

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 93

[EPA-HQ-OAR-2008-0540; FRL-8904-1]

RIN 2060-AP29

Transportation Conformity Rule PM_{2.5} and PM₁₀ Amendments

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing amendments to the transportation conformity rule that primarily affect conformity's implementation in PM_{2.5} and PM₁₀ nonattainment and maintenance areas. EPA is proposing to update the transportation conformity regulation in light of the October 17, 2006 final rule that strengthened the 24-hour PM_{2.5} air quality standard and revoked the annual PM₁₀ standard. In addition, EPA is proposing to clarify the regulations concerning hot-spot analyses to address a remand from the Court of Appeals for the District of Columbia Circuit (*Environmental Defense v. EPA*, 509 F.3d 553 (DC Cir. 2007)). This portion of the proposal applies to PM_{2.5} and PM₁₀ nonattainment and maintenance areas as well as carbon monoxide nonattainment and maintenance areas.

The Clean Air Act requires federally supported transportation plans, transportation improvement programs, and projects to be consistent with ("conform to") the purpose of the state air quality implementation plan. DOT is EPA's federal partner in implementing the transportation conformity regulation. EPA has consulted with DOT, and they concur with this proposed rule.

DATES: Written comments on this proposal must be received on or before June 15, 2009, unless a public hearing is requested by May 26, 2009. If a public hearing is requested by a commenter, it will be held June 4, 2009 at the U.S. Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, Michigan. If a hearing is requested, written comments must be received by June 29, 2009.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2008-0540, by one of the following methods:

- www.regulations.gov: Follow the on-line instructions for submitting comments.
- E-mail: a-and-r-docket@epa.gov.
- Fax: (202) 566-9744.
- Mail: Air Docket, Environmental Protection Agency, Mailcode: 2822T,

1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. EPA-HQ-OAR-2008-0540. Please include a total of two copies.

- Hand Delivery: Air Docket, Environmental Protection Agency, Mailcode: EPA West Building, EPA Docket Center (Room 3334), 1301 Constitution Ave., NW., Washington, DC, Attention Docket ID No. EPA-HQ-OAR-2008-0540. Please include two copies. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-HQ-OAR-2008-0540. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or e-mail. The www.regulations.gov Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>. For additional instructions on submitting comments, go to Section I of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., CBI or other information

whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the Air and Radiation Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744 and the telephone number for the Air and Radiation Docket is (202) 566-1742.

Public Hearing: If a public hearing is requested, it will be held at the U.S. Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, Michigan, on June 4, 2009.

FOR FURTHER INFORMATION CONTACT:

Laura Berry, State Measures and Conformity Group, Transportation and Regional Programs Division, Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105, e-mail address: berry.laura@epa.gov, telephone number: (734) 214-4858, fax number: (734) 214-4052; or Patty Klavon, State Measures and Conformity Group, Transportation and Regional Programs Division, Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105, e-mail address: klavon.patty@epa.gov, telephone number: (734) 214-4476, fax number: (734) 214-4052.

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

- I. General Information
- II. Background on the Transportation Conformity Rule
- III. General Overview of Transportation Conformity for the 2006 PM_{2.5} NAAQS
- IV. Baseline Year for Certain 2006 PM_{2.5} Nonattainment Areas
- V. Regional Conformity Tests in 2006 PM_{2.5} Nonattainment Areas That Do Not Have Adequate or Approved SIP Budgets for the 1997 PM_{2.5} NAAQS
- VI. Regional Conformity Tests in 2006 PM_{2.5} Areas That Have 1997 PM_{2.5} SIP Budgets
- VII. Other Conformity Requirements for 2006 PM_{2.5} Areas
- VIII. Transportation Conformity in PM₁₀ Nonattainment and Maintenance Areas and the Revocation of the Annual PM₁₀ NAAQS
- IX. Response to the December 2007 Hot-Spot Court Decision
- X. Statutory and Executive Order Reviews

I. General Information

A. Does this Action Apply to Me?

Entities potentially regulated by the conformity rule are those that adopt,

approve, or fund transportation plans, programs, or projects under title 23 U.S.C. or title 49 U.S.C. Regulated categories and entities affected by today's action include:

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

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

B. What Should I Consider as I Prepare My Comments for EPA?

1. Submitting CBI

Do not submit this information to EPA through www.regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. Tips for Preparing Your Comments

When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

- Follow directions—The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

- Explain why you agree or disagree, suggest alternatives and substitute language for your requested changes.

- Describe any assumptions and provide any technical information and/or data that you used.

- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

- Provide specific examples to illustrate your concerns, and suggest alternatives.

- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

- Make sure to submit your comments by the comment period deadline identified.

3. Docket Copying Costs

You may be required to pay a reasonable fee for copying docket materials.

C. How Do I Get Copies of This Proposed Rule and Other Documents?

1. Docket

EPA has established an official public docket for this action under Docket ID No. EPA-HQ-OAR-2008-0540. You can get a paper copy of this **Federal Register** document, as well as the documents specifically referenced in this action, any public comments received, and other information related to this action at the official public docket. See the **ADDRESSES** section for its location.

2. Electronic Access

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

An electronic version of the official public docket is available through www.regulations.gov. You may use www.regulations.gov to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the appropriate docket identification number.

Certain types of information will not be placed in the electronic public

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

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

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to the electronic public docket. Public comments that are mailed or delivered to the docket will be scanned and placed in the electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in the electronic public docket along with a brief description written by the docket staff.

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

II. Background on the Transportation Conformity Rule

A. What Is Transportation Conformity?

Transportation conformity is required under Clean Air Act section 176(c) (42 U.S.C. 7506(c)) to ensure that transportation plans, transportation improvement programs (TIPs) and federally supported highway and transit project activities are consistent with ("conform to") the purpose of the state air quality implementation plan (SIP). Conformity to the purpose of the SIP means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment of the relevant national ambient air quality standards (NAAQS). Transportation conformity applies to areas that are designated nonattainment, and those areas redesignated to attainment after 1990 ("maintenance areas") for transportation-related criteria

pollutants: Carbon monoxide (CO), ozone, nitrogen dioxide (NO₂) and particulate matter (PM_{2.5}, and PM₁₀).¹

EPA's transportation conformity rule (40 CFR Parts 51 and 93) establishes the criteria and procedures for determining whether transportation activities conform to the SIP. EPA first promulgated the transportation conformity rule on November 24, 1993 (58 FR 62188), and subsequently published several other amendments. DOT is EPA's federal partner in implementing the transportation conformity regulation. EPA has consulted with DOT, which concurs with this proposed rule.

A few recent amendments to the transportation conformity rule are useful background for today's proposal. In a final rule EPA published on July 1, 2004 (69 FR 40004), EPA provided conformity procedures for state and local agencies under the 1997 8-hour ozone and PM_{2.5} national ambient air quality standards (NAAQS), among other things. EPA's nonattainment area designations for the 1997 8-hour ozone and PM_{2.5} NAAQS were effective in June 2004 and April 2005 respectively. The July 2004 update provided guidance and rules for implementing conformity for these NAAQS. In addition, on May 6, 2005, EPA promulgated a final rule entitled, "Transportation Conformity Rule Amendments for the New PM_{2.5} National Ambient Air Quality Standard: PM_{2.5} Precursors" (70 FR 24280). This final rule specified transportation-related PM_{2.5} precursors and when they must be considered in transportation conformity determinations in PM_{2.5} nonattainment and maintenance areas.

On March 10, 2006, EPA promulgated a final rule (71 FR 12468) entitled, "PM_{2.5} and PM₁₀ Hot-Spot Analyses in Project-Level Transportation Conformity Determinations for the New PM_{2.5} and Existing PM₁₀ National Ambient Air Quality Standards." This rule established the criteria and procedures for determining which transportation projects must be analyzed for local air quality impacts—or "hot-spots"—in PM_{2.5} and PM₁₀ nonattainment and maintenance areas. See Section IX. of today's preamble for more information regarding the March 2006 rule; see EPA's Web site at <http://www.epa.gov/otaq/stateresources/transconf/index.htm> for further information about

any of EPA's transportation conformity rulemakings.²

B. Why Are We Issuing This Proposed Rule?

Today's proposed rule is necessary because EPA promulgated a final rule on October 17, 2006 that changed the PM_{2.5} and PM₁₀ NAAQS, as described further below. These revisions to the PM_{2.5} and PM₁₀ NAAQS necessitate an update to the transportation conformity rule to provide guidance and rules for implementing conformity for these NAAQS. Sections III. through VIII. describe the proposed changes to the transportation conformity rule that are a result of the October 2006 revisions to the PM_{2.5} and PM₁₀ NAAQS.

Today's proposed rule is also necessary because of a court decision regarding the March 2006 hot-spot rulemaking. Section IX. of this preamble describes the issue, the court's decision, and EPA's proposed response.

III. General Overview of Transportation Conformity for the 2006 PM_{2.5} NAAQS

A. Background on 2006 PM_{2.5} NAAQS Development

EPA issued a final rule on October 17, 2006 that strengthened the 24-hour PM_{2.5} NAAQS and revoked the annual PM₁₀ NAAQS (71 FR 61144). In that final rule, EPA strengthened the 24-hour PM_{2.5} NAAQS from the 1997 level of 65 micrograms per cubic meter (µg/m³) (average of 98th percentile values for three consecutive years) to 35 µg/m³, while the level of the annual PM_{2.5} NAAQS remained unchanged at 15.0 µg/m³ (average of three consecutive annual average values). This final rule was effective on December 18, 2006. EPA selected levels for the final NAAQS after completing an extensive review of thousands of scientific studies on the impact of fine and coarse particles on public health and welfare. For additional information about the October 17, 2006 rulemaking, the final rule and EPA outreach materials can be found at: <http://www.epa.gov/air/particlepollution/actions.html>.

The October 2006 rule establishing the 2006 PM_{2.5} NAAQS did not revoke the 1997 annual or 24-hour PM_{2.5} NAAQS. See Section D. below for details on how this proposal would interact with conformity requirements for those areas designated nonattainment for the 1997 PM_{2.5} NAAQS.

EPA signed the final rule designating areas for the 2006 PM_{2.5} NAAQS on December 22, 2008. Conformity for the 2006 PM_{2.5} NAAQS will apply one year after the effective date of the nonattainment designations.³ The designations for the 2006 PM_{2.5} NAAQS are separate from and do not impact existing designations for the 1997 PM_{2.5} NAAQS.

B. When Does Conformity Apply for the 2006 PM_{2.5} NAAQS?

Transportation conformity for the 2006 24-hour PM_{2.5} NAAQS ("2006 PM_{2.5} NAAQS") does not apply until one year after the effective date of nonattainment designations for this NAAQS. Clean Air Act section 176(c)(6) and 40 CFR 93.102(d) provide a one-year grace period from the effective date of designations before transportation conformity applies in areas newly designated nonattainment for a particular NAAQS.⁴

The following discussion provides more details on the application of the one-year grace period in specific types of newly designated nonattainment areas for the 2006 PM_{2.5} NAAQS in metropolitan, donut and isolated rural areas. This information is consistent with how conformity for new NAAQS has been implemented in the past.

1. Metropolitan Areas

Metropolitan areas are urbanized areas that have a population greater than 50,000 and a designated metropolitan planning organization (MPO) responsible for transportation planning per 23 U.S.C. 134. The one-year grace period means that, in general, within one year after the effective date of the initial nonattainment designation for a given pollutant and NAAQS, the area's MPO and DOT must make a conformity determination with regard to that pollutant and NAAQS for the area's transportation plan and TIP. The procedures for interagency consultation process found in 40 CFR 93.105 or a state's approved conformity SIP must be used in making conformity determinations for transportation plans and TIPs. MPOs must continue to meet conformity requirements for any other

³ The effective date for these nonattainment designations will be included in the **Federal Register** publication of the final designations rule.

⁴ EPA began the process of notifying state and local agencies, via the EPA regional offices, of the timing of conformity under the 2006 PM_{2.5} NAAQS in its April 16, 2007 memorandum entitled, "Transportation Conformity and the Revised 24-hour PM_{2.5} Standard," from Merrylin Zaw-Mon, Director, Transportation and Regional Programs Division, EPA Office of Transportation and Air Quality, to EPA Regional Air Directors, Regions I–X.

¹ 40 CFR 93.102(b)(1) defines PM_{2.5} and PM₁₀ as particles with an aerodynamic diameter less than or equal to a nominal 2.5 and 10 micrometers, respectively.

² At this Web site, click on "Regulations" to find all of EPA's proposed and final rules as well the current transportation conformity regulations.

applicable NAAQS, including the 1997 PM_{2.5} NAAQS, if the area is designated nonattainment or maintenance for such NAAQS as well.

The one-year grace period for conformity also applies to project-level conformity determinations (including hot-spot analyses in certain cases) in newly designated 2006 PM_{2.5} nonattainment areas. At the end of the one-year grace period for conformity, requirements for project-level conformity determinations must be met for the 2006 PM_{2.5} NAAQS before any new federal approvals for such projects can occur. For non-exempt Federal Highway Administration (FHWA) or Federal Transit Administration (FTA) projects, a conformity determination is normally required before the National Environmental Policy Act (NEPA) process is completed, since NEPA is typically the first stage requiring approval in a federal project's development. However, if the NEPA process was completed before conformity applies, then areas that are newly designated as nonattainment may also be required to demonstrate conformity for subsequent funding and approvals for project phases (e.g., right-of-way acquisition, final design, construction). Conformity would be needed for a subsequent project phase if it occurs after the grace period has ended, and the project has not yet been included in a conformity determination for the relevant pollutant and NAAQS or met other applicable conformity requirements.

Before the end of the one-year grace period, FHWA or FTA could voluntarily choose to make a project-level conformity determination that meets the conformity rule's requirements. The procedures for interagency consultation found in 40 CFR 93.105 or a state's approved conformity SIP must be used in making project-level conformity determinations for the 2006 PM_{2.5} NAAQS. As described further below in D. of this section, areas that are designated nonattainment for both the 1997 PM_{2.5} NAAQS and the 2006 PM_{2.5} NAAQS will need to address all of these NAAQS in conformity determinations.

If, at the conclusion of the one-year grace period, the MPO and DOT have not made a transportation plan and TIP conformity determination for the 2006 PM_{2.5} NAAQS, the area would be in a conformity "lapse." During a conformity lapse, only certain projects can receive additional federal funding or approvals to proceed (e.g., exempt projects, project phases that were approved before the lapse). The practical impact of a conformity lapse will vary on an area-by-area basis. For additional

information on projects that can proceed during a conformity lapse, read the following guidance memoranda that address the March 2, 1999 U.S. Court of Appeals decision that affected related provisions of the conformity rule (*Environmental Defense Fund v. EPA*, 167 F.3d 641 (DC Cir. 1999): DOT's January 2, 2002 guidance, published in the **Federal Register** on February 7, 2002 (67 FR 5882); DOT's May 20, 2003 and FTA's April 9, 2003 supplemental guidance documents; and, EPA's May 14, 1999 guidance memorandum. EPA's current conformity rule reflects all of these guidance documents (69 FR 40005–40006).

2. Donut Areas

For the purposes of transportation conformity, a "donut" area is the geographic area outside a metropolitan planning area boundary, but inside a designated nonattainment or maintenance area boundary that includes an MPO (40 CFR 93.101). The conformity requirements for donut areas, including the application of the one-year conformity grace period, are generally the same as those for metropolitan areas. Within one year of the effective date of an area's initial nonattainment designation for the 2006 PM_{2.5} NAAQS, the existing and planned transportation network for the donut portion of the area (as well as for the metropolitan portion of the area) must demonstrate conformity, or conformity of the metropolitan transportation plan and TIP will lapse as described above, and the entire nonattainment area will be unable to obtain additional project funding and approvals for the duration of the lapse.

The interagency consultation group for each newly designated nonattainment area that includes a donut portion should determine how best to consider the donut area transportation system and new donut area projects in the MPO's regional emissions analyses and transportation plan and TIP conformity determinations. For more discussion on how conformity determinations should be made for donut areas, see the preamble to the July 1, 2004 conformity rule (69 FR 40013).

In nonattainment and maintenance areas with a donut portion, adjacent MPOs must meet conformity requirements for the 2006 PM_{2.5} and other applicable NAAQS, including requirements for any 1997 PM_{2.5} NAAQS for which the donut area is designated nonattainment.

The one-year grace period for conformity also applies to project-level conformity determinations in newly

designated nonattainment areas that include a donut portion, as described above for projects in metropolitan areas.

3. Isolated Rural Areas

Isolated rural nonattainment and maintenance areas are areas that do not contain or are not part of any metropolitan planning area as designated by 23 U.S.C. 134 and 49 U.S.C. 5303 (40 CFR 93.101). Isolated rural areas do not have metropolitan transportation plans or TIPs required under 23 U.S.C. 134 and 49 U.S.C. 5303 and 5304 for any portion of the area, and do not have projects that are part of the emissions analysis of any MPO's transportation plan or TIP. Instead, projects in such areas are included only in statewide transportation improvement programs and statewide transportation plans, when appropriate.

As in other newly designated nonattainment areas, the one-year conformity grace period for the 2006 PM_{2.5} NAAQS will begin on the effective date of an isolated rural area's initial nonattainment designation. However, because these areas do not have federally required metropolitan transportation plans and TIPs, they are not subject to the frequency requirements for conformity determinations on transportation plans and TIPs (40 CFR 93.104(b), (c), and (e)). Instead, conformity determinations in isolated rural areas are required only when a non-exempt FHWA/FTA project(s) needs funding or approval.

In fact, many isolated rural areas may not have a transportation project in need of federal funding or approval for some time after the one-year grace period has ended, and therefore, would not have to demonstrate conformity before that time. Once the conformity grace period has expired, a conformity determination would only be required in such areas when a non-exempt FHWA/FTA project needs funding or approval. For more information on the conformity requirements for isolated rural areas, see 40 CFR 93.109(l); corresponding discussions on how to demonstrate conformity in isolated rural areas can also be found in the preambles to the November 24, 1993 transportation conformity final rule (58 FR 62207) and the August 15, 1997 final rule (62 FR 43785).

Please note that the current regulation's § 93.109(l) would be renamed as § 93.109(n) under today's proposal, due to the other proposed revisions and additions in this regulatory section. As we are simply renumbering this provision, we are not seeking comment because it is an administrative change. The basic

conformity requirements for isolated rural areas remain unchanged.

C. Proposed Definitions for PM_{2.5} NAAQS

EPA is proposing two new definitions to § 93.101 of the conformity rule to distinguish between the 1997 PM_{2.5} NAAQS and the 2006 PM_{2.5} NAAQS. These definitions would help implement certain conformity requirements in areas that have been designated nonattainment for 1997 PM_{2.5} NAAQS and/or 2006 PM_{2.5} NAAQS. Some areas designated nonattainment for the 2006 PM_{2.5} NAAQS also are designated nonattainment for the 1997 PM_{2.5} NAAQS. In addition, some areas are designated for only the 2006 PM_{2.5} NAAQS.

The proposed addition of these definitions is also similar to the existing rule's definitions in 40 CFR 93.101 for the 1-hour ozone NAAQS and 8-hour ozone NAAQS, and the proposed definitions are generally consistent with how EPA is defining both kinds of PM_{2.5} areas for air quality planning purposes. EPA also notes that any provision of the conformity rule that references only "PM_{2.5}" and does not specify which NAAQS will continue to apply to any area designated nonattainment for a PM_{2.5} NAAQS.

D. How Would This Proposal Interact With Existing Conformity Requirements for the 1997 PM_{2.5} NAAQS?

Sections IV. through VI. of today's proposal describe proposed conformity requirements for areas designated nonattainment for the 2006 PM_{2.5} NAAQS. EPA is not proposing any changes to the existing transportation conformity requirements for areas designated nonattainment for the 1997 PM_{2.5} NAAQS, since EPA's nonattainment designations for the 2006 PM_{2.5} NAAQS will not affect existing 1997 PM_{2.5} NAAQS nonattainment designations.

Nonattainment designations for the 1997 and 2006 PM_{2.5} NAAQS are different designations with separate SIP requirements, different attainment dates, etc. As a result, Clean Air Act section 176(c)(5) requires conformity requirements to be met in both 1997 and 2006 PM_{2.5} nonattainment and maintenance areas, as applicable.

Some areas designated nonattainment for the 2006 PM_{2.5} NAAQS have never been subject to PM_{2.5} conformity requirements. Under today's proposal and Clean Air Act section 176(c)(5), these areas would be required to meet only 2006 PM_{2.5} conformity requirements, and not conformity

requirements for the 1997 PM_{2.5} NAAQS, because these areas are not designated nonattainment for the 1997 PM_{2.5} NAAQS.

Other areas designated nonattainment for the 2006 PM_{2.5} NAAQS have been designated also, in whole or in part, for the 1997 PM_{2.5} NAAQS. These areas would continue to meet their existing conformity requirements for the 1997 PM_{2.5} NAAQS as well as any additional requirements for the 2006 PM_{2.5} NAAQS.

EPA notes that MPOs where both the 1997 and 2006 PM_{2.5} NAAQS apply would have to determine conformity for both NAAQS. MPOs subject to both the 1997 and 2006 PM_{2.5} NAAQS will be able to:

- Use existing transportation models and data for regional emissions analyses for both NAAQS, especially where nonattainment area boundaries are the same;
- Rely on analysis years for conformity determinations that are the same for both NAAQS (e.g., analysis years for the last year of the transportation plan, an intermediate year, etc.); and
- Meet consultation and other conformity requirements through the existing processes.

EPA is also proposing that before budgets for the 2006 PM_{2.5} NAAQS are available, conformity determinations for some 2006 PM_{2.5} areas would be based on the same conformity test (i.e., the budget test) that is being used for the 1997 PM_{2.5} NAAQS. As described in Section VI., EPA is proposing that MPOs use any adequate or approved SIP budgets for the 1997 PM_{2.5} NAAQS for conformity determinations that are made prior to SIP budgets for the 2006 PM_{2.5} NAAQS being available.

Today's proposal does not impact project-level conformity requirements for the 1997 PM_{2.5} NAAQS. For example, EPA is not proposing any changes to the PM_{2.5} hot-spot analysis requirements, and EPA and FHWA's existing guidance for such analyses continues to be available.⁵ For the purposes of PM_{2.5} conformity, a hot-spot analysis must address the PM_{2.5} NAAQS for which the area has been designated nonattainment.⁶ See Section VII. for further information regarding EPA's proposal for project-level conformity

requirements for the 2006 PM_{2.5} NAAQS.

EPA will work with PM_{2.5} nonattainment areas as needed to ensure that state and local agencies can meet conformity requirements for both the applicable 1997 and 2006 PM_{2.5} NAAQS in a timely and efficient manner. EPA requests comment on whether additional information or training will be necessary for conformity implementation under the 2006 PM_{2.5} NAAQS. If your agency submits comments, please be as specific as possible regarding what types of situations and issues may need to be addressed in future implementation of PM_{2.5} conformity requirements.

IV. Baseline Year for Certain 2006 PM_{2.5} Nonattainment Areas

A. Background

Conformity determinations for transportation plans, TIPs, and projects not from a conforming transportation plan and TIP must include a regional emissions analysis that fulfills Clean Air Act provisions. The conformity rule provides for several different regional emissions analysis tests that satisfy Clean Air Act requirements in different situations. Once a SIP with a motor vehicle emissions budget ("budget") is submitted for an air quality NAAQS and EPA finds the budget adequate for conformity purposes or approves it as part of the SIP, conformity is demonstrated using the budget test for that pollutant or precursor, as described in 40 CFR 93.118.

Before an adequate or approved SIP budget is available, conformity of the transportation plan, TIP, or project not from a conforming transportation plan and TIP is demonstrated with the interim emissions test(s), as described in 40 CFR 93.119. The interim emissions tests include different forms of the "build/no-build" test and "baseline year" test. In general, for the baseline year test, emissions from the planned transportation system or project not from a conforming transportation plan and TIP are compared to emissions that occurred in the baseline year (please refer to § 93.119 for the more detailed, specific requirements). This part of today's proposal would update § 93.119 of the current conformity rule for the 2006 PM_{2.5} NAAQS. The baseline year for nonattainment areas under the 1997 PM_{2.5} NAAQS is 2002 (40 CFR 93.119(e)(2)). Sections V. and VI. of this proposal go into further detail about how any baseline year option would be applied in 2006 PM_{2.5} areas.

⁵ "Transportation Conformity Guidance for Qualitative Hot-spot Analyses in PM_{2.5} and PM₁₀ Nonattainment and Maintenance Areas," EPA420-B-06-902, March 2006.

⁶ EPA notes that today's proposal does not address project requirements for the National Environmental Policy Act or other environmental programs.

B. Proposal

EPA is proposing that a year more recent than 2002 be used as the baseline year for conformity purposes in 2006 PM_{2.5} nonattainment areas. EPA requests comment on the following proposed options:

- *Option 1:* Define the baseline year as 2008;

- *Option 2:* Rather than naming a specific year, define the baseline year for conformity purposes as whatever year would be used to meet other air quality planning requirements, such as SIP planning and inventory requirements;

- *Option 3:* Define the baseline year as 2005.

Option 2 would establish the baseline year for conformity purposes for the 2006 PM_{2.5} nonattainment areas as well as any areas designated for a PM_{2.5} NAAQS that EPA promulgates in the future. Therefore, if this option were finalized, the transportation conformity rule would not have to be amended in the future to establish a new baseline year for conformity if additional NAAQS changes are made in the future.

There are different formulations of regulatory text that EPA could use to define the baseline year under Option 2. For example, EPA could define the baseline year for any area designated for a PM_{2.5} NAAQS promulgated after 1997 as the most recent year for which EPA's Air Emissions Reporting Requirements (AERR) (40 CFR part 51) requires submission of on-road mobile source emissions inventories, as of the effective date of EPA's nonattainment designations for such NAAQS. Another possibility would be to simply define the conformity baseline year as the year that will be used as the baseline for SIP development for given NAAQS, which EPA could specify in a guidance memorandum issued in the future.

Option 2 would likely result in the year 2008 as the baseline year in 2006 PM_{2.5} areas because this is the year anticipated to be the baseline year for SIP planning and inventory requirements. The year 2008 would also be the most recent year of on-road mobile source emissions inventories available for SIP planning purposes when SIPs for the 2006 PM_{2.5} NAAQS are likely to be due.

EPA is proposing rule language for Options 1 and 2 in § 93.119(e)(2)(B), although all three of these options could be considered for the final rule. EPA is therefore soliciting comment on all three options. While today's action proposes no changes to the 2002 baseline year for areas designated nonattainment for the 1997 PM_{2.5}

NAAQS, we propose to reorganize § 93.119(e)(2) to clarify that 2002 applies only to areas designated nonattainment for the 1997 PM_{2.5} NAAQS.

The existing interagency consultation process (40 CFR 93.105(c)(1)(i)) would be used to determine the latest assumptions and models for generating baseline year motor vehicle emissions to complete any baseline year test. The baseline year emissions level that is used in conformity would be required to be based on the latest planning assumptions available, the latest emissions model, and appropriate methods for estimating travel and speeds as required by 40 CFR 93.110, 93.111, and 93.122 of the current conformity rule. The baseline year test can be completed with a submitted or draft baseline year motor vehicle emissions SIP inventory, if the SIP reflects the latest information and models. If such a SIP baseline is not available, an MPO, in consultation with state and local air agencies, could also develop baseline year emissions as part of the conformity analysis.

C. Rationale

EPA believes that a more recent year than 2002 is appropriate for meeting Clean Air Act conformity requirements for 2006 PM_{2.5} nonattainment areas. EPA also believes that using a more recent year than 2002 is required to meet these statutory requirements, and is more environmentally protective and relevant for the 2006 PM_{2.5} NAAQS.

Coordinating the conformity baseline year with the year used for SIP planning and an emission inventory year was EPA's rationale for using 2002 as the baseline year for conformity tests in existing PM_{2.5} nonattainment areas for the 1997 NAAQS. As described in the July 1, 2004 final rule (69 FR 40015), EPA selected 2002 as the conformity baseline year because 2002 was identified as the anticipated emission inventory base year for the SIP planning process under the 1997 PM_{2.5} NAAQS.⁷ EPA continues to believe that coordinating the conformity's baseline with other data collection and inventory requirements would allow state and local governments to use their resources more efficiently. However, for the 2006 PM_{2.5} nonattainment areas, the year 2002 does not have the same relevance and does not provide the same level of environmental protection as a more recent year.

⁷ Also, the AERR requires submission of point, nonpoint, and mobile source emissions inventories every three years, and 2002 was one of those required years for such updates.

In choosing the baseline year for the 2006 PM_{2.5} NAAQS, EPA also believes it could be important to coordinate the conformity rule's baseline year with the year ultimately used as a baseline for SIP planning for the 2006 PM_{2.5} NAAQS as well as other emissions inventory requirements. EPA has proposed 2008 as a baseline year for conformity purposes (Option 1) and believes such an option would be appropriate to meet Clean Air Act conformity requirements. EPA selected 2002 for the baseline year tests in 1997 8-hour ozone and PM_{2.5} nonattainment areas in the July 1, 2004 final rule (69 FR 40015) not only because EPA believed that 2002 was the most appropriate measure for meeting Clean Air Act conformity requirements not to worsen air quality or delay timely attainment or achievement of any required interim milestone prior to SIP budgets being established, but also because EPA believed it was important to have transportation and air quality planning coordinated. Having consistent baseline years for SIPs, conformity determinations and other emissions inventory requirements helps to achieve this goal.

Alternatively, EPA has also proposed 2005 as a baseline year for conformity purposes (Option 3) because this year is also relevant for 2006 PM_{2.5} areas. The year 2005 is more recent than 2002, and 2005 data would also be available for other inventory purposes such as the AERR. In addition, most 2006 PM_{2.5} areas will be designated nonattainment based in part on air quality monitoring data from the year 2005. EPA is required to make nonattainment designations for PM_{2.5} based on the most recent three years of air quality data, *i.e.*, 2005–2007 data for most 2006 PM_{2.5} areas. For this reason, 2005 is being proposed as a baseline year for conformity purposes.

Whereas Options 1 and 3 would apply specifically to the 2006 PM_{2.5} NAAQS, EPA proposes in Option 2 to generalize the language for the baseline year for areas designated under any PM_{2.5} NAAQS established after 1997. Given that the Clean Air Act requires EPA to review the NAAQS for possible revision once every five years, adopting Option 2 would standardize the process for selecting an appropriate baseline year to use in meeting conformity requirements before SIP budgets have been established for any future PM_{2.5} NAAQS. This would enable EPA, MPOs and other transportation planners to identify the appropriate baseline year for conformity purposes without EPA having to amend the conformity regulation first.

In other words, Option 2 would allow EPA to identify an appropriate baseline

year in an expeditious manner for transportation conformity purposes. As a result, MPOs and other transportation planners would understand conformity requirements for future PM_{2.5} NAAQS revisions more quickly, which may, in turn, also allow more time to prepare and complete necessary conformity determinations.

EPA believes that Option 2 would result in an appropriate baseline year for a given PM_{2.5} NAAQS. Since Option 2 is based on the same criteria that have been used for proposed Option 1 and for establishing baseline years for other NAAQS (58 FR 62191, 69 FR 40014), EPA believes this option would also result in an environmentally protective and legal baseline year for conformity under the 2006 PM_{2.5} NAAQS and any future PM_{2.5} NAAQS revisions. Finalizing Option 2 would most likely result in a baseline year of 2008 for the 2006 PM_{2.5} NAAQS.

If the regulatory text for this option referred to the AERR requirement, the option would ensure that areas designated nonattainment for the 2006 PM_{2.5} NAAQS, as well as areas designated for revised PM_{2.5} NAAQS in the future, would use the year for which the most recent emissions inventories are *required* to be submitted as of the effective date of EPA's final designations. The regulatory text for Option 2 could also be written to refer to the year that will be used as the baseline year for SIP development for a given PM_{2.5} NAAQS.

In either case, under Option 2 EPA would most likely clarify what year is to be used for the baseline year test by issuing a memorandum. If this option were finalized, EPA would issue such a memorandum prior to conformity requirements applying.

EPA requests comment on all of these options. Though commenters can simply express a preference, providing rationale for a preference is especially useful to EPA. In particular, EPA seeks comment on whether state and local agencies believe that establishing the baseline year using Option 2 presents any implementation concerns, and if so, how EPA could address such concerns.

V. Regional Conformity Tests in 2006 PM_{2.5} Nonattainment Areas That Do Not Have Adequate or Approved SIP Budgets for the 1997 PM_{2.5} NAAQS

This part of the proposal discusses regional conformity tests for nonattainment areas for the 2006 PM_{2.5} NAAQS that do not have adequate or approved PM_{2.5} SIP budgets for the 1997 NAAQS. This proposal would apply to 2006 PM_{2.5} nonattainment areas that were not covered by the 1997 PM_{2.5}

NAAQS, as well as nonattainment areas for both PM_{2.5} NAAQS that do not have an adequate or approved 1997 PM_{2.5} SIP budget. EPA would address conformity tests for these areas under proposed section 93.109(j) of the conformity rule. See Section VI. of today's proposal for conformity tests in 2006 PM_{2.5} areas that have adequate or approved SIP budgets for the 1997 PM_{2.5} NAAQS.

Note that this section of the preamble proposes new requirements for conformity only under the 2006 PM_{2.5} NAAQS. This proposal does not address the requirements for demonstrating conformity for the 1997 PM_{2.5} NAAQS.

A. Conformity After 2006 PM_{2.5} SIP Budgets Are Adequate or Approved

1. Proposal

Once a SIP for the 2006 PM_{2.5} NAAQS is submitted with a budget(s) that EPA has found adequate or approved, EPA proposes that the budget test must be used in accordance with 40 CFR 93.118 to complete all applicable regional emissions analyses for the 2006 PM_{2.5} NAAQS. Conformity would be demonstrated if the transportation system emissions reflecting the proposed transportation plan, TIP, or project not from a conforming transportation plan and TIP were less than or equal to the motor vehicle emissions budget level defined by the SIP as being consistent with Clean Air Act requirements.

The first SIP for the 2006 PM_{2.5} NAAQS could be a control strategy SIP required by the Clean Air Act (*i.e.*, reasonable further progress SIP or attainment demonstration) or a maintenance plan. States could also voluntarily choose to submit an "early progress SIP" prior to required SIP submissions. Early progress SIPs must demonstrate a significant level of future emissions reductions from a previous year's emissions. For example, an area could submit an early progress SIP for the 2006 PM_{2.5} NAAQS that demonstrates a specific percentage of emissions reductions (*e.g.*, 5–10%) in an area's attainment year from the baseline year emissions (*e.g.*, 2008). An early progress SIP would include emissions inventories for all emissions sources for the entire 2006 PM_{2.5} nonattainment area and would meet applicable requirements for reasonable further progress SIPs. EPA has discussed this option in past conformity rule preambles, *e.g.*, the July 1, 2004 transportation conformity final rule (69 FR 40028), and many states have established early progress SIP budgets for conformity purposes.

Whatever the case, the interim emissions test(s) would no longer be used for direct PM_{2.5} or a relevant precursor once an adequate or approved SIP budget for the 2006 PM_{2.5} NAAQS is established for the pollutant or precursor. EPA encourages states to develop their future 2006 PM_{2.5} SIPs in consultation with MPOs, state and local transportation agencies, and local air quality agencies to facilitate future conformity determinations. Once EPA's nonattainment designations are finalized, EPA Regions would be available to assist states in the development of early progress SIPs for the 2006 PM_{2.5} NAAQS, if desired.

2. Rationale

EPA believes that this proposal meets statutory requirements for conformity determinations that occur after SIP budgets are available for the 2006 PM_{2.5} NAAQS. Section 176(c) of the Clean Air Act states that transportation activities must "conform to an implementation plan * * *" (SIP) and states further that conformity to an implementation plan means conformity to the SIP's purpose. Once EPA finds a budget for the 2006 PM_{2.5} NAAQS adequate or approves the SIP that includes it, the budget test provides the best means to determine whether transportation plans and TIPs meet the statutory obligations in Clean Air Act sections 176(c)(1)(A) and (B) for that NAAQS. That is, the budget test best shows that transportation plans and TIPs conform to the SIP's purpose of eliminating or reducing the severity and number of violations of the NAAQS and achieving expeditious attainment of the NAAQS (176(c)(1)(A)); and best confirms the requirement that transportation plans and TIPs not cause or contribute to any new violation, worsen an existing violation, or delay timely attainment or any required interim milestone (176(c)(1)(B)). The budget test also best demonstrates that transportation plans and TIPs comply with the statutory obligation to be consistent with the emissions estimates in SIPs, according to Clean Air Act section 176(c)(2)(A). By being consistent with the on-road mobile source emissions levels in the SIP, transportation planners can ensure that their activities remain consistent with state and local air quality goals to protect public health.

B. Conformity Before 2006 PM_{2.5} SIP Budgets Are Adequate or Approved

1. Proposal

EPA is proposing that these 2006 PM_{2.5} nonattainment areas meet one of the following interim emissions tests for

conformity determinations conducted before adequate or approved 2006 24-hour PM_{2.5} SIP budgets are established:

- The build/no-greater-than-no-build test ("build/no-build test"), or
- The no-greater-than-baseline year emissions test ("baseline year test").

Again, this part of the proposal would apply only in cases where a 2006 PM_{2.5} area does not have adequate or approved SIP budgets for either the 2006 or 1997 PM_{2.5} NAAQS. Section VI. of the proposal covers the case where a 2006 PM_{2.5} nonattainment area has a SIP budget for the 1997 PM_{2.5} NAAQS.

This proposal is similar to the transportation conformity rule at 40 CFR 93.119(e) for nonattainment areas for the 1997 PM_{2.5} NAAQS. Today's proposal would allow 2006 PM_{2.5} nonattainment areas without SIP budgets to choose between the two interim emissions tests, rather than require that one specific test or both tests be completed. Conformity would be demonstrated under the proposal if the transportation emissions reflecting the proposed transportation plan or TIP (build) were less than or equal to either the emissions from the existing transportation system (no-build), or the level of motor vehicle emissions in the baseline year, as described in 40 CFR 93.119. A full discussion of the proposed baseline year options for the 2006 PM_{2.5} NAAQS can be found in Section IV. of today's notice.

2. Rationale

EPA believes that this proposal meets statutory requirements for conformity determinations that occur before SIP budgets are available for the 2006 PM_{2.5} NAAQS. EPA believes it is appropriate to provide flexibility and allow 2006 PM_{2.5} areas to meet only one interim emissions test before adequate or approved PM_{2.5} SIP budgets are established. This proposal meets statutory requirements and parallels the current rule's requirements for 1997 PM_{2.5} nonattainment areas (69 FR 40028–40031), which were upheld by an October 2006 court decision.

Environmental Defense v. EPA, 467 F.3d 1329 (DC Cir. 2006).⁸ In addition, this

proposal is consistent with past rulemakings for interim emissions test requirements for other pollutants, as described below.

Using either the build/no-build test or baseline year test is sufficient to meet Clean Air Act section 176(c)(1)(B) requirements that transportation activities do not cause new air quality violations, worsen existing violations, or delay timely attainment or achievement of interim reductions or milestones. The baseline year and the build/no-build tests are sufficient for demonstrating conformity when an area does not have a SIP budget for a portion of a nonattainment area.

Based on the Clean Air Act, EPA has previously determined that only ozone and CO areas of higher classifications⁹ are required to also satisfy section 176(c)(3)(A)(iii) requirements during the time period before adequate or approved SIP budgets are available (58 FR 3782–3783; 62 FR 43784–43785; 69 FR 40018, 40019–40031). As a result, the current rule requires these ozone and CO areas to meet both interim emissions tests, rather than only one test.

However, the current conformity rule already allows areas designated for the other pollutants, as well as the lower classifications of ozone and CO, to conform based on only one interim emissions test, rather than having to complete two tests and thereby contribute further reductions towards attainment. EPA proposes that the 2006 PM_{2.5} areas also be required to meet only one of the interim emissions tests to meet the Clean Air Act's requirements in section 176(c)(1)(B). For more information and the full rationale for allowing some areas to conform based on only one interim emissions test, see the November 24, 1993 final rule (58 FR 62197) that addressed interim requirements for PM₁₀ and NO₂ areas, and the July 1, 2004 final rule (69 FR 40029) that established interim requirements for 1997 PM_{2.5} areas.

EPA believes that the no-greater-than-baseline year interim emissions test is an appropriate test for meeting section 176(c)(1)(B) requirements in 2006 PM_{2.5} nonattainment areas. By definition, the no-greater-than-baseline year test ensures that emissions from on-road mobile sources are no greater than they were during the baseline year that will most likely be used for 2006 PM_{2.5} NAAQS SIP planning purposes. If future on-road emissions do not increase above

their base year levels, applicable statutory requirements are met.

Finally, the build/no-build test would also allow a 2006 PM_{2.5} area to meet statutory requirements. As described above, the build/no-build test requires a regional emissions analysis to demonstrate that the emissions from the transportation system in future years, if it included the proposed action and all other expected regionally significant projects, would be less than the emissions from the current transportation system in future years. Since a new transportation plan, TIP, or project (in the build scenario) could not result in regional emissions that are higher than those that would occur in the absence of new transportation activities (in the no-build scenario) for the system, the Clean Air Act section 176(c)(1)(B) requirements are met. For these reasons, EPA believes that the build/no-build test continues to be an appropriate interim test prior to SIP budgets being available.

C. General Implementation of Regional Tests

This proposal would apply the existing conformity rule's general requirements for PM_{2.5} regional emissions analyses in 2006 PM_{2.5} areas that do not have adequate or approved SIP budgets for the 1997 PM_{2.5} NAAQS. EPA is including this discussion of the existing regulation's requirements for clarity, to help readers understand how the existing regulation would apply to areas designated nonattainment for the 2006 PM_{2.5} NAAQS. However, EPA is not soliciting comment on these existing requirements that we are not proposing to change. The following examples are intended to illustrate how today's proposal would be implemented in practice for 2006 PM_{2.5} areas without adequate or approved 1997 PM_{2.5} SIP budgets.

1. Decisions Made Through the Interagency Consultation Process

The existing rule's consultation process would be used to determine the test for completing any regional emissions analysis for the 2006 PM_{2.5} NAAQS, as required by 40 CFR 93.105(c)(1)(i). The existing interagency consultation process would also be used to determine the latest assumptions and models for generating motor vehicle emissions regardless of the test used. Refer to Section IV. of this preamble for details about generating baseline year emissions if that interim emissions test is selected for a given conformity determination.

The consultation process would also be used to determine which analysis

⁸ Petitioners challenged several aspects of the conformity regulations. In its decision, the U.S. Court of Appeals for the District of Columbia Circuit upheld EPA's regulations at 40 CFR 93.119(b)(2), (d), and (e) "because the Act does not require that activities involving transportation actually reduce pollutants, but merely not frustrate an implementation plan's purpose to reduce overall emissions." The court also upheld EPA's regulations at 40 CFR 93.118(b), (d), and (e)(6). The court vacated a narrow provision at 40 CFR 93.109(e)(2)(v) which had allowed 8-hour ozone areas to avoid using their existing 1-hour budgets under certain circumstances. This provision was

removed from the transportation conformity regulation in the January 24, 2008 final rule.

⁹ That is, ozone areas classified as moderate and above, and CO areas classified as moderate with design value greater than 12.7 ppm and serious.

years should be selected for regional emissions analyses. Before an adequate or approved 2006 PM_{2.5} budget is available, areas would be able to choose, through interagency consultation, either interim emissions test for each conformity determination. However, the same test would be required to be used for each analysis year for a given determination. EPA believes that sufficient flexibility exists without mixing and matching interim emissions tests for different analysis years within one conformity determination, which is unnecessarily complicated and may indicate that an area would not conform using one test consistently.

2. General Conformity Test Requirements for All Areas

Regional emissions analyses under this proposal would be implemented through existing conformity requirements such as 40 CFR 93.118, 93.119, and 93.122. For example, the existing conformity rule requires that only certain years within the transportation plan (or alternate timeframe) be examined. Under 40 CFR 93.118(d), the following years would be analyzed for the budget test with 2006 PM_{2.5} SIP budgets:

- The attainment year for the 2006 PM_{2.5} NAAQS (if it is within the timeframe of the transportation plan and conformity determination);
- The last year of the timeframe of the conformity determination (40 CFR 93.106(d)); and
- Intermediate years as necessary so that analysis years are no more than ten years apart.

For the interim emissions tests, the existing conformity rule (40 CFR 93.119(g)) requires the following analysis years:

- A year no more than five years beyond the year in which the conformity determination is being made;
- The last year of the timeframe of the conformity determination (as described in 40 CFR 93.106(d));
- Intermediate years as necessary so that analysis years are no more than 10 years apart.

See the relevant regulatory sections of the conformity rule and the July 1, 2004 final rule preamble for further background on how tests have been implemented for other pollutants and standards (69 FR 40020).

3. Cases Involving Multi-Jurisdictional Areas

In July 2004, EPA issued a guidance document for implementing conformity requirements in multi-jurisdictional

areas.¹⁰ Multi-jurisdictional areas are nonattainment and maintenance areas with multiple MPOs, one or more MPOs and a donut area, or multi-state areas. EPA believes that this guidance should also apply to 2006 PM_{2.5} areas with multiple jurisdictions.

There are two parts of this existing guidance that are most relevant for implementing conformity for multi-jurisdictional 2006 PM_{2.5} areas that do not have adequate or approved 1997 PM_{2.5} SIP budgets. Part 2 of this guidance describes how conformity would be implemented in all 2006 PM_{2.5} areas before adequate or approved SIP budgets are available for an applicable NAAQS. Part 3 of this guidance is relevant for meeting conformity requirements once adequate or approved 2006 PM_{2.5} SIP budgets are available. For example, Part 3 of this guidance describes how a state or MPO in a multi-state nonattainment area can operate independently from other states/MPOs for conformity purposes once adequate or approved SIP budgets for a state are established. This same conformity guidance would also apply for the 2006 PM_{2.5} NAAQS in these types of areas. Part 3 would also apply to the cases where subarea budgets are established for a nonattainment area within one state with multiple MPOs. For further information, please refer to EPA's 2004 multi-jurisdictional conformity guidance.

VI. Regional Conformity Tests in 2006 PM_{2.5} Areas That Have Adequate or Approved 1997 PM_{2.5} SIP Budgets

This section proposes the conformity tests for completing regional emissions analyses in areas designated for the 2006 PM_{2.5} NAAQS with adequate or approved SIP budgets for the 1997 PM_{2.5} NAAQS that cover either part or all of the 2006 PM_{2.5} area. EPA proposes to address conformity tests for these areas under a new section 93.109(k). See Section V. of today's proposal for conformity tests in 2006 PM_{2.5} areas that do not have an adequate or approved 1997 PM_{2.5} SIP budget. As stated elsewhere, EPA is not proposing any changes in conformity requirements for the 1997 PM_{2.5} NAAQS.

¹⁰ "Companion Guidance for the July 1, 2004, Final Transportation Conformity Rule: Conformity Implementation in Multi-Jurisdictional Nonattainment and Maintenance Areas for Existing and New Air Quality Standard," EPA40-B-04-012, July 2004, found on EPA's Web site at <http://www.epa.gov/otaq/stateresources/transconf/policy/420b04012.pdf>.

A. Conformity After 2006 PM_{2.5} SIP Budgets Are Adequate or Approved

1. Proposal

Once a SIP for the 2006 PM_{2.5} NAAQS is submitted with budget(s) that EPA has found adequate or approved, EPA proposes that the budget test must be used in accordance with 40 CFR 93.118 to complete all applicable regional emissions analyses for the 2006 PM_{2.5} NAAQS. Conformity would be demonstrated if the transportation system emissions reflecting the proposed transportation plan, TIP, or project not from a conforming transportation plan and TIP were less than or equal to the motor vehicle emissions budget level defined by the SIP as being consistent with Clean Air Act requirements.

The first submitted SIP for the 2006 PM_{2.5} NAAQS may be an attainment demonstration or a maintenance plan. Nonattainment areas for the 2006 PM_{2.5} NAAQS could also voluntarily choose to submit an "early progress SIP" to establish budgets for conformity purposes prior to required SIPs. See Section V. for further details on requirements for early progress SIPs. EPA has discussed this option in past conformity rule preamble, *e.g.*, the July 1, 2004 transportation conformity final rule (69 FR 40028), and some states have established early progress SIP budgets for conformity purposes.

Whatever the case, interim emissions tests and/or any existing 1997 PM_{2.5} SIP budget would no longer be used for conformity in 2006 PM_{2.5} areas for direct PM_{2.5} or a relevant precursor once an adequate or approved SIP budget for the 2006 PM_{2.5} NAAQS is established for the pollutant or precursor. Once a SIP budget for the 2006 PM_{2.5} NAAQS is adequate or approved, the budget test for 2006 PM_{2.5} conformity would be done based on 24-hour emissions (*i.e.*, tons per day). As noted earlier in Section III.D., areas that were also designated for the 1997 PM_{2.5} NAAQS would continue to meet their existing conformity requirements for the 1997 PM_{2.5} NAAQS, which would include a regional emissions analysis based on annual emissions (*i.e.*, tons per year). The conformity rule at 40 CFR 93.105 requires consultation on the development of SIPs; EPA encourages states to consult with MPOs, state and local transportation agencies, and local air quality agencies sufficiently early when developing 2006 PM_{2.5} SIPs to facilitate future conformity determinations. Once EPA's nonattainment designations are finalized, EPA Regions would be available to assist states in developing

early progress SIPs for the 2006 PM_{2.5} NAAQS, if desired.

2. Rationale

EPA's rationale for the use of the budget test once adequate or approved SIP budgets addressing the 2006 PM_{2.5} NAAQS are available is found in Section V.A.2. of this preamble, and not repeated here.

B. Conformity Before 2006 PM_{2.5} SIP Budgets Are Adequate or Approved

1. Proposal

Where all or a portion of the 2006 PM_{2.5} area is covered by adequate or approved 1997 PM_{2.5} budgets, EPA is proposing that the 1997 budgets would be used for 2006 PM_{2.5} conformity. In addition, in the case where the 1997 budget does not cover the entire 2006 PM_{2.5} area, EPA is proposing that one of the interim emissions tests would also be used, as described below. Section IV. of this proposal covers the proposed change to the baseline year test and Section V. covers interim emissions tests in 2006 PM_{2.5} areas before adequate or approved SIP budgets for the 2006 PM_{2.5} NAAQS are available.

Please note that this proposal is for completing conformity under the 2006 PM_{2.5} NAAQS before 2006 PM_{2.5} SIP budgets are established. For areas designated nonattainment for the 2006 PM_{2.5} NAAQS where all, or a portion, of the area is covered by adequate or approved 1997 PM_{2.5} SIP budgets, EPA is proposing that the budget test using 1997 PM_{2.5} SIP budgets serve as a proxy for the 2006 PM_{2.5} NAAQS until 2006 PM_{2.5} SIP budgets are available.

Many nonattainment areas for the 1997 PM_{2.5} NAAQS may have adequate or approved SIP budgets for the 1997 annual PM_{2.5} NAAQS. For areas that use annual PM_{2.5} budgets to meet 2006 PM_{2.5} requirements, a regional emissions analysis would be done based on an analysis of annual, rather than 24-hour, emissions (*i.e.*, tons per year).

Today's proposal is based on EPA's experience in establishing conformity requirements for areas designated for the 1997 8-hour ozone NAAQS that had SIP budgets for the 1-hour ozone NAAQS, found in 40 CFR 93.109(e)(2). This proposal covers the four possible scenarios that could result when areas are designated nonattainment for the 2006 PM_{2.5} NAAQS:¹¹

- *Scenario 1:* The 2006 PM_{2.5} area nonattainment boundary is the same as the 1997 PM_{2.5} area boundary.

- *Scenario 2:* The 2006 PM_{2.5} area is smaller than (and completely within) the 1997 PM_{2.5} area boundary.

- *Scenario 3:* The 2006 PM_{2.5} area is larger than (and contains) the 1997 PM_{2.5} area boundary.

- *Scenario 4:* The 2006 PM_{2.5} area boundary overlaps with a portion of the 1997 PM_{2.5} area boundary.

These four boundary scenarios are the same as the four boundary scenarios EPA described for the 1997 8-hour ozone areas that had existing 1-hour ozone budgets. EPA's 2004 guidance entitled, "Companion Guidance for the July 1, 2004 Final Transportation Conformity Rule, Conformity Implementation in Multi-Jurisdictional Nonattainment and Maintenance Areas for Existing and New Air Quality Standards," (EPA40-B-04-012), contains diagrams of the four scenarios for 8-hour ozone areas. Readers may be interested in reviewing these diagrams as they consider the following proposals. This document can be found on EPA's transportation conformity Web site at: <http://www.epa.gov/otaq/stateresources/transconf/policy/420b04012.pdf>.

The following paragraphs describe today's proposals for each possible scenario for 2006 PM_{2.5} nonattainment areas.

Scenario 1: 2006 PM_{2.5} areas where the nonattainment boundary is exactly the same as the 1997 PM_{2.5} boundary. In this case, the 2006 and 1997 PM_{2.5} nonattainment boundaries cover exactly the same geographic area. EPA proposes to require such areas to meet the budget test for the 2006 PM_{2.5} NAAQS using existing adequate or approved SIP budgets for the 1997 PM_{2.5} NAAQS.

Scenario 2: 2006 PM_{2.5} areas where the boundary is smaller than and within the 1997 PM_{2.5} boundary. In this case, the 2006 PM_{2.5} nonattainment area is smaller than and completely encompassed by the 1997 PM_{2.5} nonattainment boundary. EPA proposes to require such areas to meet one of the following versions of the budget test:

- The budget test using the subset or portion of existing adequate or approved 1997 PM_{2.5} SIP budgets that applies to the 2006 PM_{2.5} nonattainment area, where such portion(s) can be appropriately identified; or

- The budget test using the existing adequate or approved 1997 PM_{2.5} SIP budgets for the entire 1997 PM_{2.5} nonattainment area. In this case, any additional reductions beyond those addressed by control measures in the 1997 PM_{2.5} SIP would be required to come from the 2006 PM_{2.5} nonattainment area as described below.

Under today's proposal, areas could choose either test each time they make a conformity determination. For any particular conformity determination, however, the same choice would have to be used for each analysis year. EPA believes that to do otherwise would be unnecessarily complicated and may indicate that one test option used consistently for all analysis years would not demonstrate conformity. The consultation process would be used to determine whether using a portion of a 1997 PM_{2.5} SIP budget is appropriate and feasible, and if so, how deriving such a portion would be accomplished. See the preamble of the July 1, 2004 final rule (69 FR 40022–40023) for a description of a similar provision for the 1997 8-hour ozone NAAQS.

EPA is proposing that a conformity determination using the entire 1997 PM_{2.5} budget would include a comparison between the on-road regional emissions produced in the entire 1997 PM_{2.5} area and the existing 1997 PM_{2.5} SIP budget(s). However, if additional reductions are required to meet conformity beyond those produced by control measures in the 1997 PM_{2.5} SIP budgets, EPA proposes that those reductions must be obtained from within the 2006 PM_{2.5} nonattainment area only, since the conformity determination would be for the 2006 PM_{2.5} NAAQS.

Scenario 3: 2006 PM_{2.5} areas where the boundary is larger than the 1997 PM_{2.5} boundary. In this case, an entire 1997 PM_{2.5} nonattainment or maintenance area would be within a larger 2006 PM_{2.5} nonattainment area and the 1997 PM_{2.5} budgets would not cover the entire 2006 PM_{2.5} nonattainment area. EPA proposes to require such areas to meet one of the following:

- The budget test using the 1997 PM_{2.5} budget(s) for the 1997 PM_{2.5} area, that is, the portion of the 2006 PM_{2.5} area that lies within the 1997 PM_{2.5} area boundary, and one of the interim emissions tests for either the remaining portion of the 2006 PM_{2.5} nonattainment area, the entire 2006 PM_{2.5} area, or the entire portion of the 2006 PM_{2.5} area within an individual state, if 1997 PM_{2.5} budgets are established in each state in a multi-state area; or

- The budget test using the existing adequate or approved 1997 PM_{2.5} SIP budgets for the entire 2006 PM_{2.5} nonattainment area.¹²

¹¹ Although all four scenarios are included in this proposal, most of the 2006 PM_{2.5} areas that have 1997 PM_{2.5} budgets will be Scenario 1 areas.

¹² While the existing regulation for 8-hour ozone areas does not explicitly contain this option, it was addressed in the preamble to the final rule addressing 8-hour ozone areas (July 1, 2004, 69 FR 40027).

Under this proposal, the budget test would be completed according to the requirements in 40 CFR 93.118, and the interim emissions test requirements of 40 CFR 93.119.

Once an area selects a particular interim emissions test and the geographic area it will address, EPA proposes that the same test must be used consistently for all analysis years. The consultation process would have to be used to determine which analysis years should be selected for regional emissions analyses where the budget test and interim emissions tests are used. It may be possible to choose analysis years that would satisfy both the budget and interim emissions test requirements for areas using both tests prior to adequate or approved 2006 PM_{2.5} SIP budgets being established. Further information regarding the implementation of these requirements is illustrated later in this section.

Scenario 4: 2006 PM_{2.5} areas where the boundary partially overlaps a portion of the 1997 PM_{2.5} boundary. In this case, the 1997 and 2006 PM_{2.5} nonattainment boundaries partially overlap. As in the case with Scenario 3 areas, the 1997 PM_{2.5} budgets would not cover the entire 2006 PM_{2.5} nonattainment area. However, unlike Scenario 3 areas, the 2006 area does not contain the entire 1997 PM_{2.5} nonattainment or maintenance area. Therefore, 1997 PM_{2.5} budgets cannot be the sole test of conformity for the 2006 PM_{2.5} NAAQS, since a conformity determination must include a regional emissions analysis that includes the entire 2006 PM_{2.5} nonattainment area.

EPA proposes that 2006 PM_{2.5} areas covered under this scenario would use the 1997 PM_{2.5} budget(s) to meet the budget test for the portion of the 1997 PM_{2.5} area and budgets that overlap with the 2006 PM_{2.5} area boundary, and one of the interim emissions tests for either the remaining portion of the 2006 PM_{2.5} nonattainment area, the entire 2006 PM_{2.5} area, or the entire portion of the 2006 PM_{2.5} area within an individual state, if 1997 PM_{2.5} budgets are established in each state in a multi-state area. Under this proposal, the budget test would be completed according to the requirements in 40 CFR 93.118, and the interim emissions test requirements of 40 CFR 93.119.

Similar to Scenario 3 areas, once an area selects a particular interim emissions test and the geographic area it will address, EPA proposes that the same test must be used consistently for all analysis years. Further information regarding the implementation of these requirements is found in the discussion

above for Scenario 3, and illustrated later in this section.

2. Rationale

General. EPA believes that using the existing 1997 PM_{2.5} budgets as a proxy for the 2006 PM_{2.5} NAAQS is required by the Clean Air Act. In *Environmental Defense v. EPA*, 467 F.3d 1329 (DC Cir. 2006), the Court of Appeals for the District of Columbia Circuit held that where a motor vehicle emissions budget developed for the revoked 1-hour ozone NAAQS existed in an approved SIP, that budget must be used to demonstrate conformity to the 8-hour ozone NAAQS until the SIP is revised to include budgets for the new NAAQS. EPA reflected the court's decision for ozone conformity tests in its January 24, 2008 final rule (73 FR 4434).

While the *Environmental Defense* case concerned ozone, EPA believes the court's holding is relevant for other pollutants for which conformity must be demonstrated. Consequently, EPA believes that 2006 PM_{2.5} areas that have 1997 PM_{2.5} budgets must use them for 2006 PM_{2.5} conformity before 2006 PM_{2.5} SIP budgets are established.

The use of the 1997 PM_{2.5} budgets as a proxy for the 2006 PM_{2.5} NAAQS also would ensure that Clean Air Act requirements are met. Section 176(c) of the Clean Air Act requires that transportation activities may not cause new violations, increase the frequency or severity of existing violations, or delay timely attainment. In these areas, the budgets for the 1997 annual PM_{2.5} NAAQS have been the measure of PM_{2.5} conformity thus far, and have been consistent with these areas' PM_{2.5} air quality progress to date. Therefore, using budgets that address the 1997 annual PM_{2.5} NAAQS where no other PM_{2.5} budgets are available ensures that the requirements of Clean Air Act 176(c) are met. Once 2006 PM_{2.5} budgets are found adequate or approved, the budget test for that NAAQS provides the best means to determine whether transportation plans, TIPs, or projects meet Clean Air Act requirements.

EPA also believes the budget test is a better environmental measure than the interim emissions tests when SIP budgets for a pollutant or precursor are available. As EPA reiterated in its July 1, 2004 final rule (69 FR 40026), when motor vehicle emissions budgets have been established by SIPs, they provide a more relevant basis for conformity determinations than the interim emissions tests. EPA believes this is true even though in most cases the budgets established for the 1997 PM_{2.5} NAAQS would address an annual rather than a 24-hour NAAQS. A 1997 PM_{2.5} budget

represents the state's best estimate of the level of permissible PM_{2.5} emissions from the on-road transportation sector for a particular area. Such a budget is created based on local information for that particular area—its population, its estimated VMT and other travel data, its transit availability, its particular vehicle fleet, its local controls, and so forth. Hence EPA believes using budgets, designed for specific areas and based on information from those specific areas, is preferable to using either of the more generic interim emissions tests. The baseline year and the build/no-build tests are sufficient for demonstrating conformity when an area does not have a budget for a portion of a nonattainment area. However, these interim emissions tests usually do not ensure that transportation emissions promote progress for the NAAQS to the same extent that the use of motor vehicle emissions budgets do.

In addition, using the 1997 PM_{2.5} budgets for 2006 PM_{2.5} conformity purposes may also streamline the conformity process for areas designated nonattainment for both the 1997 and 2006 PM_{2.5} NAAQS. These areas would already be using 1997 PM_{2.5} budgets for conformity of that NAAQS. In areas where the 1997 and 2006 PM_{2.5} nonattainment boundaries are the same (Scenario 1), today's proposal would result in having to meet only one type of test—the budget test—to demonstrate conformity for both the 1997 and 2006 NAAQS.

For multi-state 2006 PM_{2.5} nonattainment areas, today's proposal would also preserve states' ability to do conformity independently from one another, if a state has already established budgets for its own state (and/or MPO(s)) for the 1997 PM_{2.5} NAAQS. Further explanation and examples are given below in Section VI.C.

Scenario 1 and 2 areas. Today's proposal for conformity in 2006 PM_{2.5} areas before budgets that address that NAAQS are available is largely consistent with the process that EPA finalized for 8-hour ozone areas designated under the 1997 ozone NAAQS where 1-hour ozone budgets exist (69 FR 40021–40028). Our proposals for Scenario 1 and 2 areas are identical to the final rule for these 8-hour ozone areas. Scenario 2 2006 PM_{2.5} areas would also have the choice of adjusting the existing 1997 PM_{2.5} budgets for the new geographical area. As we indicated in the November 5, 2003 proposed rule for the 8-hour ozone areas (68 FR 62702), using the relevant portion of existing budgets for purposes of conducting conformity

determinations for a different NAAQS of the same pollutant is appropriate since the budgets for the 1997 PM_{2.5} NAAQS would only be used as a proxy for the 2006 PM_{2.5} NAAQS. These 1997 PM_{2.5} budgets still have to be met in the 1997 PM_{2.5} areas.

Scenario 3 and 4 areas. Some Scenario 3 areas and all Scenario 4 areas would also have to meet one of the interim emissions tests, for either the portion of the 2006 PM_{2.5} area not covered by the 1997 PM_{2.5} SIP budgets, the entire PM_{2.5} area, or the entire portion of the 2006 PM_{2.5} area within an individual state. As explained in the November 2003 proposed rule for 8-hour ozone areas (68 FR 62702), in these cases budgets cannot be the sole test of conformity because a conformity determination must include a regional emissions analysis that covers the entire nonattainment area.

However, some Scenario 3 areas may be able to demonstrate conformity without an interim emissions test. For Scenario 3 PM_{2.5} areas, EPA is proposing an option that similar 8-hour ozone areas also have: the entire larger, newly designated area could meet budgets established for the smaller, existing area. In the July 1, 2004 final rule, EPA clarified that 8-hour ozone areas have this ability. In that final rule, EPA noted that while this option was not explicitly addressed by the regulatory text, it would be consistent with the requirements and is available to interested 8-hour ozone areas (69 FR 40027). Given the benefit of that history, EPA is proposing to adopt regulatory text for this option for Scenario 3 2006 PM_{2.5} areas.

Finally, EPA believes that statutory requirements are met under the proposal to use either interim emissions test when no adequate or approved PM_{2.5} SIP budgets are available. See further rationale regarding the flexibility offered by today's proposal in Section V.

C. General Implementation of Regional Tests

This proposal would apply the existing conformity rule's general requirements for PM_{2.5} regional emissions analyses to all 2006 PM_{2.5} areas. As described in Section V.C., EPA is including this discussion of the existing regulation's requirements for clarity, to help readers understand how the existing regulation would apply to areas designated nonattainment for the 2006 PM_{2.5} NAAQS. However, EPA is not soliciting comment on existing requirements that we are not proposing to change.

The following examples are intended to illustrate how today's proposal would

be implemented in practice for 2006 PM_{2.5} areas with adequate or approved 1997 PM_{2.5} SIP budgets.

1. General Conformity Test Requirements for Most Areas

Regional emissions analyses under this proposal would be implemented through existing conformity requirements such as 40 CFR 93.118, 93.119, and 93.122. For example, the existing conformity rule requires that only certain years within the transportation plan (or alternate timeframe) be examined.

Although four scenarios are described in Section VI.B. for the time period before 2006 PM_{2.5} SIP budgets are available, most areas with 1997 PM_{2.5} SIP budgets will be covered by Scenario 1 (*i.e.*, the 1997 and 2006 PM_{2.5} NAAQS boundaries are the same). Under Scenario 1, the consultation process would be used to determine which analysis years should be selected for regional emissions analyses for the budget test. The existing conformity rule at 40 CFR 93.118(d) requires the following analysis years for this test:

- The attainment year for the 2006 PM_{2.5} NAAQS (if it is within the timeframe of the transportation plan and conformity determination);
- The last year of the timeframe of the conformity determination (40 CFR 93.106(d)); and
- Intermediate years as necessary so that analysis years are no more than 10 years apart.

Areas covered by this proposal would also be determining conformity for the 1997 PM_{2.5} NAAQS, using adequate or approved budgets established for that NAAQS.

See the relevant regulatory sections of the conformity rule and the July 1, 2004 final rule preamble for further background on how tests have been implemented for other pollutants and standards (69 FR 40020).

2. Cases Involving Multi-Jurisdictional Areas

As described earlier, EPA issued a guidance document in 2004 for implementing conformity requirements in multi-jurisdictional areas. There are two parts of this existing guidance that are relevant for implementing conformity for these areas. Part 3 of the existing guidance describes how conformity would be implemented in all 2006 PM_{2.5} areas once adequate or approved SIP budgets for the 2006 PM_{2.5} NAAQS are established. Part 4 of this guidance is relevant for meeting

conformity requirements when only 1997 PM_{2.5} budgets are available.¹³

This guidance is also applicable for conformity purposes in multi-state and multi-MPO areas. For example, in multi-state 2006 PM_{2.5} nonattainment areas where each state has its own 1997 PM_{2.5} SIP budgets, the states could do conformity for the 2006 NAAQS (as well as the 1997 PM_{2.5} NAAQS) independently of each other. In addition, MPOs in areas that have subarea budgets for the 1997 PM_{2.5} NAAQS could use these subarea budgets for conformity to the 2006 PM_{2.5} NAAQS.

For further information, please refer to Section V.C. and EPA's 2004 multi-jurisdictional conformity guidance.

VII. Other Conformity Requirements for 2006 PM_{2.5} Areas

The existing regulations already provide the remaining requirements that will be necessary for conformity under the 2006 PM_{2.5} NAAQS. EPA believes that any existing conformity requirements that are listed for "PM_{2.5}" areas that are not being revised in today's proposal would also apply to 2006 PM_{2.5} nonattainment or maintenance areas. These provisions have already been promulgated, based on past rulemakings and rationale, and EPA is not proposing any changes to these provisions. Therefore, EPA is not requesting public comment on these provisions in today's proposal.

For example, a hot-spot analysis is required for certain projects in any PM_{2.5} nonattainment and maintenance areas before such projects can be found to conform. These requirements are found in §§ 93.116(a) and § 93.123(b) of the current conformity rule, although please note that EPA, for other reasons, is proposing today to clarify amendments to section 93.116(a) of the conformity rule. See Section IX. of this preamble for details. Any hot-spot analysis requirements that were promulgated for "PM_{2.5}" areas in the conformity rule do not need to be amended because they would already apply to 2006 PM_{2.5} areas for this NAAQS.

A hot-spot analysis in an area designated for both the 1997 and 2006 PM_{2.5} NAAQS would have to demonstrate that the project meets the conformity rule's hot-spot requirements for all of the PM_{2.5} standards for which the area is designated nonattainment.

¹³ This section of the guidance covers how 8-hour ozone areas that have 1-hour ozone budgets would proceed with developing their regional emissions analyses and making conformity determinations, which is analogous to any 2006 PM_{2.5} areas that have 1997 budgets in the interim.

For example, if an area is designated nonattainment for the 1997 annual standard, and the 2006 24-hour standard, the analysis would have to consider both standards. Similarly, in the case where an area is designated nonattainment for both the 1997 annual and 24-hour standards, as well as the 2006 24-hour standard, the analysis would have to consider all of these standards. (See Section IX. for more information regarding the requirements of hot-spot analyses.)

Please refer to the March 10, 2006 final rule for additional information regarding hot-spot analyses (47 FR 12468) and EPA and FHWA's current guidance for implementing this requirement (Transportation Conformity Guidance for Qualitative Hot-spot Analyses in PM_{2.5} and PM₁₀ Nonattainment and Maintenance Areas, March 2006, EPA420-B-06-902).

Section 93.117 of the conformity rule, which requires project-level conformity determinations to comply with any PM_{2.5} control measures in an approved SIP, would also apply for conformity under the 2006 PM_{2.5} NAAQS. Again, EPA promulgated this requirement in general for nonattainment and maintenance areas under PM_{2.5} air quality NAAQS. Therefore, EPA is not reopening this provision for comment in today's proposal, since it is unnecessary to do so in order to implement conformity requirements under the 2006 PM_{2.5} NAAQS. See EPA's July 2004 final rule for further information on this requirement (69 FR 40036-40037).

EPA will work with PM_{2.5} nonattainment areas as needed to ensure that state and local agencies can meet existing and new conformity requirements for the 2006 PM_{2.5} NAAQS in a timely and efficient manner. EPA requests comment on whether additional information or training will be necessary to ensure proper conformity implementation under the existing rule and today's proposal for the 2006 PM_{2.5} NAAQS. If your agency submits comments, please be as specific as possible regarding what types of situations and issues may need to be addressed in future implementation of PM_{2.5} conformity requirements.

VIII. Transportation Conformity in PM₁₀ Nonattainment and Maintenance Areas and the Revocation of the Annual PM₁₀ NAAQS

A. Background

On October 17, 2006, EPA issued a final rule establishing changes to the PM_{2.5} and PM₁₀ NAAQS (71 FR 61144). The October 2006 final rule retained the 24-hour PM₁₀ NAAQS of 150 µg/m³, and

revoked the annual PM₁₀ NAAQS of 50 µg/m³. EPA made a commitment in this October 2006 final rule to provide information regarding how transportation conformity will be implemented under the revised PM₁₀ NAAQS (71 FR 61215). To satisfy this commitment, EPA described which conformity tests would apply in PM₁₀ nonattainment and maintenance areas ("PM₁₀ areas") in a guidance document.¹⁴ Today's proposal to update the conformity rule also responds to this commitment.

Clean Air Act section 176(c)(5) requires conformity only in areas that are designated nonattainment or maintenance for a given pollutant and NAAQS. Therefore, transportation conformity has continued to apply to all PM₁₀ nonattainment and maintenance areas because transportation conformity applies based on an area's status as a nonattainment or maintenance area, and PM₁₀ designations were not affected by the October 2006 final rule. As stated in the October 2006 final rule, "both transportation and general conformity will continue to apply to all PM₁₀ nonattainment and maintenance areas since no designations are changing" (71 FR 61215).

As of the effective date of the October 2006 rule, conformity determinations in PM₁₀ areas have been required only for the 24-hour PM₁₀ NAAQS. The October 2006 final rule stated, "However, because EPA is revoking the annual PM₁₀ NAAQS in this final rule, after the effective date of this rule conformity determinations in PM₁₀ areas will only be required for the 24-hour PM₁₀ NAAQS; conformity to the annual PM₁₀ NAAQS will no longer be required" (71 FR 61215). Please refer to the October 17, 2006 final rule for additional information (71 FR 61144).

B. Proposed Definitions for PM₁₀ NAAQS

EPA proposes to add new definitions to 40 CFR 93.101 of the conformity rule to distinguish between the 24-hour PM₁₀ NAAQS and the annual PM₁₀ NAAQS. EPA is proposing these two definitions to simplify the changes necessary for other conformity rule provisions, as described further below. The addition of these definitions parallels the existing definitions in 40 CFR 93.101 for the 1-hour ozone NAAQS and 8-hour ozone NAAQS.

¹⁴ Transportation Conformity in PM₁₀ Nonattainment and Maintenance Areas and the Revocation of the Annual PM₁₀ Standard, September 25, 2008, found on EPA's Web site at: <http://www.epa.gov/otaq/stateresources/transconf/policy.htm>.

C. Proposal for Conformity Tests in PM₁₀ Areas With Budgets

EPA proposes to update one section of the regulation, consistent with the October 2006 final rule and the September 25, 2008 guidance entitled, "Transportation Conformity in PM₁₀ Nonattainment and Maintenance Areas and the Revocation of the Annual PM₁₀ NAAQS." This proposal would be consistent with how PM₁₀ transportation conformity requirements have been applied since the revocation of the annual PM₁₀ NAAQS was effective.

Specifically, EPA is proposing to update 40 CFR 93.109(g) so that:

- PM₁₀ areas that have adequate or approved SIP budgets for both the 24-hour and annual PM₁₀ NAAQS would be required to use only the budgets established for the 24-hour PM₁₀ NAAQS. Conformity to the annual PM₁₀ budgets in such a case would no longer be required.¹⁵

- PM₁₀ areas that have adequate or approved SIP budgets for only the annual PM₁₀ NAAQS would be required to use them for PM₁₀ conformity determinations until PM₁₀ SIP budgets for the 24-hour PM₁₀ NAAQS are found adequate or approved. For areas that use annual PM₁₀ budgets, a regional emissions analysis would be done based on an analysis of annual, rather than 24-hour, emissions.

EPA is not proposing to change any other existing conformity requirements for PM₁₀ nonattainment and maintenance areas. For example, the existing requirement for project-level conformity determinations in PM₁₀ areas would also continue to apply, including hot-spot analyses in some cases (see §§ 93.116(a) and 93.123(b)). Although project-level conformity requirements and any required hot-spot analysis would apply only with respect to the 24-hour PM₁₀ NAAQS, this requires no revisions to the current conformity rule.

D. Rationale

Today's proposed rule changes for PM₁₀ conformity tests result from the revocation of the annual PM₁₀ NAAQS. Where annual PM₁₀ budgets are the only PM₁₀ budgets, EPA believes it is necessary to use such budgets to demonstrate conformity for the 24-hour

¹⁵ Note that it would not be necessary to remove budgets established for the annual PM₁₀ NAAQS from a SIP for conformity purposes; they do not apply if an area has budgets for the 24-hour PM₁₀ NAAQS. However, states can choose to revise such SIPs to remove any annual PM₁₀ budgets, since this standard has been revoked and remaining 24-hour PM₁₀ budgets would ensure that anti-backsliding SIP requirements are met.

PM₁₀ NAAQS to meet Clean Air Act requirements. As discussed above in Section VI.B.2., a 2006 decision by the Court of Appeals for the DC Circuit clarified this point. In this decision, the court stated, "A current SIP, even one tied to outdated NAAQS, remains in force until replaced by another but later-approved SIP. The Clean Air Act provides that the current SIPs are legally sufficient until they are replaced by new SIPs." (*Environmental Defense v. EPA*, 467 F.3d 1329, 1335 (DC Cir. 2006)). Refer to Section VI.B.2. for further information about the decision. EPA believes that today's proposal is consistent with this decision.

Consequently, EPA believes that annual PM₁₀ budgets must be used to demonstrate conformity for the 24-hour PM₁₀ NAAQS when adequate or approved 24-hour PM₁₀ budgets are not yet established. In areas with PM₁₀ budgets that address only the annual PM₁₀ NAAQS, these budgets have been the measure of PM₁₀ conformity thus far, and have been consistent with these areas' PM₁₀ air quality progress to date. Therefore, using annual PM₁₀ budgets where no other PM₁₀ SIP budgets are available ensures that air quality progress to date is maintained, air quality will not be worsened and attainment and any interim milestones for the 24-hour PM₁₀ NAAQS will not be delayed because of emissions increases. Once 24-hour PM₁₀ budgets are found adequate or approved, the budget test solely for the 24-hour PM₁₀ NAAQS provides the best means to determine whether transportation plans, TIPs, or projects meet Clean Air Act conformity requirements.

Most PM₁₀ areas already have adequate or approved budgets for only the 24-hour PM₁₀ NAAQS. However, there are a limited number of PM₁₀ areas that have SIP budgets only for the annual PM₁₀ NAAQS. EPA believes that the statute as interpreted by the court requires such areas to continue to use these adequate or approved annual PM₁₀ SIP budgets, rather than use one of the interim emissions tests in 40 CFR 93.119(d) which could be less environmentally protective tests than SIP budgets.

While EPA addressed how the revocation affected PM₁₀ transportation conformity requirements in its September 2008 guidance, updating the regulation clarifies the requirements and simplifies implementation. This proposed rule also saves resources in some areas with adequate or approved SIP budgets for both the 24-hour and annual PM₁₀ NAAQS because these areas are no longer required to use budgets for the annual PM₁₀ NAAQS. As

mentioned above, today's minor revision to the conformity rule is consistent with what is already required in the field for PM₁₀ nonattainment and maintenance areas.

IX. Response to the December 2007 Hot-Spot Court Decision

A. Background

EPA promulgated a final rule on March 10, 2006 (71 FR 12468) that revised the previous PM₁₀ conformity hot-spot analysis requirements and applied these revised requirements to PM_{2.5}.¹⁶ A hot-spot analysis is defined in 40 CFR 93.101 as an estimation of likely future localized pollutant concentrations and a comparison of those concentrations to relevant NAAQS. A hot-spot analysis assesses the air quality impacts of an individual transportation project on a scale smaller than a regional emissions analysis for an entire nonattainment or maintenance area.

Section 93.116(a) of the current conformity rule requires that projects in PM_{2.5}, PM₁₀, and CO nonattainment and maintenance areas "must not cause or contribute to any new localized CO, PM₁₀, and/or PM_{2.5} violations or increase the frequency or severity of any existing CO, PM₁₀, and/or PM_{2.5} violations * * *." This requirement is satisfied for applicable projects¹⁷ "if it is demonstrated that during the time frame of the transportation plan 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." Sections 93.105(c)(1)(i) and 93.123 contain the consultation and methodology requirements for conducting hot-spot analyses.

A hot-spot analysis, when required, is only one part of a project-level conformity determination. In order to meet all Clean Air Act requirements, an individual project must also be included in a conforming transportation plan and TIP (and regional emissions analysis for the entire nonattainment or maintenance area) and meet any other applicable requirements.

Environmental petitioners challenged the March 2006 final rule, and raised several issues related to it. First,

petitioners alleged that the final rule did not ensure that transportation projects complied with Clean Air Act section 176(c)(1)(A) and (c)(1)(B)(iii). Second, petitioners alleged that EPA had previously approved its MOBILE6.2 on-road mobile source emissions model for use in quantitative PM_{2.5} and PM₁₀ hot-spot analyses, and withdrew such approval in the March 2006 final rule without providing adequate notice and opportunity for public comment.¹⁸

On December 11, 2007, the DC Circuit Court of Appeals issued its decision, and upheld EPA's March 2006 final rule and remanded one issue for clarification. *Environmental Defense v. EPA*, 509 F.3d 553 (DC Cir. 2007). The court agreed with EPA's position that Clean Air Act section 176(c)(1)(A) does not require that an individual transportation project reduce emissions, but only that such a project not worsen air quality compared to what would have otherwise occurred if the project was not implemented. The court held that, assuming section 176(c)(1)(A) applies in the local area surrounding an individual project, EPA's position that this provision is met if a transportation project conforms to the emissions estimates and control requirements of the SIP was a reasonable one. The court also rejected petitioners' arguments regarding MOBILE6.2 and found that EPA had in fact provided adequate notice and comment on its decision not to require quantitative PM hot-spot analyses using MOBILE6.2 due to the model's technical limitations at the project-level (71 FR 12498–12502).

However, the court remanded to EPA for further explanation of the Agency's interpretation of Clean Air Act section 176(c)(1)(B)(iii). The court instructed EPA on remand to interpret how this provision of the Act is met within the local area affected by an individual project, or explain why this statutory provision does not apply within such an area. *Environmental Defense v. EPA*, 509 F.3d 553 (DC Cir. 2007). Today's proposal is intended to respond to this part of the court's decision.

B. Proposal

EPA is proposing to make two minor changes to section 93.116(a) of the conformity rule to address the court's remand. First, EPA is explicitly stating in this provision that federally funded or approved highway and transit projects in PM_{2.5} and PM₁₀

¹⁶ The March 10, 2006 rule constituted final action on EPA's original proposal from November 5, 2003 (68 FR 62690, 62712) and a supplemental proposal from December 13, 2004 (69 FR 72140, 72144–45, and 72149–50).

¹⁷ Section 93.123(b) contains the types of projects for which a hot-spot analysis applies in PM_{2.5} and PM₁₀ areas. For additional discussion, please refer to "V. Projects of Air Quality Concern and General Requirements for PM_{2.5} and PM₁₀ Hot-spot Analyses" in the preamble of the March 10, 2006 final rule at 71 FR 12490–12498.

¹⁸ EPA and petitioners settled a third issue that was not raised to the court. The settlement was finalized on June 22, 2007 (72 FR 34460), and described a stakeholder process that EPA will use to develop its future PM_{2.5} and PM₁₀ quantitative hot-spot modeling guidance.

nonattainment and maintenance areas must meet the requirements of Clean Air Act section 176(c)(1)(B)(iii) within the local area affected by the project. EPA is also proposing to make explicit in § 93.116 the existing requirement that projects must be included in a regional emissions analysis under 40 CFR 93.118 or 93.119. Consistent with the Court's decision, EPA is not proposing additional requirements, such as requiring that an individual project reduce emissions in the local project area.

EPA is not proposing any substantive changes to existing requirements for project-level conformity determinations. Under today's proposal, project-level conformity determinations, including any hot-spot analyses, would continue to be performed in the same manner as current practice. Projects would continue to be required to be a part of a regional emissions analysis that supports a conforming transportation plan and TIP. Hot-spot analyses would need to demonstrate that during the time frame of the transportation plan no new local violations would be created and the severity or number of existing violations would not be increased as a result of a new project. By making these demonstrations, it can be assured that the project would not delay timely attainment or any required interim reductions or milestones, as described further below. In addition, project sponsors would continue to document the hot-spot analysis as part of the project-level conformity determination, and the public would continue to be able to comment on any aspects of the conformity determination through existing public involvement requirements.

EPA notes that today's proposal would also address new projects in CO nonattainment and maintenance areas, since the hot-spot analysis requirements in section 93.116(a) also apply to such areas. Although the March 2006 final rule and the December 2007 court case did not involve CO hot-spot requirements, EPA believes it is appropriate to clarify that Clean Air Act section 176(c)(1)(B)(iii) must also be met for projects in CO nonattainment and maintenance areas.

Solely for purposes of ensuring that state and local implementers and the public understand today's proposed change within the context of existing conformity requirements, EPA is also including section 93.116(a) regulatory text in its entirety in today's proposal. However, EPA is not proposing to amend the existing regulatory text in 40 CFR 93.116(a) that is not addressed by the issues discussed in today's proposal.

As described above, EPA is proposing only to add regulatory text to section 93.116(a) to clarify that federally funded or approved highway and transit projects in PM_{2.5}, PM₁₀, and CO nonattainment and maintenance areas must meet the requirements of Clean Air Act section 176(c)(1)(B)(iii) within the local area affected by the project. EPA is not reopening for public comment any other aspects of the current section 93.116(a), or any other provisions in the conformity rule regarding project-level conformity determinations (e.g., what projects require hot-spot analyses or methodology requirements, as described in 40 CFR 93.123).

C. Rationale

1. General

Project-level conformity determinations must demonstrate that all of the requirements in Clean Air Act section 176(c)(1)(B) are met. Section 176(c)(1)(B) defines conformity to a SIP to mean "that such activities will not (i) cause or contribute to any new violation of any NAAQS in any area; (ii) increase the frequency or severity of any existing violation of any NAAQS in any area; or (iii) delay timely attainment of any NAAQS or any required interim emission reductions or other milestones in any area."

In *Environmental Defense*, the court held that EPA did not explain how it interpreted the language of Clean Air Act section 176(c)(1)(B)(iii) in conjunction with related language in sections 176(c)(1)(B)(i) and (ii). Although section 93.116(a) of the existing conformity rule includes the statutory text for section 176(c)(1)(B)(i) and (ii), it does not explicitly include the statutory language in section 176(c)(1)(B)(iii). The court stated that, if "any area" in the first two provisions refers to a "local area," then EPA must either interpret the term "any area" in section 176(c)(1)(B)(iii) to also mean "local area," or explain why a different interpretation is reasonable. 509 F.3d at 560–61. EPA agrees with the court that it is reasonable to conclude that all of section 176(c)(1)(B) requirements must be met in the local project area.

EPA believes that its existing conformity hot-spot regulations, as well as other conformity requirements, already require that individual projects comply with section 176(c)(1)(B)(iii) in the local project area. EPA has always intended the term "any area" in all three statutory provisions of section 176(c)(1)(B) to include the local area affected by the emissions produced by a new project. For example, as EPA stated in the March 2006 final hot-spot

rule (71 FR 12483), "a regional emissions analysis for an area's entire planned transportation system is not sufficient to ensure that individual projects meet the requirements of section 176(c)(1)(B) where projects could have a localized air quality impact."

To implement section 176(c)(1)(B) requirements in PM_{2.5}, PM₁₀, and CO nonattainment and maintenance areas (40 CFR 93.109(b)), EPA's current conformity rule requires project-level conformity determinations to address the regional and local emissions impacts from new projects. Section 93.115(a) requires that an individual project must be consistent with the emissions projections and control measures in the SIP, either by inclusion in a conforming transportation plan and TIP or through a separate demonstration (and regional emissions analysis developed under 40 CFR 93.118 or 93.119). In addition, section 93.116(a) requires that some project-level conformity determinations include a hot-spot analysis that demonstrates emissions from a single project do not negatively impact air quality within the area substantially affected by the project.¹⁹ Through meeting all of these requirements, it can be assured that a project does not cause or contribute to a new or worsened air quality violation, delay timely attainment, or delay required interim emission reductions or other milestones.

However, in light of the court's request for further explanation, EPA is clarifying in this proposal that it interprets the term "any area" in Clean Air Act section 176(c)(1)(B) to mean any portion of a nonattainment or maintenance area, including the local area affected by a transportation project. The proposed clarifications and the existing conformity requirements ensure that transportation planners address the requirement that there be no delay in timely attainment or required interim reductions or other milestones in the local project area.

EPA notes that Clean Air Act section 176(c)(1)(B)(iii) does not require an individual project to reduce emissions in the local project area for it to be consistent with the requirement not to delay timely attainment or required interim reductions or milestones, as EPA explained in the preamble to its March 2006 hot-spot regulations (71 FR 12482), with which the Court agreed.

¹⁹ Hot-spot analyses must be based on the latest data and models under 40 CFR 93.109(b), 93.111, and 93.123, and therefore any growth in other emissions sources or the impact of new or existing emissions controls (including those in any required SIP) would always be considered in a hot-spot analysis prior to approving a project.

See also *Environmental Defense v. EPA*, 467 F.3d 1329, 1337 (DC Cir. 2006) (“EPA argues, and we agree, that conformity to a SIP can be demonstrated by using the build/no-build test, even if individual transportation plans do not actively reduce emissions”). Clean Air Act section 176(c)(1)(B)(iii) does not require a new project to mitigate new or worsened air quality violations that it does not cause. This statutory provision also does not require a new project to contribute new interim reductions beyond those that are already required in the SIP.

The only case where Congress specifically required individual projects to provide emission reductions in hot-spot analyses is for projects in certain CO nonattainment areas. Clean Air Act section 176(c)(3)(B)(ii) requires individual projects in CO nonattainment areas to “eliminate or reduce the severity and number of violations of the carbon monoxide NAAQS in areas substantially affected by the project.”²⁰ Since Congress did not establish such a requirement for any project in PM_{2.5} and PM₁₀ areas under section 176(c)(3)(B)(ii), and for the reasons described in today’s proposal, EPA does not interpret such a requirement to apply to projects in PM_{2.5} or PM₁₀ areas under section 176(c)(1)(B)(iii).

2. Requirement for No Delay in Timely Attainment of the NAAQS

Today’s proposal would clarify that a project would meet Clean Air Act section 176(c)(1)(B)(iii) requirements not to delay timely attainment as long as no new or worsened violations are predicted to occur, which is already required under the existing hot-spot requirements. While overall emissions can increase in a local area above those expected without a new project’s implementation, a project will not delay timely attainment if air quality concentrations meet federal air quality NAAQS or air quality is improved from what would have occurred without the new project’s implementation.

For example, suppose a hot-spot analysis is performed for a new highway project that is predicted to significantly increase the number of diesel trucks from what is expected in the local area without the project. A year is chosen in this example to analyze when peak emissions from the project are expected and future air quality is most likely to be impacted due to the cumulative impacts of the project and background emissions in the project area. Under both the current conformity rule and the

proposed clarification, the project would meet section 176(c)(1)(B)(iii) requirements not to delay timely attainment in the local project area as long as the project’s new emissions do not create new violations or worsen existing violations in the local project area. Such a demonstration would examine the total impact of the project’s new emissions in the context of the future transportation system, any expected growth in other emissions sources, and any existing or new control measures that are expected to impact the local project area. If the hot-spot analysis demonstrated that the proposed project would improve or not impact air quality, then timely attainment would also not be delayed from what would have occurred without the project. In contrast, if such a project increased emissions enough to cause a new violation or worsen an existing violation in the local project area, then the project would delay timely attainment, since worsening air quality above the NAAQS would impede the ability to attain in the local project area. In such a case, the project could not be found to conform until the new or worsened future violation was mitigated.

3. Requirement for No Delay in Timely Attainment of Any Required Interim Reductions or Milestones

Today’s proposal also ensures that a project would meet Clean Air Act section 176(c)(1)(B)(iii) requirements for no delay in the timely attainment of any *required* interim reductions or other milestones. EPA interprets “any required interim emission reductions or other milestones” to refer to Clean Air Act requirements associated with reductions and milestones addressed by reasonable further progress SIPs, rather than other reductions required for other purposes. However, EPA believes there is added value in referencing in section 93.116(a) the existing conformity requirement that a project be consistent with the budgets and control measures in any applicable SIP. Therefore, EPA is proposing to clarify that this requirement is satisfied in the local project area if a project is consistent with the motor vehicle emissions budget(s) and control measures in the applicable SIP or interim emission test(s) (in the absence of a SIP budget). Although such a demonstration is already required under the current rule, EPA’s proposed reference to the requirements in 40 CFR 93.118 and 93.119 would clarify that a project’s emissions—when combined with all other emissions from all other existing and other proposed transportation projects—are consistent with any

applicable required interim reductions and milestones.

Today’s proposal also supports the implementation of control measures that are relied upon in reasonable further progress demonstrations and could impact air quality in the local project area. Under the existing conformity rule, control measures that are relied upon for reasonable further progress SIPs must have sufficient state and local commitments to be included in a regional emissions analysis or a hot-spot analysis. If the implementation of a control measure is not assured, then such reductions cannot be included in the regional emissions analysis for the entire nonattainment or maintenance area (40 CFR 93.122(a)) or within the local project area considered in a hot-spot analysis (40 CFR 93.123(c)(3) and (4)). EPA believes that these existing requirements also ensure that “any required interim emissions reductions or other milestones” are not delayed within a local project area as a result of a single project’s emissions.

For example, a project may not meet Clean Air Act section 176(c)(1)(B)(iii) requirements if SIP control measures were not being implemented as expected and as a result, a project’s emissions (when combined with expected future emissions without the SIP control measures) caused a new violation or worsened an existing violation in the local project area. In such a case, additional control measures as part of the conformity determination may be required in order to offset any emissions increases from a project.

Today’s proposal would also result in all Clean Air Act section 176(c)(1)(B)(iii) requirements being met when air quality improves as a result of the project, *e.g.*, an existing air quality violation that would have occurred without the project is estimated to be reduced or eliminated if the new project were implemented. EPA believes that all of section 176(c)(1)(B) requirements would be met in the local project area in such a case since the Act requires that individual projects do not worsen air quality or affect an area’s ability to attain or achieve interim requirements. Certainly, if air quality improves in the local project area with the implementation of a new project, EPA believes that timely attainment and required reasonable further progress interim requirements are not delayed. In fact, the opposite would be true in such a case, since future air quality would be improved and attainment possibly expedited from what would have occurred without the project’s implementation.

²⁰ This requirement is included in section 93.116(b) of the existing conformity rule.

4. Summary

In summary, today's proposed clarifications and the existing conformity rule would ensure that transportation projects meet Clean Air Act section 176(c)(1)(B)(iii) requirements. As long as a transportation project does not worsen air quality concentrations within the local project area, and is consistent with the motor vehicle emissions budget(s) and control measures in the applicable SIP or interim emissions test(s) (in the absence of budgets), it would not delay timely attainment, or interfere with required interim reductions and other milestones, even if it does not reduce emissions levels within a project's location. For these reasons, EPA is not proposing to add any new requirements to the existing conformity rule. Instead, EPA is proposing simply to clarify the rule in § 93.116(a) to address the *Environmental Defense* court's remand of the March 2006 hot-spot regulation for further explanation of the applicability of Clean Air Act section 176(c)(1)(B)(iii).

X. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

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

B. Paperwork Reduction Act

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

C. Regulatory Flexibility Act

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

For purposes of assessing the impacts of this proposed rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This regulation directly affects federal agencies and metropolitan planning organizations that, by definition, are designated under federal transportation laws only for metropolitan areas with a population of at least 50,000. These organizations do not constitute small entities within the meaning of the Regulatory Flexibility Act. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. The purpose of this proposal is to amend the conformity rule to clarify how certain highway and transit projects meet statutory conformity requirements for particulate matter (PM) in response to a December 2007 court ruling, and to update the regulation to accommodate revisions to the PM₁₀ and PM_{2.5} NAAQS. This proposal merely implements already established law that imposes conformity requirements and does not itself impose requirements that may result in expenditures of \$100 million or more in any year. Thus,

today's proposal is not subject to the requirements of sections 202 and 205 of the UMRA.

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

E. Executive Order 13132: Federalism

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

This proposed rule does not have federalism implications. It will not have substantial direct effects on states, on the relationship between the national government and states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The Clean Air Act requires conformity to apply in certain nonattainment and maintenance areas as a matter of law, and this proposed action merely proposes to establish and revise procedures for transportation planning entities in subject areas to follow in meeting their existing statutory obligations. Thus, Executive Order 13132 does not apply to this rule.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communication between EPA and state and local governments, EPA specifically solicits comment on this proposed rule from state and local officials.

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). The Clean Air Act requires transportation conformity to apply in

any area that is designated nonattainment or maintenance by EPA. This proposal would amend the conformity rule to clarify how certain highway and transit projects meet statutory conformity requirements for particulate matter in response to a December 2007 court ruling, and to update the conformity rule to accommodate revisions to the PM₁₀ and PM_{2.5} NAAQS. Because today's proposed amendments to the conformity rule do not significantly or uniquely affect the communities of Indian tribal governments, Executive Order 13175 does not apply to this action.

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

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

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

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

This action is not a "significant energy action" as defined in Executive Order 13211 (66 FR 18355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. It does not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency regarding energy. Further, this rule is not likely to have any adverse energy effects because it does not raise novel legal or policy issues adversely affecting the supply, distribution or use of energy arising out of legal mandates, the President's priorities, or the principles set forth in Executive Orders 12866 and 13211.

I. National Technology Transfer and Advancement Act

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

This proposal does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

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

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

EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. This proposal would simply amend the conformity rule to clarify how certain highway and transit projects meet statutory requirements for particulate matter in response to a December 2007 court ruling, and updates the conformity rule to accommodate revisions to the PM₁₀ and PM_{2.5} NAAQS.

K. Determination Under Section 307(d)

Pursuant to Clean Air Act Section 307(d)(1)(U), the Administrator

determines that this section is subject to the provisions of section 307(d). Section 307(d)(1)(U) provides that the provisions of section 307(d) apply to "such other actions as the Administrator may determine."

List of Subjects in 40 CFR Part 93

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

Dated: May 6, 2009.

Lisa P. Jackson,
Administrator.

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

PART 93—[AMENDED]

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

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

2. Section 93.101 is amended by adding new definitions for "24-hour PM₁₀ NAAQS", "1997 PM_{2.5} NAAQS", "2006 PM_{2.5} NAAQS", and "Annual PM₁₀ NAAQS" to read as follows:

§ 93.101 Definitions.

* * * * *

24-hour PM₁₀ NAAQS means the 24-hour PM₁₀ national ambient air quality standard codified at 40 CFR 50.6.

* * * * *

1997 PM_{2.5} NAAQS means the PM_{2.5} national ambient air quality standards codified at 40 CFR 50.7.

* * * * *

2006 PM_{2.5} NAAQS means the 24-hour PM_{2.5} national ambient air quality standard codified at 40 CFR 50.13.

* * * * *

Annual PM₁₀ NAAQS means the annual PM₁₀ national ambient air quality standard that EPA revoked on December 18, 2006.

* * * * *

§ 93.105 [Amended]

3. Section 93.105 is amended in paragraph (c)(1)(vi) by removing the citation "\$ 93.109(l)(2)(iii)" and adding in its place "\$ 93.109(n)(2)(iii)".

4. Section 93.109 is amended as follows:

a. In paragraph (b):

i. By removing the citation "(c) through (i)" and adding in its place the citation "(c) through (k)";

ii. By removing the reference "(j)" and adding in its place "(l)";

- iii. By removing the reference “(k)” and adding in its place “(m)”;
- iv. By removing the reference “(l)” and adding in its place “(n)”;
- b. By revising paragraph (g)(2) introductory text;
- c. By redesignating paragraph (g)(3) as (g)(4);
- d. By adding new paragraph (g)(3);
- e. By revising the heading of paragraph (i);
- f. By adding the words “such 1997” before the words “PM_{2.5} nonattainment and maintenance areas” in paragraphs (i)(1), (i)(2) introductory text, and (i)(3);
- g. By redesignating paragraphs (j), (k), and (l) as (l), (m), and (n), respectively;
- h. In newly designated paragraph (n)(2) introductory text by removing the citation “(c) through (k)” and adding in its place the citation “(c) through (m)”;
- i. In newly designated paragraph (n)(2)(iii):
 - i. By removing the citation “(l)(2)(ii)” and adding in its place the citation “(n)(2)(ii)”;
 - ii. By removing the citation “(l)(2)(ii)(C)” and adding in its place the citation “(n)(2)(ii)(C)”;
- j. By adding new paragraphs (j) and (k).

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

* * * * *

(g) * * *

(2) In PM₁₀ nonattainment and maintenance areas where a budget is submitted for the 24-hour PM₁₀ NAAQS, the budget test must be satisfied as required by § 93.118 for conformity determinations made on or after:

* * * * *

(3) Prior to paragraph (g)(2) of this section applying, the budget test must be satisfied as required by § 93.118 using the approved or adequate motor vehicle emissions budget established for the revoked annual PM₁₀ NAAQS, if such a budget exists.

* * * * *

(i) 1997 PM_{2.5} nonattainment and maintenance areas. * * *

(j) 2006 PM_{2.5} NAAQS nonattainment and maintenance areas without 1997 PM_{2.5} NAAQS motor vehicle emissions budgets for any portion of the 2006 PM_{2.5} NAAQS 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 2006 PM_{2.5} nonattainment and maintenance areas conformity determinations must include a demonstration that the budget and/or interim emissions tests are satisfied as described in the following:

(1) FHWA/FTA projects in such PM_{2.5} nonattainment and maintenance areas

must satisfy the appropriate hot-spot test required by § 93.116(a).

(2) In such PM_{2.5} nonattainment and maintenance areas the budget test must be satisfied as required by § 93.118 for conformity determinations made on or after:

(i) The effective date of EPA's finding that a motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan for the 2006 PM_{2.5} 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.

(3) In such PM_{2.5} nonattainment areas the interim emissions tests must be satisfied as required by § 93.119 for conformity determinations made if there is no approved motor vehicle emissions budget from an applicable implementation plan for the 2006 PM_{2.5} NAAQS and no adequate motor vehicle emissions budget from a submitted control strategy implementation plan revision or maintenance plan for the 2006 PM_{2.5} NAAQS.

(k) 2006 PM_{2.5} NAAQS nonattainment and maintenance areas with motor vehicle emissions budgets for the 1997 PM_{2.5} NAAQS that cover all or a portion of the 2006 PM_{2.5} nonattainment 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 2006 PM_{2.5} nonattainment and maintenance areas conformity determinations must include a demonstration that the budget and/or interim emissions tests are satisfied as described in the following:

(1) FHWA/FTA projects in such PM_{2.5} nonattainment and maintenance areas must satisfy the appropriate hot-spot test required by § 93.116(a).

(2) In such PM_{2.5} nonattainment and maintenance areas the budget test must be satisfied as required by § 93.118 for conformity determinations made on or after:

(i) The effective date of EPA's finding that a motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan for the 2006 PM_{2.5} 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.

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

(i) If the 2006 PM_{2.5} nonattainment area covers the same geographic area as the 1997 PM_{2.5} nonattainment or maintenance area(s), the budget test as required by § 93.118 using the approved or adequate motor vehicle emissions budgets in the 1997 PM_{2.5} applicable implementation plan or implementation plan submission;

(ii) If the 2006 PM_{2.5} nonattainment area covers a smaller geographic area within the 1997 PM_{2.5} nonattainment or maintenance area(s), the budget test as required by § 93.118 for either:

(A) The 2006 PM_{2.5} nonattainment area using corresponding portion(s) of the approved or adequate motor vehicle emissions budgets in the 1997 PM_{2.5} applicable implementation plan or implementation plan submission where such portion(s) can reasonably be identified through the interagency consultation process required by § 93.105; or

(B) The 1997 PM_{2.5} nonattainment area using the approved or adequate motor vehicle emissions budgets in the 1997 PM_{2.5} applicable implementation plan or implementation plan submission. If additional emissions reductions are necessary to meet the budget test for the 2006 PM_{2.5} NAAQS in such cases, these emissions reductions must come from within the 2006 PM_{2.5} nonattainment area;

(iii) If the 2006 PM_{2.5} nonattainment area covers a larger geographic area and encompasses the entire 1997 PM_{2.5} nonattainment or maintenance area(s):

(A) The budget test as required by § 93.118 for the portion of the 2006 PM_{2.5} nonattainment area covered by the approved or adequate motor vehicle emissions budgets in the 1997 PM_{2.5} applicable implementation plan or implementation plan submission; and the interim emissions tests as required by § 93.119 for either: The portion of the 2006 PM_{2.5} nonattainment area not covered by the approved or adequate budgets in the 1997 PM_{2.5} implementation plan, the entire 2006 PM_{2.5} nonattainment area, or the entire portion of the 2006 PM_{2.5} nonattainment area within an individual state, in the case where separate 1997 PM_{2.5} SIP budgets are established for each state of a multi-state 1997 PM_{2.5} nonattainment or maintenance area; or

(B) The budget test as required by § 93.118 for the entire 2006 PM_{2.5} nonattainment area using the approved or adequate motor vehicle emissions budgets in the applicable 1997 PM_{2.5}

implementation plan or implementation plan submission.

(iv) If the 2006 PM_{2.5} nonattainment area partially covers a 1997 PM_{2.5} nonattainment or maintenance area(s):

(A) The budget test as required by § 93.118 for the portion of the 2006 PM_{2.5} nonattainment area covered by the corresponding portion of the approved or adequate motor vehicle emissions budgets in the 1997 PM_{2.5} applicable implementation plan or implementation plan submission where they can be reasonably identified through the interagency consultation process required by § 93.105; and

(B) The interim emissions tests as required by § 93.119, when applicable, for either: The portion of the 2006 PM_{2.5} nonattainment area not covered by the approved or adequate budgets in the 1997 PM_{2.5} implementation plan, the entire 2006 PM_{2.5} nonattainment area, or the entire portion of the 2006 PM_{2.5} nonattainment area within an individual state, in the case where separate 1997 PM_{2.5} SIP budgets are established for each state in a multi-state 1997 PM_{2.5} nonattainment or maintenance area.

* * * * *

5. Section 93.116 is amended by revising paragraph (a) to read as follows:

§ 93.116 Criteria and procedures: Localized CO, PM₁₀, and PM_{2.5} violations (hot-spots).

(a) This paragraph applies at all times. The FHWA/FTA project must not cause or contribute to any new localized CO, PM₁₀, and/or PM_{2.5} violations, increase the frequency or severity of any existing CO, PM₁₀, and/or PM_{2.5} violations, or

delay timely attainment of any standard or any required interim emission reductions or other milestones in CO, PM₁₀, and PM_{2.5} nonattainment and maintenance areas. This criterion is satisfied without a hot-spot analysis in PM₁₀ and PM_{2.5} nonattainment and maintenance areas for FHWA/FTA projects that are not identified in § 93.123(b)(1). This criterion is satisfied for all other FHWA/FTA projects in CO, PM₁₀ and PM_{2.5} nonattainment and maintenance areas if it is demonstrated that during the time frame of the transportation plan 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, and the project has been included in a regional emissions analysis that meets applicable §§ 93.118 and/or 93.119 requirements. The demonstration must be performed according to the consultation requirements of § 93.105(c)(1)(i) and the methodology requirements of § 93.123.

§ 93.118 [Amended]

6. Section 93.118 is amended in paragraph (a) by removing the citation “§ 93.109(c) through (l)” and adding in its place “§ 93.109(c) through (n)”.

7. Section 93.119 is amended as follows:

a. In paragraph (a), by removing the citation “§ 93.109(c) through (l)” and adding in its place “§ 93.109(c) through (n)”; and

b. By revising paragraph (e)(2).

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

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(e) * * *

Option 1 for paragraph (e)(2):

(2) The emissions predicted in the “Action” scenario are not greater than:

(A) 2002 emissions, in areas designated nonattainment for the 1997 PM_{2.5} NAAQS as described in § 93.109(i); or

(B) 2008 emissions, in areas designated nonattainment for the 2006 PM_{2.5} NAAQS as described in § 93.109(j) and (k).

Option 2 for paragraph (e)(2):

(2) The emissions predicted in the “Action” scenario are not greater than:

(A) 2002 emissions, in areas designated nonattainment for the 1997 PM_{2.5} NAAQS; or

(B) Emissions in the most recent year for which EPA’s Air Emissions Reporting Requirements (40 CFR Part 51, Subpart A) requires submission of on-road mobile source emissions inventories, as of the effective date of nonattainment designations for any PM_{2.5} NAAQS other than the 1997 PM_{2.5} NAAQS.

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§ 93.121 [Amended]

8. Section 93.121 is amended:

a. In paragraph (b) introductory text by removing the citation “§ 93.109(l)” and adding in its place “§ 93.109(n)”; and

b. In paragraph (c) introductory text by removing the citation “§ 93.109(j) and (k)” and adding in its place “§ 93.109(l) and (m)”.

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