable implementation plan or implementation plan submission.

(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 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:

(1) Until a maintenance plan is submitted:

(i) Emissions in each year (such as milestone years and the attainment year) for which the control strategy implementation plan revision establishes motor vehicle emissions budget(s) must be less than or equal to that year's motor vehicle emissions budget(s); and

(ii) Emissions in years for which no motor vehicle emissions budget(s) are specifically established must be less than or equal to the motor vehicle emissions budget(s) established for the most recent prior year. For example, emissions in years after the attainment year for which the implementation plan does not establish a budget must be less than or equal to the motor vehicle emissions budget(s) for the attainment year.

(2) When a maintenance plan has been submitted:

(i) Emissions must be less than or equal to the motor vehicle emissions budget(s) established for the last year of the maintenance plan, and for any other years for which the maintenance plan establishes motor vehicle emissions budgets. If the maintenance plan does not establish motor vehicle emissions budgets for any years other than the last year of the maintenance plan, the demonstration of consistency with the motor vehicle emissions budget(s) must be accompanied by a qualitative finding 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. The interagency consultation process required by Sec. **93**.105 shall determine what must be considered in order to make such a finding;

(ii) For years after the last year of the maintenance plan, emissions must be less than or equal to the maintenance plan's motor vehicle emissions budget(s) for the last year of the maintenance plan; and

(iii) If an approved control strategy implementation plan has established motor vehicle emissions budgets for years in the timeframe 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.

(c) Consistency with the motor vehicle emissions budget(s) must be demonstrated for each pollutant or pollutant precursor in Sec. **93**.102(b) for which the area is in nonattainment or maintenance and for which the applicable implementation plan (or implementation plan submission) establishes a motor vehicle emissions budget.

(d) Consistency with the motor vehicle emissions budget(s) must be demonstrated by including emissions from the entire transportation system, including all regionally significant projects contained in the transportation plan and all other regionally significant highway and transit projects expected in the nonattainment or maintenance area in the timeframe of the transportation plan.

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(1) Consistency with the motor vehicle emissions budget(s) must be demonstrated with a regional emissions analysis that meets the requirements of Sec. Sec. **93**.122 and **93**.105(c)(1)(i).

(2) The regional emissions analysis may be performed for any years in the timeframe of the transportation plan provided they are not more than ten years apart and provided the analysis is performed for the attainment year (if it is in the timeframe of the transportation plan) and the last year of the plan's forecast period. Emissions in years for which consistency with motor vehicle emissions budgets must be demonstrated, as required in paragraph (b) of this section, may be determined by interpolating between the years for which the regional emissions analysis is performed.

(e) Motor vehicle emissions budgets in submitted control strategy implementation plan revisions and submitted maintenance plans. (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, or beginning 45 days after the control strategy implementation plan revision or maintenance plan has been submitted (unless EPA has declared the motor

vehicle emissions budget(s) inadequate for transportation conformity purposes). However, submitted implementation plans do not supersede the motor vehicle emissions budgets in approved implementation plans for the period of years addressed by the approved implementation plan.

(2) If EPA has declared an implementation plan submission's motor vehicle emissions budget(s) inadequate for transportation conformity purposes, the inadequate 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 previous approved implementation plans or implementation plan submissions with motor vehicle emissions budgets, the emission reduction tests required by Sec. **93**.119 must be satisfied.

(3) If EPA declares an implementation plan submission's motor vehicle emissions budget(s) inadequate for transportation conformity purposes more than 45 days after its submission to EPA, 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 Sec. Sec. **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.

(4) EPA will not find a motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan to be adequate for transportation conformity purposes unless the following minimum criteria are satisfied:

(i) The submitted control strategy implementation plan revision or maintenance plan was endorsed by the Governor (or his or her designee) and was subject to a State public hearing;

(ii) Before the control strategy implementation plan or maintenance plan was submitted to EPA, consultation among federal, State, and local agencies occurred; full implementation plan documentation was provided to EPA; and EPA's stated concerns, if any, were addressed;

(iii) The motor vehicle emissions budget(s) is clearly identified and precisely quantified;

(iv) 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 (whichever is relevant to the given implementation plan submission);

(v) The motor vehicle emissions budget(s) is consistent with and clearly related to the emissions inventory and the control measures in the submitted control strategy implementation plan revision or maintenance plan; and

(vi) Revisions to previously submitted control strategy implementation plans or maintenance plans explain and document any changes to

previously submitted budgets and control measures; impacts on point and area source emissions; any changes to established safety margins (see Sec. **93**.101 for definition); and reasons for the changes (including the basis for any changes related to emission factors or estimates of vehicle miles traveled).

(5) Before determining the adequacy of a submitted motor vehicle emissions budget, EPA will review the State's compilation of public comments and response to comments that are required to be submitted with any implementation plan. EPA will document its consideration of such comments and responses in a letter to the State indicating the adequacy of the submitted motor vehicle emissions budget.

(6) When the motor vehicle emissions budget(s) used to satisfy the requirements of this section are established by an implementation plan submittal that has not yet been approved or disapproved by EPA, the MPO and DOT's conformity determinations will be deemed to be a statement that the MPO and DOT are not aware of any information that would indicate that emissions consistent with the motor vehicle emissions budget will cause or contribute to any new violation of any standard; increase the frequency or severity of any existing violation of any standard; or delay timely attainment of any standard or any required interim emission reductions or other milestones.

Effective Date Note: At 69 FR 44078, July 1, 2004, Sec. **93**.118 was amended by revising the reference ``Sec. **93**.109(c) through (g)'' in paragraph (a) to read ``Sec. **93**.109(c) through (l)''; 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); revising paragraphs (e)(1), (e)(2) and (e)(3); and adding new paragraph (f), effective Aug. 2, 2004. For the convenience of the user, the added and revised text is set forth as follows:

Sec. **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 Sec. **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 Sec. Sec. **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.

Sec. **93**.119 Criteria and procedures: Emission reductions in areas without motor vehicle emissions budgets.

(a) The transportation plan, TIP, and project not from a conforming transportation plan and TIP must contribute to emissions reductions. This criterion applies as described in Sec. **93**.109(c) through (g). It applies to the net effect of the action (transportation plan, TIP, or project not from a conforming transportation plan and TIP) on motor vehicle emissions from the entire transportation system.

(b) This criterion may be met in moderate and above ozone nonattainment areas that are subject to the reasonable further progress requirements of CAA section 182(b)(1) and in moderate with design value greater than 12.7 ppm and serious CO nonattainment areas if



a regional emissions analysis that satisfies the requirements of Sec. **93**.122 and paragraphs (e) through (h) of this section demonstrates that for each analysis year and for each of the pollutants described in paragraph (d) of this section:

(1) 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

(2) The emissions predicted in the ``Action'' scenario are lower than 1990 emissions by any nonzero amount.

(c) This criterion may be met in PM<INF>10</INF> and NO<INF>2</INF> nonattainment areas; 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); and moderate with design value less than 12.7 ppm and below CO nonattainment areas if

a regional emissions analysis that satisfies the requirements of Sec. **93**.122 and paragraphs (e) through (h) of this section demonstrates that for each analysis year and for each of the pollutants described in paragraph (d) of this section, one of the following requirements is met:

(1) 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; or

(2) The emissions predicted in the ``Action'' scenario are not greater than baseline emissions. Baseline emissions are those estimated to have occurred during calendar year 1990, unless the conformity implementation plan revision required by Sec. **51**.390 of this chapter defines the baseline emissions for a PM<INF>10</INF> area to be those occurring in a different calendar year for which a baseline emissions inventory was developed for the purpose of developing a control strategy implementation plan.

(d) Pollutants. The regional emissions analysis must be performed for the following pollutants:

(1) VOC in ozone areas;

(2) NO<INF>X</INF> in ozone areas, unless the EPA Administrator determines that additional reductions of NO<INF>X</INF> would not contribute to attainment;

(3) CO in CO areas;

(4) PM<INF>10</INF> in PM<INF>10</INF> areas;

(5) Transportation-related precursors of PM<INF>10</INF> in PM<INF>10</INF> nonattainment and maintenance areas if the EPA Regional Administrator or the director of the State air agency has made a finding that such precursor emissions from within the area are a significant contributor to the PM<INF>10</INF> nonattainment problem and has so notified the MPO and DOT; and

(6) NO<INF>X</INF> in NO<INF>2</INF> areas.

(e) Analysis years. 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 transportation plan's forecast period must also be an analysis year.

(f) ``Baseline'' scenario. The regional emissions analysis required by paragraphs (b) and (c) of this section must estimate the emissions that would result from the ``Baseline'' scenario in each analysis year. The ``Baseline'' scenario must be defined for each of the analysis years. The ``Baseline'' scenario is the future transportation system that will result from current programs, including the following (except that exempt projects listed in Sec. **93**.126 and projects exempt from regional emissions analysis as listed in Sec. **93**.127 need not be explicitly considered):

(1) All in-place regionally significant highway and transit facilities, services and activities;

(2) All ongoing travel demand management or transportation system management activities; and

(3) Completion of all regionally significant projects, regardless of funding source, which are currently under construction or are undergoing right-of-way acquisition (except for hardship acquisition and protective buying); come from the first year of the previously conforming transportation plan and/or TIP; or have completed the NEPA process.

(g) ``Action'' scenario. The regional emissions analysis required by paragraphs (b) and (c) of this section must

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estimate the emissions that would result from the ``Action'' scenario in each analysis year. The ``Action'' scenario must be defined for each of the analysis years. The ``Action'' scenario is the transportation system that would result from the implementation of the proposed action (transportation plan, TIP, or project not from a conforming transportation plan and TIP) and all other expected regionally significant projects in the nonattainment area. The ``Action'' scenario must include the following (except that exempt projects listed in Sec. **93**.126 and projects exempt from regional emissions analysis as listed in Sec. **93**.127 need not be explicitly considered):

(1) All facilities, services, and activities in the ``Baseline'' scenario;

(2) Completion of all TCMs and regionally significant projects (including facilities, services, and activities) specifically identified in the proposed transportation plan which will be operational or in effect in the analysis year, except that regulatory TCMs may not be assumed to begin at a future time unless the regulation is already adopted by the enforcing jurisdiction or the TCM is identified in the applicable implementation plan;

(3) All travel demand management programs and transportation system management activities known to the MPO, but not included in the applicable implementation plan or utilizing any Federal funding or approval, which have been fully adopted and/or funded by the enforcing jurisdiction or sponsoring agency since the last conformity determination;

(4) The incremental effects of any travel demand management programs and transportation system management activities known to the MPO, but not included in the applicable implementation plan or utilizing any Federal funding or approval, which were adopted and/or funded prior to the date of the last conformity determination, but which have been modified since then to be more stringent or effective;

(5) Completion of all expected regionally significant highway and transit projects which are not from a conforming transportation plan and TIP; and

(6) Completion of all expected regionally significant non-FHWA/FTA

highway and transit projects that have clear funding sources and commitments leading toward their implementation and completion by the analysis year.

(h) Projects not from a conforming transportation plan and TIP. For the regional emissions analysis required by paragraphs (b) and (c) of this section, if the project which is not from a conforming transportation plan and TIP is a modification of a project currently in the plan or TIP, the `Baseline' scenario must include the project with its original design concept and scope, and the `Action' scenario must include the project with its new design concept and scope.

Effective Date Note: At 69 FR 44079, July 1, 2004, Sec. **93**.119 was 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)'', effective Aug. 2, 2004. For the convenience of the user, the added and revised text is set forth as follows:

Sec. **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 Sec. **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 Sec. **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 Sec. **93**.109(c); or

(B) 2002 emissions by any nonzero amount, in areas for the 8-hour ozone NAAQS as described in Sec. **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 Sec. **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 Sec. **93**.109(c); or

(B) 2002 emissions, in areas for the 8-hour ozone NAAQS as described in Sec. **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 Sec. **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 Sec. **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) PM10 and NO2 areas. This criterion may be met in PM<INF>10</INF> and NO<INF>2</INF> nonattainment areas if a regional emissions analysis that satisfies the requirements of Sec. **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) PM2.5 areas. This criterion may be met in PM<INF>2.5</INF> nonattainment areas if a regional emissions analysis that satisfies the requirements of Sec. **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<INF>X</INF> in PM<INF>10</INF> 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<INF>10</INF> nonattainment problem and has so notified the MPO and DOT;

(6) * * *

(7) PM<INF>2.5</INF> in PM<INF>2.5</INF> areas; and

(8) Reentrained road dust in PM<INF>2.5</INF> 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<INF>2.5</INF> 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 Sec. **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.

* * * * *

Sec. **93**.120 Consequences of control strategy implementation plan failures.

(a) Disapprovals. (1) If EPA disapproves any submitted control strategy implementation plan revision (with or without a protective finding), the conformity status of the transportation plan and TIP shall lapse on the date that highway sanctions as a result of the disapproval are imposed on the nonattainment area under section 179(b)(1) of the CAA. No new transportation plan, TIP, or project may be found to conform until another control strategy implementation plan revision fulfilling the same CAA requirements is submitted and conformity to this submission is determined.

(2) If EPA disapproves a submitted control strategy implementation plan revision without making a protective finding, then beginning 120 days after such disapproval, only projects in the first three years of the currently conforming transportation plan and TIP may be found to conform. This means that beginning 120 days after disapproval without a protective finding, no transportation plan, TIP, or project not in the first three years of the currently conforming plan and TIP may be found to conform until another control strategy implementation plan revision fulfilling the same CAA requirements is submitted and conformity to this submission is determined. During the first 120 days following EPA's disapproval without a protective finding, transportation plan, TIP, and project conformity determinations shall be made using the motor vehicle emissions budget(s) in the disapproved control strategy implementation

plan, unless another control strategy implementation plan revision has been submitted and its motor vehicle emissions budget(s) applies for transportation conformity purposes, pursuant to Sec. **93**.109.

(3) In disapproving a control strategy implementation plan revision, EPA would give a protective finding where a submitted plan contains adopted control measures or written commitments to adopt enforceable control measures that fully satisfy the emissions reductions requirements relevant to the statutory provision for which the implementation plan revision was submitted, such as reasonable further progress or attainment.

(b) Failure to submit and incompleteness. In areas where EPA notifies the State, MPO, and DOT of the State's failure to submit a control strategy implementation plan or submission of an incomplete control strategy implementation plan revision (either of which initiates the sanction process under CAA sections 179 or 110(m)), the conformity status of the transportation plan and TIP shall lapse on the date that highway sanctions are imposed on the nonattainment area for such failure under section 179(b)(1) of the CAA, unless the failure has been remedied and acknowledged by a letter from the EPA Regional Administrator.

(c) Federal implementation plans. If EPA promulgates a Federal implementation plan that contains motor vehicle emissions budget(s) as a result of a State failure, the conformity lapse imposed by this section because of that State failure is removed.

Effective Date Note: At 69 FR 44080, July 1, 2004, Sec. **93**.120 was amended by revising paragraph (a)(2), effective Aug. 2, 2004. For the convenience of the user, the revised text is set forth as follows:

Sec. **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

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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 Sec. **93**.118 or approves the submission, and conformity to the implementation plan revision is determined.

* * * * *

Sec. **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) Except as provided in paragraph (b) of this section, 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:

(1) The project was included in the first three years of the most recently conforming transportation plan and TIP (or the conformity determination's regional emissions analyses), even if conformity status is currently lapsed; and the project's design concept and scope has not changed significantly from those analyses; or

(2) There is a currently conforming transportation plan and TIP, and 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 Sec. Sec. **93**.118 and/or **93**.119 for a project not from a conforming transportation plan and TIP).

(b) In isolated rural nonattainment and maintenance areas subject to Sec. **93**.109(g), 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:

(1) The project was included in the regional emissions analysis supporting the most recent conformity determination for the portion of the statewide transportation plan and TIP which are in the nonattainment or maintenance area, and the project's design concept and scope has not changed significantly; or

(2) A new regional emissions analysis including the project and all other regionally significant projects expected in the nonattainment or maintenance area demonstrates that those projects in the statewide transportation plan and statewide TIP which are in the nonattainment or maintenance area would still conform if the project were implemented (consistent with the requirements of Sec. Sec. **93**.118 and/or **93**.119 for projects not from a conforming transportation plan and TIP).

Effective Date Note: At 69 FR 44080, July 1, 2004, Sec. **93**.121 was amended by revising paragraph (a)(1), redesignating paragraph (a)(2) as (a)(3), adding a new paragraph (a)(2) and revising newly redesignated paragraph (a)(3); amending paragraph (b) introductory text by removing

the reference ``Sec. **93**.109(g)'' and adding in its place a reference for ``Sec. **93**.109(l)'', and revising paragraph (b)(1); and adding new paragraph (c), effective Aug. 2, 2004. For the convenience of the user, the added and revised text is set forth as follows:

Sec. **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

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implemented (consistent with the requirements of Sec. Sec. **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 Sec. **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.

Sec. **93**.122 Procedures for determining regional transportation-related emissions.

(a) General requirements. (1) The regional emissions analysis required by Sec. Sec. **93**.118 and **93**.119 for the transportation plan, TIP, or project not from a conforming plan and TIP must include all regionally significant projects expected in the nonattainment or maintenance area. The analysis shall include FHWA/FTA projects proposed in the transportation plan and TIP and all other regionally significant projects which are disclosed to the MPO as required by Sec. **93**.105. Projects which are not regionally significant are not required to be explicitly modeled, but vehicle miles traveled (VMT) from such projects must be estimated in accordance with reasonable professional practice. The effects of TCMs and similar projects that are not regionally significant may also be estimated in accordance with reasonable professional practice.

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

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

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

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

(iii) The control strategy implementation plan submission or maintenance plan submission that establishes the motor vehicle emissions budget(s) for the purposes of Sec. **93**.118 contains a written commitment to the project, program, or activity by the agency with authority to implement it; or

(iv) EPA has approved an opt-in to a Federally enforced program, EPA has promulgated the program (if the control program is a Federal responsibility, such as vehicle tailpipe standards), or the Clean Air

Act requires the program without need for individual State action and without any discretionary authority for EPA to set its stringency, delay its effective date, or not implement the program.

(4) Emissions reduction credit from control measures that are not included in the transportation plan and TIP and that do not require a regulatory action in order to be implemented may not be included in the emissions analysis unless the conformity determination includes written commitments to implementation from the appropriate entities.

(i) Persons or entities voluntarily committing to control measures must comply with the obligations of such commitments.

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(ii) The conformity implementation plan revision required in Sec. **51**.390 of this chapter must provide that written commitments to control measures that are not included in the transportation plan and TIP must be obtained prior to a conformity determination and that such commitments must be fulfilled.

(5) A regional emissions analysis for the purpose of satisfying the requirements of Sec. **93**.119 must make the same assumptions in both the ``Baseline'' and ``Action'' scenarios regarding control measures that are external to the transportation system itself, such as vehicle tailpipe or evaporative emission standards, limits on gasoline volatility, vehicle inspection and maintenance programs, and oxygenated or reformulated gasoline or diesel fuel.

(6) The ambient temperatures used for the regional emissions analysis shall be consistent with those used to establish the emissions budget in the applicable implementation plan. All other factors, for example the fraction of travel in a hot stabilized engine mode, must be consistent with the applicable implementation plan, unless modified after interagency consultation according to Sec. **93**.105(c)(1)(i) to incorporate additional or more geographically specific information or represent a logically estimated trend in such factors beyond the period considered in the applicable implementation plan.

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

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

(1) By January 1, 1997, estimates of regional transportation-related emissions used to support conformity determinations must be made at a minimum using network-based travel models according to procedures and methods that are available and in practice and supported by current and

available documentation. These procedures, methods, and practices are available from DOT and will be updated periodically. Agencies must discuss these modeling procedures and practices through the interagency consultation process, as required by Sec. **93**.105(c)(1)(i). Network-based travel models must at a minimum satisfy the following requirements:

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

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

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

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

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

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

(2) Reasonable methods in accordance with good practice must be used to estimate traffic speeds and delays in a



manner that is sensitive to the estimated volume of travel on each roadway segment represented in the network-based travel model.

(3) Highway Performance Monitoring System (HPMS) estimates of vehicle miles traveled (VMT) shall be considered the primary measure of VMT within the portion of the nonattainment or maintenance area and for the functional classes of roadways included in HPMS, for urban areas which are sampled on a separate urban area basis. For areas with network-based travel models, a factor (or factors) may be developed to reconcile and calibrate the network-based travel model estimates of VMT in the base year of its validation to the HPMS estimates for the same period. These factors may then be applied to model estimates of future

VMT. In this factoring process, consideration will be given to differences between HPMS and network-based travel models, such as differences in the facility coverage of the HPMS and the modeled network description. Locally developed count- based programs and other departures from these procedures are permitted subject to the interagency consultation procedures of Sec. **93**.105(c)(1)(i).

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

(d) PM10 from construction-related fugitive dust. (1) For areas in which the implementation plan does not identify construction-related fugitive PM<INF>10</INF> as a contributor to the nonattainment problem, the fugitive PM<INF>10</INF> emissions associated with highway and transit project construction are not required to be considered in the regional emissions analysis.

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

(e) Reliance on previous regional emissions analysis. (1) The TIP may be demonstrated to satisfy the requirements of Sec. Sec. **93**.118 (``Motor vehicle emissions budget'') or **93**.119 (``Emission reductions in areas without motor vehicle emissions budgets'') without new regional emissions analysis if the regional emissions analysis already performed for the plan also applies to the TIP. This requires a demonstration that:

(i) The TIP contains all projects which must be started in the TIP's timeframe in order to achieve the highway and transit system envisioned by the transportation plan;

(ii) All 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 regional emissions at the time of the transportation plan's conformity determination; and

(iii) The design concept and scope of each regionally significant project in the TIP is not significantly different from that described in

the transportation plan.

(2) A project which is not from a conforming transportation plan and a conforming TIP may be demonstrated to satisfy the requirements of Sec. **93**.118 or Sec. **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, and if the project is either:

(i) Not regionally significant; or

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

Effective Date Note: At 69 FR 44080, July 1, 2004, Sec. **93**.122 was amended by redesignating paragraphs (c), (d), and (e) as paragraphs (d), (e) and (g), respectively; adding new paragraphs (c) and (f); and revising newly redesignated paragraphs (g)(1) and (g)(2) introductory text, and adding new paragraph (g)(3), effective Aug. 2, 2004. For the convenience of the user, the added and revised text is set forth as follows:

Sec. **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) PM2.5 from construction-related fugitive dust. (1) For PM<INF>2.5</INF> areas in which the implementation plan does not identify construction-related fugitive PM<INF>2.5</INF> as a significant contributor to the nonattainment problem, the fugitive PM<INF>2.5</INF> emissions associated with highway and transit project construction are not required to be considered in the regional emissions analysis.

(2) In PM<INF>2.5</INF> nonattainment and maintenance areas with implementation plans which identify construction-related fugitive PM<INF>2.5</INF> as a significant contributor to the nonattainment problem, the regional PM<INF>2.5</INF> emissions analysis shall consider construction-related fugitive PM<INF>2.5</INF> and shall account for the level of construction activity, the fugitive PM<INF>2.5</INF> 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 Sec. Sec. **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 Sec. Sec. **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 Sec. **93**.118 or Sec. **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 Sec. **93**.118 (including that

conformity to all currently applicable budgets is demonstrated) and/or Sec. **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 Sec. **93**.104(b) or (c).

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Sec. **93**.123 Procedures for determining localized CO and PM<INF>10</INF> concentrations (hot-spot analysis).

(a) CO hot-spot analysis. (1) The demonstrations required by Sec. **93**.116 (``Localized CO and PM<INF>10</INF> violations'') must be based on quantitative analysis using the applicable air quality models, data bases, and other requirements specified in **40 CFR** part **51**, Appendix W (Guideline on Air Quality Models). These procedures shall be used in the following cases, unless different procedures developed through the interagency consultation process required in Sec. **93**.105 and approved by the EPA Regional Administrator are used:

(i) For projects in or affecting locations, areas, or categories of sites which are identified in the applicable implementation plan as sites of violation or possible violation;

(ii) For projects affecting intersections that are at Level-of-Service D, E, or F, or those that will change to Level-of-Service D, E, or F because of increased traffic volumes related to the project;

(iii) For any project affecting one or more of the top three intersections in the nonattainment or maintenance area with highest traffic volumes, as identified in the applicable implementation plan; and

(iv) For any project affecting one or more of the top three intersections in the nonattainment or maintenance area with the worst level of service, as identified in the applicable implementation plan.

(2) In cases other than those described in paragraph (a)(1) of this section, the demonstrations required by Sec. **93**.116 may be based on either:

(i) Quantitative methods that represent reasonable and common professional practice; or

(ii) A qualitative consideration of local factors, if this can provide a clear demonstration that the requirements of Sec. **93**.116 are met.

(b) PM10 hot-spot analysis. (1) The hot-spot demonstration required by Sec. **93**.116 must be based on quantitative analysis methods for the following types of projects:

(i) Projects which are located at sites at which violations have

been verified by monitoring;

(ii) Projects which are located at sites which have vehicle and roadway emission and dispersion characteristics that are essentially identical to those of sites with verified violations (including sites near one at which a violation has been monitored); and

(iii) New or expanded bus and rail terminals and transfer points which increase the number of diesel vehicles congregating at a single location.

(2) Where quantitative analysis methods are not required, the demonstration required by Sec. **93**.116 may be based on a qualitative consideration of local factors.

(3) The identification of the sites described in paragraph (b)(1)(i) and (ii) of this section, and other cases where quantitative methods are appropriate, shall be determined through the interagency consultation process required in Sec. **93**.105. DOT may choose to make a categorical conformity determination on bus and rail terminals or transfer points based on appropriate modeling of various terminal sizes, configurations, and activity levels.

(4) The requirements for quantitative analysis contained in this paragraph (b) will not take effect until EPA releases modeling guidance on this subject and announces in the Federal Register that these requirements are in effect.

(c) General requirements. (1) Estimated pollutant concentrations must be based on the total emissions burden which may result from the implementation of the project, summed together with future background concentrations. The total concentration must be estimated and analyzed at appropriate receptor locations in the area substantially affected by the project.

(2) Hot-spot analyses must include the entire project, and may be performed only after the major design features which will significantly impact concentrations have been identified. The future background concentration should be estimated by multiplying current background by the ratio of future to current traffic and the ratio of future to current emission factors.

(3) Hot-spot analysis assumptions must be consistent with those in the regional emissions analysis for those



inputs which are required for both analyses.

(4) PM<INF>10</INF> or CO mitigation or control measures shall be assumed in the hot-spot analysis only where there are written commitments from the project sponsor and/or operator to implement such measures, as required by Sec. **93**.125(a).

(5) CO and PM<INF>10</INF> hot-spot analyses are not required to consider construction-related activities which cause temporary increases in emissions. Each site which is affected by construction-related

activities shall be considered separately, using established ``Guideline'' methods. Temporary increases are defined as those which occur only during the construction phase and last five years or less at any individual site.

Sec. **93**.124 Using the motor vehicle emissions budget in the applicable implementation plan (or implementation plan submission).

(a) In interpreting an applicable implementation plan (or implementation plan submission) with respect to its motor vehicle emissions budget(s), the MPO and DOT may not infer additions to the budget(s) that are not explicitly intended by the implementation plan (or submission). Unless the implementation plan explicitly quantifies the amount by which motor vehicle emissions could be higher while still allowing a demonstration of compliance with the milestone, attainment, or maintenance requirement and explicitly states an intent that some or all of this additional amount should be available to the MPO and DOT in the emissions budget for conformity purposes, the MPO may not interpret the budget to be higher than the implementation plan's estimate of future emissions. This applies in particular to applicable implementation plans (or submissions) which demonstrate that after implementation of control measures in the implementation plan:

(1) Emissions from all sources will be less than the total emissions that would be consistent with a required demonstration of an emissions reduction milestone;

(2) Emissions from all sources will result in achieving attainment prior to the attainment deadline and/or ambient concentrations in the attainment deadline year will be lower than needed to demonstrate attainment; or

(3) Emissions will be lower than needed to provide for continued maintenance.

(b) If an applicable implementation plan submitted before November 24, 1993, demonstrates that emissions from all sources will be less than the total emissions that would be consistent with attainment and quantifies that ``safety margin,'' the State may submit an implementation plan revision which assigns some or all of this safety margin to highway and transit mobile sources for the purposes of conformity. Such an implementation plan revision, once it is endorsed by the Governor and has been subject to a public hearing, may be used for the purposes of transportation conformity before it is approved by EPA.

(c) A conformity demonstration shall not trade emissions among budgets which the applicable implementation plan (or implementation plan submission) allocates for different pollutants or precursors, or among budgets allocated to motor vehicles and other sources, unless the implementation plan establishes appropriate mechanisms for such trades.

(d) If the applicable implementation plan (or implementation plan submission) estimates future emissions by geographic subarea of the

nonattainment area, the MPO and DOT are not required to consider this to establish subarea budgets, unless the applicable implementation plan (or implementation plan submission) explicitly indicates an intent to create such subarea budgets for the purposes of conformity.

(e) If a nonattainment area includes more than one MPO, the implementation plan may establish motor vehicle emissions budgets for each MPO, or else the MPOs must collectively make a conformity determination for the entire nonattainment area.

Effective Date Note: At 69 FR 44081, July 1, 2004, Sec. **93**.124 was amended by removing paragraph (b) and redesignating paragraphs (c) through (e) as paragraphs (b) through (d), effective Aug. 2, 2004.

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Sec. **93**.125 Enforceability of design concept and scope and project-level mitigation and control measures.

(a) Prior to determining that a transportation project is in conformity, the MPO, other recipient of funds designated under title 23 U.S.C. or the Federal Transit Laws, FHWA, or FTA must obtain from the project sponsor and/or operator written commitments to implement in the construction of the project and operation of the resulting facility or service any project-level mitigation or control measures which are identified as conditions for NEPA process completion with respect to local PM<INF>10</INF> or CO impacts. Before a conformity determination is made, written commitments must also be obtained for project-level mitigation or control measures which are conditions for making conformity determinations for a transportation plan or TIP and are included in the project design concept and scope which is used in the regional emissions analysis required by Sec. Sec. **93**.118 (``Motor vehicle emissions budget'') and **93**.119 (``Emission reductions in areas without motor vehicle emissions budgets'') or used in the project-level hot-spot analysis required by Sec. **93**.116.

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

(c) The implementation plan revision required in Sec. **51**.390 of this chapter shall provide that written commitments to mitigation measures must be obtained prior to a positive conformity determination, and that project sponsors must comply with such commitments.

(d) If the MPO or project sponsor believes the mitigation or control measure is no longer necessary for conformity, the project sponsor or operator may be relieved of its obligation to implement the mitigation or control measure if it can demonstrate that the applicable hot-spot requirements of Sec. **93**.116, emission budget requirements of Sec. **93**.118, and emission reduction requirements of Sec. **93**.119 are

satisfied without the mitigation or control measure, and so notifies the agencies involved in the interagency consultation process required under Sec. **93**.105. The MPO and DOT must find that the transportation plan and TIP still satisfy the applicable requirements of Sec. Sec. **93**.118 and/or **93**.119 and that the project still satisfies the requirements of Sec. **93**.116, and therefore that the conformity determinations for the transportation plan, TIP, and project are still valid. This finding is subject to the applicable public consultation requirements in Sec. **93**.105(e) for conformity determinations for projects.

Effective Date Note: At 69 FR 44081, July 1, 2004, Sec. **93**.125 was 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 Sec. **93**.119'' to read ``interim emissions requirements of Sec. **93**.119.'', effective Aug. 2, 2004.

Sec. **93**.126 Exempt projects.

Notwithstanding the other requirements of this subpart, highway and transit projects of the types listed in Table 2 of this section are exempt from the requirement to determine conformity. Such projects may proceed toward implementation even in the absence of a conforming transportation plan and TIP. A particular action of the type listed in Table 2 of this section is not exempt if the MPO in consultation with other agencies (see Sec. **93**.105(c)(1)(iii)), the EPA, and the FHWA (in the case of a highway project) or the FTA (in the case of a transit project) concur that it has potentially adverse emissions impacts for any reason. States and MPOs must ensure that exempt projects do not interfere with TCM implementation. Table 2 follows:

Table 2--Exempt Projects

Safety

Railroad/highway crossing.
Hazard elimination program.
Safer non-Federal-aid system roads.
Shoulder improvements.
Increasing sight distance.
Safety improvement program.
Traffic control devices and operating assistance other than signalization projects.
Railroad/highway crossing warning devices.
Guardrails, median barriers, crash cushions.
Pavement resurfacing and/or rehabilitation.

Pavement marking demonstration.
Emergency relief (23 U.S.C. 125).
Fencing.

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Skid treatments.
Safety roadside rest areas.
Adding medians.
Truck climbing lanes outside the urbanized area.
Lighting improvements.
Widening narrow pavements or reconstructing bridges (no additional travel lanes).
Emergency truck pullovers.

Mass Transit

Operating assistance to transit agencies.
Purchase of support vehicles.
Rehabilitation of transit vehicles \1\.
Purchase of office, shop, and operating equipment for existing facilities.
Purchase of operating equipment for vehicles (e.g., radios, fareboxes, lifts, etc.).
Construction or renovation of power, signal, and communications systems.
Construction of small passenger shelters and information kiosks.
Reconstruction or renovation of transit buildings and structures (e.g., rail or bus buildings, storage and maintenance facilities, stations, terminals, and ancillary structures).
Rehabilitation or reconstruction of track structures, track, and trackbed in existing rights-of-way.
Purchase of new buses and rail cars to replace existing vehicles or for minor expansions of the fleet \1\.
Construction of new bus or rail storage/maintenance facilities categorically excluded in 23 **CFR** part 771.

Air Quality

Continuation of ride-sharing and van-pooling promotion activities at current levels.
Bicycle and pedestrian facilities.

Other

Specific activities which do not involve or lead directly to construction, such as:
Planning and technical studies.

Grants for training and research programs.
Planning activities conducted pursuant to titles 23 and 49 U.S.C.
Federal-aid systems revisions.
Engineering to assess social, economic, and environmental effects of the proposed action or alternatives to that action.
Noise attenuation.
Emergency or hardship advance land acquisitions (23 **CFR** 712.204(d)).
Acquisition of scenic easements.
Plantings, landscaping, etc.
Sign removal.
Directional and informational signs.
Transportation enhancement activities (except rehabilitation and operation of historic transportation buildings, structures, or facilities).
Repair of damage caused by natural disasters, civil unrest, or terrorist acts, except projects involving substantial functional, locational or capacity changes.
Note: \1\In PM<INF>10</INF> nonattainment or maintenance areas, such projects are exempt only if they are in compliance with control measures in the applicable implementation plan.

Effective Date Note: At 69 FR 44081, July 1, 2004, Sec. **93**.126 was 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).'', effective Aug. 2, 2004.

Sec. **93**.127 Projects exempt from regional emissions analyses.

Notwithstanding the other requirements of this subpart, highway and transit projects of the types listed in Table 3 of this section are exempt from regional emissions analysis requirements. The local effects of these projects with respect to CO or PM<INF>10</INF> concentrations must be considered to determine if a hot-spot analysis is required prior to making a project-level conformity determination. These projects may then proceed to the project development process even in the absence of a conforming transportation plan and TIP. A particular action of the type listed in Table 3 of this section is not exempt from regional emissions analysis if the MPO in consultation with other agencies (see Sec. **93**.105(c)(1)(iii)), the EPA, and the FHWA (in the case of a highway project) or the FTA (in the case of a transit project) concur that it has potential regional impacts for any reason. Table 3 follows:

Table 3--Projects Exempt From Regional Emissions Analyses

Intersection channelization projects.
Intersection signalization projects at individual intersections.

Interchange reconfiguration projects.
Changes in vertical and horizontal alignment.
Truck size and weight inspection stations.
Bus terminals and transfer points.

Sec. **93**.128 Traffic signal synchronization projects.

Traffic signal synchronization projects may be approved, funded, and implemented without satisfying the requirements of this subpart. However,

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all subsequent regional emissions analyses required by Sec. Sec. **93**.118 and **93**.119 for transportation plans, TIPs, or projects not from a conforming plan and TIP must include such regionally significant traffic signal synchronization projects.

Sec. **93**.129 Special exemptions from conformity requirements for pilot program areas.

EPA and DOT may exempt no more than six areas for no more than three years from certain requirements of this subpart if these areas are selected to participate in a conformity pilot program and have developed alternative requirements that have been approved by EPA as an implementation plan revision in accordance with Sec. **51**.390 of this chapter. For the duration of the pilot program, areas selected to participate in the pilot program must comply with the conformity requirements of the pilot area's implementation plan revision for Sec. **51**.390 of this chapter and all other requirements in **40 CFR parts 51** and **93** that are not covered by the pilot area's implementation plan revision for Sec. **51**.390 of this chapter. The alternative conformity requirements in conjunction with any applicable state and/or federal conformity requirements must be proposed to fulfill all of the requirements of and achieve results equivalent to or better than section 176(c) of the Clean Air Act. After the three-year duration of the pilot program has expired, areas will again be subject to all of the requirements of this subpart and **40 CFR** part **51**, subpart T, and/or to the requirements of any implementation plan revision that was previously approved by EPA in accordance with Sec. **51**.390 of this chapter.

[64 FR 13483, Mar. 18, 1999]

Subpart B_Determining Conformity of General Federal Actions to State or Federal Implementation Plans

Source: 58 FR 63253, Nov. 30, 1993, unless otherwise noted.

Sec. **93**.150 Prohibition.

(a) No department, agency or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve any activity which does not conform to an applicable implementation plan.

(b) A Federal agency must make a determination that a Federal action conforms to the applicable implementation plan in accordance with the requirements of this subpart before the action is taken.

(c) Paragraph (b) of this section does not include Federal actions where:

(1) A National Environmental Policy Act (NEPA) analysis was completed as evidenced by a final environmental assessment (EA), environmental impact statement (EIS), or finding of no significant impact (FONSI) that was prepared prior to January 31, 1994; or

(2)(i) Prior to January 31, 1994, an environmental analysis was commenced or a contract was awarded to develop the specific environmental analysis;

(ii) Sufficient environmental analysis is completed by March 15, 1994 so that the Federal agency may determine that the Federal action is in conformity with the specific requirements and the purposes of the applicable SIP pursuant to the agency's affirmative obligation under section 176(c) of the Clean Air Act (Act); and

(iii) A written determination of conformity under section 176(c) of the Act has been made by the Federal agency responsible for the Federal action by March 15, 1994.

(d) Notwithstanding any provision of this subpart, a determination that an action is in conformance with the applicable implementation plan does not exempt the action from any other requirements of the applicable implementation plan, the National Environmental Policy Act (NEPA), or the Clean Air Act (Act).

[58 FR 63253, Nov. 30, 1993; 58 FR 67442, Dec. 21, 1993]

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Sec. **93**.151 State implementation plan (SIP) revision.

The Federal conformity rules under this subpart, in addition to any existing applicable State requirements, establish the conformity criteria and procedures necessary to meet the Act requirements until such time as the required conformity SIP revision is approved by EPA. A State's conformity provisions must contain criteria and procedures that are no less stringent than the requirements described in this subpart. A State may establish more stringent conformity criteria and procedures only if they apply equally to nonfederal as well as Federal entities.

Following EPA approval of the State conformity provisions (or a portion thereof) in a revision to the applicable SIP, the approved (or approved portion of the) State criteria and procedures would govern conformity determinations and the Federal conformity regulations contained in this part would apply only for the portion, if any, of the State's conformity provisions that is not approved by EPA. In addition, any previously applicable SIP requirements relating to conformity remain enforceable until the State revises its SIP to specifically remove them from the SIP and that revision is approved by EPA.

Sec. **93**.152 Definitions.

Terms used but not defined in this part shall have the meaning given them by the Act and EPA's regulations (**40 CFR** chapter I), in that order of priority.

Affected Federal land manager means the Federal agency or the Federal official charged with direct responsibility for management of an area designated as Class I under the Act (42 U.S.C. 7472) that is located within 100 km of the proposed Federal action.

Applicable implementation plan or applicable SIP means the portion (or portions) of the SIP or most recent revision thereof, which has been approved under section 110 of the Act, or promulgated under section 110(c) of the Act (Federal implementation plan), or promulgated or approved pursuant to regulations promulgated under section 301(d) of the Act and which implements the relevant requirements of the Act.

Areawide air quality modeling analysis means an assessment on a scale that includes the entire nonattainment or maintenance area which uses an air quality dispersion model to determine the effects of emissions on air quality.

Cause or contribute to a new violation means a Federal action that:

(1) Causes a new violation of a national ambient air quality standard (NAAQS) at a location in a nonattainment or maintenance area which would otherwise not be in violation of the standard during the future period in question if the Federal action were not taken; or

(2) Contributes, in conjunction with other reasonably foreseeable actions, to a new violation of a NAAQS at a location in a nonattainment or maintenance area in a manner that would increase the frequency or severity of the new violation.

Caused by, as used in the terms ``direct emissions'' and ``indirect emissions,'' means emissions that would not otherwise occur in the absence of the Federal action.

Criteria pollutant or standard means any pollutant for which there is established a NAAQS at **40 CFR** part 50.

Direct emissions means those emissions of a criteria pollutant or its precursors that are caused or initiated by the Federal action and occur at the same time and place as the action.

Emergency means a situation where extremely quick action on the part

of the Federal agencies involved is needed and where the timing of such Federal activities makes it impractical to meet the requirements of this subpart, such as natural disasters like hurricanes or earthquakes, civil disturbances such as terrorist acts and military mobilizations.

Emissions budgets are those portions of the applicable SIP's projected emission inventories that describe the levels of emissions (mobile, stationary, area, etc.) that provide for meeting reasonable further progress milestones, attainment, and/or maintenance for any criteria pollutant or its precursors.

Emissions offsets, for purposes of Sec. **93**.158, are emissions reductions which are quantifiable, consistent with the applicable SIP attainment and reasonable further progress demonstrations,

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surplus to reductions required by, and credited to, other applicable SIP provisions, enforceable at both the State and Federal levels, and permanent within the timeframe specified by the program.

Emissions that a Federal agency has a continuing program responsibility for means emissions that are specifically caused by an agency carrying out its authorities, and does not include emissions that occur due to subsequent activities, unless such activities are required by the Federal agency. When an agency, in performing its normal program responsibilities, takes actions itself or imposes conditions that result in air pollutant emissions by a non-Federal entity taking subsequent actions, such emissions are covered by the meaning of a continuing program responsibility.

EPA means the Environmental Protection Agency.

Federal action means any activity engaged in by a department, agency, or instrumentality of the Federal government, or any activity that a department, agency or instrumentality of the Federal government supports in any way, provides financial assistance for, licenses, permits, or approves, other than activities related to transportation plans, programs, and projects developed, funded, or approved under title 23 U.S.C. or the Federal Transit Act (49 U.S.C. 1601 et seq.). Where the Federal action is a permit, license, or other approval for some aspect of a non-Federal undertaking, the relevant activity is the part, portion, or phase of the non-Federal undertaking that requires the Federal permit, license, or approval.

Federal agency means, for purposes of this subpart, a Federal department, agency, or instrumentality of the Federal government.

Increase the frequency or severity of any existing violation of any standard in any area means to cause a nonattainment area to exceed a standard more often or to cause a violation at a greater concentration than previously existed and/or would otherwise exist during the future period in question, if the project were not implemented.

Indirect emissions means those emissions of a criteria pollutant or

its precursors that:

(1) Are caused by the Federal action, but may occur later in time and/or may be further removed in distance from the action itself but are still reasonably foreseeable; and

(2) The Federal agency can practicably control and will maintain control over due to a continuing program responsibility of the Federal agency.

Local air quality modeling analysis means an assessment of localized impacts on a scale smaller than the entire nonattainment or maintenance area, including, for example, congested roadway intersections and highways or transit terminals, which uses an air quality dispersion model to determine the effects of emissions on air quality.

Maintenance area means an area with a maintenance plan approved under section 175A of the Act.

Maintenance plan means a revision to the applicable SIP, meeting the requirements of section 175A of the Act.

Metropolitan Planning Organization (MPO) is that organization designated as being responsible, together with the State, for conducting the continuing, cooperative, and comprehensive planning process under 23 U.S.C. 134 and 49 U.S.C. 1607.

Milestone has the meaning given in sections 182(g)(1) and 189(c)(1) of the Act.

National ambient air quality standards (NAAQS) are those standards established pursuant to section 109 of the Act and include standards for carbon monoxide (CO), lead (Pb), nitrogen dioxide (NO<INF>2</INF>), ozone, particulate matter (PM-10), and sulfur dioxide (SO<INF>2</INF>).

NEPA is the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.).

Nonattainment area means an area designated as nonattainment under section 107 of the Act and described in **40 CFR** part 81.

Precursors of a criteria pollutant are:

(1) For ozone, nitrogen oxides (NOx), unless an area is exempted from NOx requirements under section 182(f) of the Act, and volatile organic compounds (VOC); and

(2) For PM-10, those pollutants described in the PM-10 nonattainment



area applicable SIP as significant contributors to the PM-10 levels.

Reasonably foreseeable emissions are projected future indirect emissions that are identified at the time the conformity determination is made; the location of such emissions is known and the emissions are quantifiable, as described and documented by the Federal agency based on its own information and after reviewing any information presented to the Federal agency.

Regional water and/or wastewater projects include construction, operation, and maintenance of water or wastewater conveyances, water or

wastewater treatment facilities, and water storage reservoirs which affect a large portion of a nonattainment or maintenance area.

Regionally significant action means a Federal action for which the direct and indirect emissions of any pollutant represent 10 percent or more of a nonattainment or maintenance area's emission inventory for that pollutant.

Total of direct and indirect emissions means the sum of direct and indirect emissions increases and decreases caused by the Federal action; i.e., the ``net'' emissions considering all direct and indirect emissions. The portion of emissions which are exempt or presumed to conform under Sec. **93**.153 (c), (d), (e), or (f) are not included in the ``total of direct and indirect emissions.'' The ``total of direct and indirect emissions'' includes emissions of criteria pollutants and emissions of precursors of criteria pollutants.

Sec. **93**.153 Applicability.

(a) Conformity determinations for Federal actions related to transportation plans, programs, and projects developed, funded, or approved under title 23 U.S.C. or the Federal Transit Act (49 U.S.C. 1601 et seq.) must meet the procedures and criteria of **40 CFR** part **51**, subpart T, in lieu of the procedures set forth in this subpart.

(b) For Federal actions not covered by paragraph (a) of this section, a conformity determination is required for each pollutant where the total of direct and indirect emissions in a nonattainment or maintenance area caused by a Federal action would equal or exceed any of the rates in paragraphs (b)(1) or (2) of this section.

(1) For purposes of paragraph (b) of this section, the following rates apply in nonattainment areas (NAA's):

| | Tons/ year |
|---|---|
| Ozone (VOC's or NOX): | |
| Serious NAA's | 50 |
| Severe NAA's | 25 |
| Extreme NAA's | 10 |
| Other ozone NAA's outside an ozone transport region | 100 |
| Marginal and moderate NAA's inside an ozone transport region: | |
| VOC | 50 |
| NOX | 100 |
| Carbon monoxide: | |
| All NAA's | 100 |
| SO2 or NO2: | |
| All NAA's | 100 |
| PM-10: | |

| | |
|---|---|
| Moderate NAA's | 100 |
| Serious NAA's | 70 |
| Pb: | |
| All NAA's | 25 |

(2) For purposes of paragraph (b) of this section, the following rates apply in maintenance areas:

| | Tons/ year |
|---|---|
| Ozone (NOX), SO2 or NO2: | |
| All Maintenance Areas | 100 |
| Ozone (VOC's): | |
| Maintenance areas inside an ozone transport region | 50 |
| Maintenance areas outside an ozone transport region | 100 |
| Carbon monoxide: | |
| All Maintenance Areas | 100 |
| PM-10: | |
| All Maintenance Areas | 100 |
| Pb: | |
| All Maintenance Areas | 25 |

(c) The requirements of this subpart shall not apply to the following Federal actions:

(1) Actions where the total of direct and indirect emissions are below the emissions levels specified in paragraph (b) of this section.

(2) Actions which would result in no emissions increase or an increase in emissions that is clearly de minimis:

(i) Judicial and legislative proceedings.

(ii) Continuing and recurring activities such as permit renewals where activities conducted will be similar in scope and operation to activities currently being conducted.

(iii) Rulemaking and policy development and issuance.

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(iv) Routine maintenance and repair activities, including repair and maintenance of administrative sites, roads, trails, and facilities.

(v) Civil and criminal enforcement activities, such as investigations, audits, inspections, examinations, prosecutions, and the training of law enforcement personnel.

(vi) Administrative actions such as personnel actions, organizational changes, debt management or collection, cash management,

internal agency audits, program budget proposals, and matters relating to the administration and collection of taxes, duties and fees.

(vii) The routine, recurring transportation of materiel and personnel.

(viii) Routine movement of mobile assets, such as ships and aircraft, in home port reassignments and stations (when no new support facilities or personnel are required) to perform as operational groups and/or for repair or overhaul.

(ix) Maintenance dredging and debris disposal where no new depths are required, applicable permits are secured, and disposal will be at an approved disposal site.

(x) Actions, such as the following, with respect to existing structures, properties, facilities and lands where future activities conducted will be similar in scope and operation to activities currently being conducted at the existing structures, properties, facilities, and lands; for example, relocation of personnel, disposition of federally-owned existing structures, properties, facilities, and lands, rent subsidies, operation and maintenance cost subsidies, the exercise of receivership or conservatorship authority, assistance in purchasing structures, and the production of coins and currency.

(xi) The granting of leases, licenses such as for exports and trade, permits, and easements where activities conducted will be similar in scope and operation to activities currently being conducted.

(xii) Planning, studies, and provision of technical assistance.

(xiii) Routine operation of facilities, mobile assets and equipment.

(xiv) Transfers of ownership, interests, and titles in land, facilities, and real and personal properties, regardless of the form or method of the transfer.

(xv) The designation of empowerment zones, enterprise communities, or viticultural areas.

(xvi) Actions by any of the Federal banking agencies or the Federal Reserve Banks, including actions regarding charters, applications, notices, licenses, the supervision or examination of depository institutions or depository institution holding companies, access to the discount window, or the provision of financial services to banking organizations or to any department, agency or instrumentality of the United States.

(xvii) Actions by the Board of Governors of the Federal Reserve System or any Federal Reserve Bank necessary to effect monetary or exchange rate policy.

(xviii) Actions that implement a foreign affairs function of the United States.

(xix) Actions (or portions thereof) associated with transfers of land, facilities, title, and real properties through an enforceable contract or lease agreement where the delivery of the deed is required to occur promptly after a specific, reasonable condition is met, such as promptly after the land is certified as meeting the requirements of

CERCLA, and where the Federal agency does not retain continuing authority to control emissions associated with the lands, facilities, title, or real properties.

(xx) Transfers of real property, including land, facilities, and related personal property from a Federal entity to another Federal entity and assignments of real property, including land, facilities, and related personal property from a Federal entity to another Federal entity for subsequent deeding to eligible applicants.

(xxi) Actions by the Department of the Treasury to effect fiscal policy and to exercise the borrowing authority of the United States.

(3) Actions where the emissions are not reasonably foreseeable, such as the following:

(i) Initial Outer Continental Shelf lease sales which are made on a broad scale and are followed by exploration



and development plans on a project level.

(ii) Electric power marketing activities that involve the acquisition, sale and transmission of electric energy.

(4) Actions which implement a decision to conduct or carry out a conforming program such as prescribed burning actions which are consistent with a conforming land management plan.

(d) Notwithstanding the other requirements of this subpart, a conformity determination is not required for the following Federal actions (or portion thereof):

(1) The portion of an action that includes major new or modified stationary sources that require a permit under the new source review (NSR) program (section 173 of the Act) or the prevention of significant deterioration program (title I, part C of the Act).

(2) Actions in response to emergencies or natural disasters such as hurricanes, earthquakes, etc., which are commenced on the order of hours or days after the emergency or disaster and, if applicable, which meet the requirements of paragraph (e) of this section.

(3) Research, investigations, studies, demonstrations, or training (other than those exempted under paragraph (c)(2) of this section), where no environmental detriment is incurred and/or, the particular action furthers air quality research, as determined by the State agency primarily responsible for the applicable SIP;

(4) Alteration and additions of existing structures as specifically required by new or existing applicable environmental legislation or environmental regulations (e.g., hush houses for aircraft engines and scrubbers for air emissions).

(5) Direct emissions from remedial and removal actions carried out under the Comprehensive Environmental Response, Compensation and Liability Act and associated regulations to the extent such emissions either comply with the substantive requirements of the PSD/NSR

permitting program or are exempted from other environmental regulation under the provisions of CERCLA and applicable regulations issued under CERCLA.

(e) Federal actions which are part of a continuing response to an emergency or disaster under paragraph (d)(2) of this section and which are to be taken more than 6 months after the commencement of the response to the emergency or disaster under paragraph (d)(2) of this section are exempt from the requirements of this subpart only if:

(1) The Federal agency taking the actions makes a written determination that, for a specified period not to exceed an additional 6 months, it is impractical to prepare the conformity analyses which would otherwise be required and the actions cannot be delayed due to overriding concerns for public health and welfare, national security interests and foreign policy commitments; or

(2) For actions which are to be taken after those actions covered by paragraph (e)(1) of this section, the Federal agency makes a new determination as provided in paragraph (e)(1) of this section.

(f) Notwithstanding other requirements of this subpart, actions specified by individual Federal agencies that have met the criteria set forth in either paragraph (g)(1) or (g)(2) of this section and the procedures set forth in paragraph (h) of this section are presumed to conform, except as provided in paragraph (j) of this section.

(g) The Federal agency must meet the criteria for establishing activities that are presumed to conform by fulfilling the requirements set forth in either paragraph (g)(1) or (g)(2) of this section:

(1) The Federal agency must clearly demonstrate using methods consistent with this subpart that the total of direct and indirect emissions from the type of activities which would be presumed to conform would not:

(i) Cause or contribute to any new violation of any standard in any area;

(ii) Interfere with provisions in the applicable SIP for maintenance of any standard;

(iii) Increase the frequency or severity of any existing violation of any standard in any area; or

(iv) Delay timely attainment of any standard or any required interim emission reductions or other milestones in



any area including, where applicable, emission levels specified in the applicable SIP for purposes of:

(A) A demonstration of reasonable further progress;

(B) A demonstration of attainment; or

(C) A maintenance plan; or

(2) The Federal agency must provide documentation that the total of direct and indirect emissions from such future actions would be below

the emission rates for a conformity determination that are established in paragraph (b) of this section, based, for example, on similar actions taken over recent years.

(h) In addition to meeting the criteria for establishing exemptions set forth in paragraphs (g)(1) or (g)(2) of this section, the following procedures must also be complied with to presume that activities will conform:

(1) The Federal agency must identify through publication in the Federal Register its list of proposed activities that are presumed to conform and the basis for the presumptions;

(2) The Federal agency must notify the appropriate EPA Regional Office(s), State and local air quality agencies and, where applicable, the agency designated under section 174 of the Act and the MPO and provide at least 30 days for the public to comment on the list of proposed activities presumed to conform;

(3) The Federal agency must document its response to all the comments received and make the comments, response, and final list of activities available to the public upon request; and

(4) The Federal agency must publish the final list of such activities in the Federal Register.

(i) Notwithstanding the other requirements of this subpart, when the total of direct and indirect emissions of any pollutant from a Federal action does not equal or exceed the rates specified in paragraph (b) of this section, but represents 10 percent or more of a nonattainment or maintenance area's total emissions of that pollutant, the action is defined as a regionally significant action and the requirements of Sec. **93**.150 and Sec. Sec. **93**.155 through **93**.160 shall apply for the Federal action.

(j) Where an action otherwise presumed to conform under paragraph (f) of this section is a regionally significant action or does not in fact meet one of the criteria in paragraph (g)(1) of this section, that action shall not be presumed to conform and the requirements of Sec. **93**.150 and Sec. Sec. **93**.155 through **93**.160 shall apply for the Federal action.

(k) The provisions of this subpart shall apply in all nonattainment and maintenance areas.

Sec. **93**.154 Conformity analysis.

Any Federal department, agency, or instrumentality of the Federal government taking an action subject to this subpart must make its own conformity determination consistent with the requirements of this subpart. In making its conformity determination, a Federal agency must consider comments from any interested parties. Where multiple Federal agencies have jurisdiction for various aspects of a project, a Federal agency may choose to adopt the analysis of another Federal agency or develop its own analysis in order to make its conformity determination.

Sec. **93**.155 Reporting requirements.

(a) A Federal agency making a conformity determination under Sec. **93**.158 must provide to the appropriate EPA Regional Office(s), State and local air quality agencies and, where applicable, affected Federal land managers, the agency designated under section 174 of the Act and the MPO a 30 day notice which describes the proposed action and the Federal agency's draft conformity determination on the action.

(b) A Federal agency must notify the appropriate EPA Regional Office(s), State and local air quality agencies and, where applicable, affected Federal land managers, the agency designated under section 174 of the Clean Air Act and the MPO within 30 days after making a final conformity determination under Sec. **93**.158.

Sec. **93**.156 Public participation.

(a) Upon request by any person regarding a specific Federal action, a Federal agency must make available for review its draft conformity determination under Sec. **93**.158 with supporting



materials which describe the analytical methods and conclusions relied upon in making the applicability analysis and draft conformity determination.

(b) A Federal agency must make public its draft conformity determination under Sec. **93**.158 by placing a notice by prominent advertisement in a daily newspaper of general circulation in the area affected by the action and by providing 30 days for written public comment prior to taking any formal action on the draft determination. This comment period may be concurrent with any other public involvement, such as occurs in the NEPA process.

(c) A Federal agency must document its response to all the comments received on its draft conformity determination under Sec. **93**.158 and make the comments and responses available, upon request by any person regarding a specific Federal action, within 30 days of the final conformity determination.

(d) A Federal agency must make public its final conformity determination under Sec. **93**.158 for a Federal action by placing a notice by prominent advertisement in a daily newspaper of general circulation in the area affected by the action within 30 days of the final conformity determination.

Sec. **93**.157 Frequency of conformity determinations.

(a) The conformity status of a Federal action automatically lapses 5

years from the date a final conformity determination is reported under Sec. **93**.155, unless the Federal action has been completed or a continuous program has been commenced to implement that Federal action within a reasonable time.

(b) Ongoing Federal activities at a given site showing continuous progress are not new actions and do not require periodic redeterminations so long as such activities are within the scope of the final conformity determination reported under Sec. **93**.155.

(c) If, after the conformity determination is made, the Federal action is changed so that there is an increase in the total of direct and indirect emissions, above the levels in Sec. **93**.153(b), a new conformity determination is required.

Sec. **93**.158 Criteria for determining conformity of general Federal actions.

(a) An action required under Sec. **93**.153 to have a conformity determination for a specific pollutant, will be determined to conform to the applicable SIP if, for each pollutant that exceeds the rates in Sec. **93**.153(b), or otherwise requires a conformity determination due to the total of direct and indirect emissions from the action, the action meets the requirements of paragraph (c) of this section, and meets any of the following requirements:

(1) For any criteria pollutant, the total of direct and indirect emissions from the action are specifically identified and accounted for in the applicable SIP's attainment or maintenance demonstration;

(2) For ozone or nitrogen dioxide, the total of direct and indirect emissions from the action are fully offset within the same nonattainment or maintenance area through a revision to the applicable SIP or a similarly enforceable measure that effects emission reductions so that there is no net increase in emissions of that pollutant;

(3) For any criteria pollutant, except ozone and nitrogen dioxide, the total of direct and indirect emissions from the action meet the requirements:

(i) Specified in paragraph (b) of this section, based on areawide air quality modeling analysis and local air quality modeling analysis; or

(ii) Meet the requirements of paragraph (a)(5) of this section and, for local air quality modeling analysis, the requirement of paragraph (b) of this section;

(4) For CO or PM-10--

(i) Where the State agency primarily responsible for the applicable SIP determines that an areawide air quality modeling analysis is not needed, the total of direct and indirect emissions from the action meet the requirements specified in paragraph (b) of this section, based on local air quality modeling analysis; or

(ii) Where the State agency primarily responsible for the applicable

SIP determines that an areawide air quality modeling analysis is appropriate and that a local air quality modeling analysis is not needed, the total of direct and indirect emissions from the action



meet the requirements specified in paragraph (b) of this section, based on areawide modeling, or meet the requirements of paragraph (a)(5) of this section; or

(5) For ozone or nitrogen dioxide, and for purposes of paragraphs (a)(3)(11) and (a)(4)(ii) of this section, each portion of the action or the action as a whole meets any of the following requirements:

(i) Where EPA has approved a revision to an area's attainment or maintenance demonstration after 1990 and the State makes a determination as provided in paragraph (a)(5)(i)(A) of this section or where the State makes a commitment as provided in paragraph (a)(5)(i)(B) of this section:

(A) The total of direct and indirect emissions from the action (or portion thereof) is determined and documented by the State agency primarily responsible for the applicable SIP to result in a level of emissions which, together with all other emissions in the nonattainment (or maintenance) area, would not exceed the emissions budgets specified in the applicable SIP;

(B) The total of direct and indirect emissions from the action (or portion thereof) is determined by the State agency responsible for the applicable SIP to result in a level of emissions which, together with all other emissions in the nonattainment (or maintenance) area, would exceed an emissions budget specified in the applicable SIP and the State Governor or the Governor's designee for SIP actions makes a written commitment to EPA which includes the following:

(1) A specific schedule for adoption and submittal of a revision to the SIP which would achieve the needed emission reductions prior to the time emissions from the Federal action would occur;

(2) Identification of specific measures for incorporation into the SIP which would result in a level of emissions which, together with all other emissions in the nonattainment or maintenance area, would not exceed any emissions budget specified in the applicable SIP;

(3) A demonstration that all existing applicable SIP requirements are being implemented in the area for the pollutants affected by the Federal action, and that local authority to implement additional requirements has been fully pursued;

(4) A determination that the responsible Federal agencies have required all reasonable mitigation measures associated with their action; and

(5) Written documentation including all air quality analyses supporting the conformity determination;

(C) Where a Federal agency made a conformity determination based on

a State commitment under paragraph (a)(5)(i)(B) of this section, such a State commitment is automatically deemed a call for a SIP revision by EPA under section 110(k)(5) of the Act, effective on the date of the Federal conformity determination and requiring response within 18 months or any shorter time within which the State commits to revise the applicable SIP;

(ii) The action (or portion thereof), as determined by the MPO, is specifically included in a current transportation plan and transportation improvement program which have been found to conform to the applicable SIP under **40 CFR** part **51**, subpart T, or **40 CFR** part **93**, subpart A;

(iii) The action (or portion thereof) fully offsets its emissions within the same nonattainment or maintenance area through a revision to the applicable SIP or an equally enforceable measure that effects emission reductions equal to or greater than the total of direct and indirect emissions from the action so that there is no net increase in emissions of that pollutant;

(iv) Where EPA has not approved a revision to the relevant SIP attainment or maintenance demonstration since 1990, the total of direct and indirect emissions from the action for the future years (described in Sec. **93**.159(d) do not increase emissions with respect to the baseline emissions:

(A) The baseline emissions reflect the historical activity levels that occurred in the geographic area affected by the proposed Federal action during:

(1) Calendar year 1990;

(2) The calendar year that is the basis for the classification (or, where the classification is based on multiple years, the most representative year), if

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a classification is promulgated in **40 CFR** part 81; or

(3) The year of the baseline inventory in the PM-10 applicable SIP;

(B) The baseline emissions are the total of direct and indirect emissions calculated for the future years (described in Sec. **93**.159(d)) using the historic activity levels (described in paragraph (a)(5)(iv)(A) of this section) and appropriate emission factors for the future years; or

(v) Where the action involves regional water and/or wastewater projects, such projects are sized to meet only the needs of population projections that are in the applicable SIP.

(b) The areawide and/or local air quality modeling analyses must:

(1) Meet the requirements in Sec. **93**.159; and

(2) Show that the action does not:

(i) Cause or contribute to any new violation of any standard in any area; or

(ii) Increase the frequency or severity of any existing violation of any standard in any area.

(c) Notwithstanding any other requirements of this section, an action subject to this subpart may not be determined to conform to the applicable SIP unless the total of direct and indirect emissions from the action is in compliance or consistent with all relevant requirements and milestones contained in the applicable SIP, such as elements identified as part of the reasonable further progress schedules, assumptions specified in the attainment or maintenance demonstration, prohibitions, numerical emission limits, and work practice requirements.

(d) Any analyses required under this section must be completed, and any mitigation requirements necessary for a finding of conformity must be identified before the determination of conformity is made.

Sec. **93**.159 Procedures for conformity determinations of general Federal actions.

(a) The analyses required under this subpart must be based on the latest planning assumptions.

(1) All planning assumptions must be derived from the estimates of population, employment, travel, and congestion most recently approved by the MPO, or other agency authorized to make such estimates, where available.

(2) Any revisions to these estimates used as part of the conformity determination, including projected shifts in geographic location or level of population, employment, travel, and congestion, must be approved by the MPO or other agency authorized to make such estimates for the urban area.

(b) The analyses required under this subpart must be based on the latest and most accurate emission estimation techniques available as described below, unless such techniques are inappropriate. If such techniques are inappropriate and written approval of the EPA Regional Administrator is obtained for any modification or substitution, they may be modified or another technique substituted on a case-by-case basis or, where appropriate, on a generic basis for a specific Federal agency program.

(1) For motor vehicle emissions, the most current version of the motor vehicle emissions model specified by EPA and available for use in the preparation or revision of SIPs in that State must be used for the conformity analysis as specified in paragraphs (b)(1)(i) and (ii) of this section:

(i) The EPA must publish in the Federal Register a notice of availability of any new motor vehicle emissions model; and

(ii) A grace period of 3 months shall apply during which the motor vehicle emissions model previously specified by EPA as the most current version may be used. Conformity analyses for which the analysis was begun during the grace period or no more than 3 years before the Federal

Register notice of availability of the latest emission model may continue to use the previous version of the model specified by EPA.

(2) For non-motor vehicle sources, including stationary and area source emissions, the latest emission factors specified by EPA in the ``Compilation of Air Pollutant Emission Factors (AP-

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42)'' \1\ must be used for the conformity analysis unless more accurate emission data are available, such as actual stack test data from stationary sources which are part of the conformity analysis.

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\1\ Copies may be obtained from the Technical Support Division of OAQPS, EPA, MD-14, Research Triangle Park, NC 27711.

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(c) The air quality modeling analyses required under this subpart must be based on the applicable air quality models, data bases, and other requirements specified in the most recent version of the ``Guideline on Air Quality Models (Revised)'' (1986), including supplements (EPA publication no. 450/2-78-027R) \2\, unless:

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\2\ See footnote 1 at Sec. **93**.159(b)(2).

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(1) The guideline techniques are inappropriate, in which case the model may be modified or another model substituted on a case-by-case basis or, where appropriate, on a generic basis for a specific Federal agency program; and

(2) Written approval of the EPA Regional Administrator is obtained for any modification or substitution.

(d) The analyses required under this subpart, except Sec. **93**.158(a)(1), must be based on the total of direct and indirect emissions from the action and must reflect emission scenarios that are expected to occur under each of the following cases:

(1) The Act mandated attainment year or, if applicable, the farthest year for which emissions are projected in the maintenance plan;

(2) The year during which the total of direct and indirect emissions from the action is expected to be the greatest on an annual basis; and

(3) Any year for which the applicable SIP specifies an emissions budget.

Sec. **93**.160 Mitigation of air quality impacts.

(a) Any measures that are intended to mitigate air quality impacts

must be identified and the process for implementation and enforcement of such measures must be described, including an implementation schedule containing explicit timelines for implementation.

(b) Prior to determining that a Federal action is in conformity, the Federal agency making the conformity determination must obtain written commitments from the appropriate persons or agencies to implement any mitigation measures which are identified as conditions for making conformity determinations.

(c) Persons or agencies voluntarily committing to mitigation measures to facilitate positive conformity determinations must comply with the obligations of such commitments.

(d) In instances where the Federal agency is licensing, permitting or otherwise approving the action of another governmental or private entity, approval by the Federal agency must be conditioned on the other entity meeting the mitigation measures set forth in the conformity determination.

(e) When necessary because of changed circumstances, mitigation measures may be modified so long as the new mitigation measures continue to support the conformity determination. Any proposed change in the mitigation measures is subject to the reporting requirements of Sec. **93**.156 and the public participation requirements of Sec. **93**.157.

(f) The implementation plan revision required in Sec. **93**.151 shall provide that written commitments to mitigation measures must be obtained prior to a positive conformity determination and that such commitments must be fulfilled.

(g) After a State revises its SIP to adopt its general conformity rules and EPA approves that SIP revision, any agreements, including mitigation measures, necessary for a conformity determination will be both State and federally enforceable. Enforceability through the applicable SIP will apply to all persons who agree to mitigate direct and indirect emissions associated with a Federal action for a conformity determination.

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TITLE 40--PROTECTION OF ENVIRONMENT

CHAPTER I--ENVIRONMENTAL PROTECTION AGENCY (CONTINUED)

PART 51_REQUIREMENTS FOR PREPARATION, ADOPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS--Table of Contents

Subpart T_Conformity to State or Federal Implementation Plans of Transportation

Plans, Programs, and Projects Developed, Funded or Approved Under Title 23

U.S.C. or the Federal Transit Laws

Sec. 51.390 Implementation plan revision.

(a) States with areas subject to this subpart and part 93, subpart A, of this chapter must submit to the EPA and DOT a revision to their implementation plan which contains criteria and procedures for DOT, MPOs and other State or local agencies to assess the conformity of transportation plans, programs, and projects, consistent with this subpart and part 93, subpart A, of this chapter. This revision is to be submitted by November 25, 1994 (or within 12 months of an area's redesignation from attainment to nonattainment, if the State has not previously submitted such a revision). Further revisions to the implementation plan required by amendments to part 93, subpart A, of this chapter must be submitted within 12 months of the date of publication of such final amendments. EPA will provide DOT with a 30-day comment period before taking action to approve or disapprove the submission. A State's conformity provisions may contain criteria and procedures more stringent than the requirements described in this subpart and part 93, subpart A, of this chapter only if the State's conformity provisions apply equally to non-federal as well as Federal entities.

(b) The Federal conformity rules under part 93, subpart A, of this chapter, in addition to any existing applicable State requirements, establish the conformity criteria and procedures necessary to meet the requirements of Clean Air Act section 176(c) until such time as EPA approves the conformity implementation plan revision required by this subpart. Following EPA approval of the State conformity provisions (or a portion thereof) in a revision to the applicable implementation plan, conformity determinations would be governed by the approved (or approved portion of the) State criteria and procedures. The Federal conformity regulations contained in part



93, subpart A, of this chapter would apply only for the portion, if any, of the State's conformity provisions that is not approved by EPA. In addition, any previously applicable implementation plan conformity requirements remain enforceable until the State submits a revision to its applicable implementation plan to specifically remove them and that revision is approved by EPA.

(c) The implementation plan revision required by this section must meet all of the requirements of part 93, subpart A, of this chapter.

(d) In order for EPA to approve the implementation plan revision submitted to EPA and DOT under this subpart, the plan must address all requirements of part 93, subpart A, of this chapter in a manner which gives them full legal effect. In particular, the revision shall

incorporate the provisions of the following sections of part 93, subpart A, of this chapter in verbatim form, except insofar as needed to clarify or to give effect to a stated intent in the revision to establish criteria and procedures more stringent than the requirements stated in the following sections of this chapter: Sec. Sec. 93.101, 93.102, 93.103, 93.104, 93.106, 93.109, 93.110, 93.111, 93.112, 93.113, 93.114, 93.115, 93.116, 93.117, 93.118, 93.119, 93.120, 93.121, 93.126, and 93.127.

[62 FR 43801, Aug. 15, 1997]