

## EPA-APPROVED TENNESSEE NON-REGULATORY PROVISIONS

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

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**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 93**

[EPA-HQ-OAR-2009-0128; FRL-9637-3]

RIN 2060-AP57

**Transportation Conformity Rule Restructuring Amendments****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

**SUMMARY:** EPA is amending the transportation conformity rule to finalize provisions that were proposed on August 13, 2010. These amendments restructure several sections of the transportation conformity rule so that they apply to any new or revised National Ambient Air Quality Standards. EPA is also finalizing several clarifications to improve implementation of the rule. EPA is not taking a final action at this time on the proposal that areas analyze a near-term analysis year when using the budget test.

The Clean Air Act requires federally supported transportation plans, transportation improvement programs, and projects to be consistent with (conform to) the purpose of the state air

quality implementation plan. EPA consulted with the U.S. Department of Transportation and they concur in the development of this final rule.

**DATES:** This final rule is effective on April 13, 2012.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA-HQ-OAR-2009-0128. All documents in the docket are listed in the [www.regulations.gov](http://www.regulations.gov) index. Although listed in the index, some information may not be publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in [www.regulations.gov](http://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.

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

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

**I. General Information***A. Does this action apply to me?*

Entities potentially regulated by the transportation conformity rule are those that adopt, approve, or fund transportation plans, programs, or projects under title 23 U.S.C. or title 49 U.S.C. Chapter 53. Regulated categories and entities affected by today's action include:

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

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this final rule. This table lists the types of entities of which EPA is aware that potentially could be regulated by the transportation

conformity rule. Other types of entities not listed in the table could also be regulated. To determine whether your organization is regulated by this action, you should carefully examine the applicability requirements in 40 CFR 93.102. If you have questions regarding

the applicability of this action to a particular entity, consult the persons listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

## B. How do I get copies of this document?

### 1. Docket

EPA has established an official public docket for this action under Docket ID No. EPA-HQ-OAR-2009-0128. You can get a paper copy of this **Federal Register** document, as well as the documents specifically referenced in this action, any public comments received, and other information related to this action at the official public docket. See the **ADDRESSES** section for its location.

### 2. Electronic Access

You may access this **Federal Register** document electronically through EPA's Transportation Conformity Web site at [www.epa.gov/otaq/stateresources/transconf/index.htm](http://www.epa.gov/otaq/stateresources/transconf/index.htm). An electronic version of the official public docket is also available through [www.regulations.gov](http://www.regulations.gov). You may use [www.regulations.gov](http://www.regulations.gov) to view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then enter the appropriate docket identification number.

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

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

For additional information about the electronic public docket, visit the EPA Docket Center homepage at [www.epa.gov/epahome/dockets.htm](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 (CAA) section

176(c) (42 U.S.C. 7506(c)) to ensure that transportation plans, transportation improvement programs (TIPs) and federally supported highway and transit projects are consistent with (conform to) the purpose of the state air quality implementation plan (SIP). Conformity to the purpose of the SIP means that transportation activities will not cause or contribute to new air quality violations, worsen existing violations, or delay timely attainment or achievement of the relevant National Ambient Air Quality Standards (NAAQS) and interim emission reductions or milestones. Transportation conformity (hereafter, "conformity") applies to areas that are designated nonattainment, and those areas redesignated to attainment after 1990 ("maintenance areas") for transportation-related criteria pollutants: Carbon monoxide (CO), ozone, nitrogen dioxide (NO<sub>2</sub>) and particulate matter (PM<sub>2.5</sub> and PM<sub>10</sub>).<sup>1</sup>

EPA's conformity rule (40 CFR Parts 51.390 and 93 Subpart A) establishes the criteria and procedures for determining whether transportation activities conform to the SIP. EPA first promulgated the conformity rule on November 24, 1993 (58 FR 62188), and subsequently published several other amendments. DOT is EPA's federal partner in implementing the conformity regulation. EPA consulted with the U.S. Department of Transportation (DOT), and they concur on this final rule.

### B. Why are we issuing this final rule?

EPA is amending the conformity rule so that its requirements will clearly apply to areas designated for any future new or revised NAAQS. To achieve this, today's final rule restructures two sections of the conformity rule, 40 CFR 93.109 and 93.119, and makes changes to certain definitions in 40 CFR 93.101. These amendments are intended to minimize the need to make administrative updates to the conformity rule merely to reference a specific new or revised NAAQS. EPA has already undertaken two conformity rulemakings primarily for the purpose of addressing a new or revised NAAQS. See the March 24, 2010 Transportation Conformity Rule PM<sub>2.5</sub> and PM<sub>10</sub> Amendments ("PM Amendments") final rule and the July 1, 2004 final rule (75 FR 14260, and 69 FR 40004, respectively). Due to other CAA requirements, EPA will continue to establish new or revised NAAQS in the future. EPA believes that today's

conformity rule revisions provide more certainty to implementers without compromising air quality benefits from the current program. These changes are described in Sections III. and V. of today's final rule.

EPA is also clarifying in today's final rule the additional conformity test option available to current ozone "clean data" areas and is extending that option to any nonattainment areas for which EPA has developed a clean data regulation or policy.<sup>2</sup> This provision should eliminate the need to update the conformity rule in the future in order to extend this conformity option to other NAAQS. See Section IV. of today's final rule for further details.

EPA is also finalizing a change to the wording of conformity rule section 93.118(b) that does not change its requirements. Section 93.118(b) of the conformity rule continues to require consistency<sup>3</sup> for any years where the SIP establishes a budget and for any years that are analyzed to meet the requirements in 40 CFR 93.118(d). This change simplifies this provision and eliminates repetitiveness within the regulation, but does not change the requirements for demonstrating consistency. EPA did not receive comments on this section, and we are finalizing it as proposed.

Section VI. covers how today's final rule affects conformity SIPs. A conformity SIP includes a state's specific criteria and procedures for certain aspects of the conformity process.<sup>4</sup>

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

Finally, EPA received several comments requesting that we issue a rulemaking, rather than guidance, to address conformity requirements in areas designated for a distinct secondary NAAQS. Transportation conformity applies to any NAAQS for transportation-related criteria pollutants, including secondary

<sup>2</sup> Clean data refers to air quality monitoring data determined by EPA to indicate attainment of the NAAQS. Note that we are finalizing a minor change to the definition of clean data found in conformity rule section 93.101; see Section IV. of today's notice.

<sup>3</sup> That is, transportation plan and TIP emissions must be less than or equal to the budget(s) in the applicable SIP.

<sup>4</sup> For more information about conformity SIPs, see EPA's "Guidance for Developing Transportation Conformity State Implementation Plans (SIPs)", (EPA-420-B-09-001, January 2009).

<sup>1</sup> 40 CFR 93.102(b)(1) defines PM<sub>2.5</sub> and PM<sub>10</sub> as particles with an aerodynamic diameter less than or equal to a nominal 2.5 and 10 micrometers, respectively.

NAAQS.<sup>5</sup> CAA section 176(c) does not distinguish between primary and secondary NAAQS. EPA would issue future transportation conformity guidance as needed to implement new or revised NAAQS, including a distinct secondary NAAQS if one is promulgated in the future.

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

#### A. Overview

Conformity determinations for transportation plans, TIPs, and projects not from a conforming transportation plan and TIP must include a regional emissions analysis that fulfills CAA requirements. The conformity rule provides for several different regional conformity tests that satisfy statutory requirements in different situations. Once a SIP with a budget is submitted for a NAAQS and EPA finds the budget adequate for conformity purposes or approves the SIP, conformity must be demonstrated using the budget test for that pollutant or precursor, as described in 40 CFR 93.118.

EPA has amended the conformity rule on two prior occasions to address a new or revised NAAQS. In the July 1, 2004 final rule (69 FR 40004), EPA amended 40 CFR 93.109 by adding new paragraphs to describe the regional conformity tests for the 1997 ozone areas that do not have 1-hour ozone budgets, 1997 ozone areas that have 1-hour ozone budgets, and 1997 PM<sub>2.5</sub> areas. Also, in the March 24, 2010 PM<sub>2.5</sub> Amendments rulemaking (75 FR 14260), EPA amended 40 CFR 93.109 again by adding two new paragraphs to describe the regional conformity tests for 2006 PM<sub>2.5</sub> areas without 1997 PM<sub>2.5</sub> budgets, and 2006 PM<sub>2.5</sub> areas that have 1997 PM<sub>2.5</sub> budgets.

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

nonattainment and maintenance areas for transportation-related pollutants or NAAQS.

#### B. Description of the Final Rule

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

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

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

- First, a nonattainment or maintenance area for a specific NAAQS must use the budget test, if the area has adequate or approved SIP budgets for that specific NAAQS (section 93.109(c)(1)). For example, once a 2006 PM<sub>2.5</sub> nonattainment area has adequate or approved SIP budgets for the 2006 PM<sub>2.5</sub> NAAQS, it must use those budgets in the budget test as the regional test of conformity for the 2006 PM<sub>2.5</sub> NAAQS;
- Second, if an area does not have such budgets but has adequate or approved budgets from a SIP that addresses a different NAAQS of the same criteria pollutant, these budgets must be used in the budget test. Where such budgets do not cover the entire area, the interim emissions test(s) may also have to be used (section 93.109(c)(2)). For example, before a 2006 PM<sub>2.5</sub> area has adequate or approved budgets for the 2006 PM<sub>2.5</sub> NAAQS, it must use the budget test, using budgets from an adequate or approved SIP for the 1997 PM<sub>2.5</sub> NAAQS, if it has them. If these budgets do not cover the entire 2006 PM<sub>2.5</sub> area, one of the interim emissions tests may also have to be used;

- Third, if an area has no adequate or approved SIP budgets for that criteria pollutant at all, it must use the interim emissions test(s) (section 93.109(c)(3)). For example, if a 2006 PM<sub>2.5</sub> area has no adequate or approved budgets for any PM<sub>2.5</sub> NAAQS, it must use one of the interim emissions tests, as described in 40 CFR 93.119.

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

In addition, in conformity rule section 93.109(c)(5), EPA is expanding the clean data conformity option to all clean data areas for which EPA has a clean data

regulation or policy.<sup>6</sup> See Section IV. below for further information.

*New paragraph (d).* With regard to project-level requirements, today's final rule places the existing rule's requirements for hot-spot analyses of projects in CO, PM<sub>10</sub>, and PM<sub>2.5</sub> nonattainment and maintenance areas together in one paragraph (section 93.109(d)(1), (2), and (3)). These requirements are unchanged from the previous regulation; today's rulemaking simply groups them together under one paragraph.<sup>7</sup>

*Related amendments.* Today's final rule removes the definitions for "1-hour ozone NAAQS", "8-hour ozone NAAQS", "24-hour PM<sub>10</sub> NAAQS", "1997 PM<sub>2.5</sub> NAAQS", "2006 PM<sub>2.5</sub> NAAQS", and "Annual PM<sub>10</sub> NAAQS" from 40 CFR 93.101. These definitions are no longer necessary because the updated regulatory text for sections 93.109 and 93.119<sup>8</sup> applies to any and all NAAQS of those pollutants for which conformity applies. In addition, today's final rule updates references to 40 CFR 93.109 found elsewhere in the regulation. Finally, today's final rule corrects a reference to the consultation requirements found in 93.109(g)(2)(iii) which applies to isolated rural areas.

#### C. Rationale and Response to Comments

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

<sup>6</sup> Clean data refers to air quality monitoring data determined by EPA to indicate attainment of the NAAQS. Note that this action finalizes a minor change to the definition of clean data which is found in section 93.101 of the conformity rule; see Section IV. of today's rulemaking.

<sup>7</sup> Project-level conformity determinations are typically developed during the National Environmental Policy Act (NEPA) process, although conformity requirements are separate from NEPA-related requirements. Today's action to restructure 40 CFR 93.109 does not affect how NEPA-related requirements are implemented in the field.

<sup>8</sup> See Section V. of today's rulemaking for revisions to 40 CFR 93.119.

<sup>5</sup> See the preamble to the August 13, 2010 proposal for further background (75 FR 49441).

conformity must be demonstrated. Consequently, EPA believes the hierarchy of regional conformity tests described above, which is already found in the existing rule for 1997 ozone and 2006 PM<sub>2.5</sub> areas, would apply for any NAAQS of a pollutant for which the conformity rule applies.

EPA's restructuring of 40 CFR 93.109 and elimination of certain definitions in 40 CFR 93.101, along with the standardization of the baseline year in 40 CFR 93.119 (see Section V. of today's final rule for details), should make the rule sufficiently flexible to address any future NAAQS changes, including the promulgation of a new or revised NAAQS or revocation of a NAAQS, without additional rulemakings.

The restructured section 93.109 does not change the criteria and procedures for determining conformity of transportation plans, TIPs, and projects and is consistent with the regional conformity test requirements described in the PM Amendments final rule (75 FR 14266–14274). The rationale for the required regional tests has been described in previous rulemakings.<sup>9</sup> The rationale for the requirements for project-level conformity tests in CO, PM<sub>2.5</sub>, and PM<sub>10</sub> areas has also been described in previous rulemakings.<sup>10</sup>

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

All commenters who addressed this proposal supported EPA's approach for restructuring 40 CFR 93.109. Several commenters agreed with EPA that these changes will help streamline the

conformity regulation and reduce the need to revise the conformity rule when new or revised NAAQS are promulgated. One commenter opined that the restructuring of 40 CFR 93.109 provides a clear and concise organization of the conformity requirements and agreed with EPA's rationale that it will be beneficial for implementing organizations to know the conformity requirements in advance of any new or revised NAAQS.

A few commenters requested that EPA clarify whether areas that have an adequate or approved NO<sub>x</sub> SIP budget for a specific NAAQS (e.g., the 1997 ozone NAAQS) would have to use that NO<sub>x</sub> budget to demonstrate conformity for another pollutant, such as PM<sub>2.5</sub>.

A NO<sub>x</sub> budget in an ozone SIP would apply for conformity for an ozone NAAQS only, and could not be used as a budget for any other pollutant. CAA section 176(c)(1)(A) establishes that nonattainment and maintenance areas must demonstrate conformity to a SIP's "purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards." The purpose of a SIP is tied to the pollutant it addresses. The 2006 court case cited above in this section supports this point. In that ruling, the court held that where a budget developed for the revoked 1-hour ozone NAAQS existed in an approved SIP, that budget must be used to demonstrate conformity to the 8-hour ozone NAAQS until a SIP is revised to include budgets for the new or revised NAAQS. The court did not refer to adequate or approved NO<sub>x</sub> or VOC budgets from a SIP that addressed a pollutant other than ozone, and did not indicate that such budgets would need to be used. In accordance with this court decision, if, for example, a 1997 ozone area has an approved 1997 ozone attainment demonstration with a NO<sub>x</sub> budget, this NO<sub>x</sub> budget must be used to demonstrate conformity for the 1997 ozone NAAQS and could also be used to demonstrate conformity for any future ozone NAAQS before the area has a SIP for that ozone NAAQS. However, the NO<sub>x</sub> budget could not be used to demonstrate conformity for a PM or NO<sub>2</sub> NAAQS because doing so would not be consistent with CAA section 176(c) requirements that conformity be demonstrated to the relevant SIP.

Finally, while pollutants may have precursors in common, control strategies may differ by pollutant and the seasons for which the budget is established may differ by pollutant as well. For example, precursor SIP budgets for the ozone NAAQS address

a typical summer day, because ozone is a summertime air quality problem. However, PM<sub>2.5</sub> violations in the same geographic area may have occurred during winter months. An ozone precursor SIP budget established for a typical summer day has no relevance in addressing a wintertime PM<sub>2.5</sub> problem.

EPA believes that section 93.109(c)(2) in today's final rule provides sufficient clarity for these situations because it specifies that where an area does not have an adequate or approved SIP budget for a NAAQS, it would use an approved or adequate SIP budget(s) for another NAAQS of the same pollutant as the test of conformity. No additional changes are necessary.

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

##### A. Overview

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

##### B. Description of the Final Rule

Today, EPA is clarifying that any nonattainment area that EPA determines has air quality monitoring data that meet the requirements of 40 CFR parts 50 and 58 and that show attainment of a NAAQS—a "clean data" area<sup>11</sup>—can choose to satisfy the regional conformity test requirements by using on-road emissions from the most recent year of clean data as the budget(s) for that NAAQS rather than using the interim emissions test(s) per 40 CFR 93.119. The area may do this if the following are true:

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

<sup>11</sup> See conformity rule section 93.101 for a definition of "clean data."

<sup>9</sup> See EPA's March 24, 2010 final rule (75 FR 14266–14273). See also EPA's July 1, 2004 final rule (69 FR 40019–40031).

<sup>10</sup> For further details on project-level conformity test requirements, please refer to the March 10, 2006 final rule (71 FR 12469–12506). See also EPA's January 24, 2008 final rule (73 FR 4432–4434), EPA's July 1, 2004 final rule (69 FR 40036–40038; 40056–40058), the August 15, 1997 final rule (62 FR 43798), and the November 24, 1993 final rule (58 FR 62199–62201; 62207–62208; 62212–62213).

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

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

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

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

### C. Rationale and Response to Comments

EPA believes that it is reasonable to extend the same conformity option available to clean data ozone areas to all clean data areas for which EPA has a clean data regulation or policy. Furthermore, this provision should work with any clean data policy or regulation that EPA develops; thus, it would eliminate the need to update the conformity rule in the future in order to extend this conformity option to any NAAQS for which EPA develops a clean data policy or regulation. See EPA's previous discussion and rationale for the clean data conformity option in July 1, 2004 final rule (69 FR 40019–40021). See also the preamble to the 1996 conformity proposal and 1997 final rule (July 9, 1996, 61 FR 36116, and August 15, 1997, 62 FR 43784–43785, respectively).

Several commenters requested that EPA clarify whether the use of the most recent year of clean data as the budget becomes binding once EPA approves it for use in completing regional conformity analyses. These commenters also wanted assurance that the state or local air quality agency would need to use the interagency and public

consultation process before such budgets are submitted to EPA for approval. As EPA explained in its proposed rule (August 13, 2010, 75 FR 49439), once the state or local air quality agency makes the request that the emissions in the most recent year for which the area is attaining be used as the budget, and EPA approves that request through a rulemaking, this level of emissions becomes the approved budget for conformity purposes in the clean data area for the relevant NAAQS.<sup>12</sup> The area may not revert back to using the interim emissions test(s) to demonstrate conformity once a budget has been established through a rulemaking, regardless of whether such budget is approved in a Clean Data rulemaking for a NAAQS or is approved as part of a control strategy SIP. Note that should EPA subsequently determine that the area has violated the relevant NAAQS and withdraw the determination of attainment through appropriate rulemaking,<sup>13</sup> EPA will also withdraw its approval for the clean data budget.

Once a clean data area submits a maintenance plan, and its budget(s) are found adequate or approved, the maintenance plan budget(s) must be used for conformity based on the regulation at 40 CFR 93.118(b).

The conformity rule at 93.105(a)(1) requires interagency consultation in SIP development. The final rule is consistent with prior conformity rulemakings that require any clean data budgets to be subject to the existing interagency consultation process and public comment. EPA established in its August 15, 1997 final rule (62 FR 43784–43785) that, regardless of whether a budget is created through the SIP process or through a Clean Data rulemaking, the interagency consultation process must be used and the public must be provided an opportunity to comment. See the August 15, 1997 final rule for further details.

For details on EPA's clean data regulations and policies, see the November 29, 2005 Phase 2 Ozone Implementation rulemaking for the 1997 ozone NAAQS (70 FR 71644–71646), 40 CFR 51.918, and the April 25, 2007 Clean Air Fine Particle Implementation Rule for the 1997 PM<sub>2.5</sub> NAAQS (72 FR

20603–20605, 40 CFR 1004(c)). See also various determinations of attainment for PM<sub>10</sub> nonattainment areas using EPA's Clean Data policy (October 30, 2006 final rule (71 FR 63642), February 8, 2006 final rule (71 FR 6352), March 14, 2006 final rule (71 FR 13021), March 23, 2010 proposed rule (75 FR 13710)).

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

### A. Overview

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

### B. Description of Final Rule

Today's action revises 40 CFR 93.119 to apply more generally to any NAAQS for a given pollutant. First, the section has been reorganized to place the baseline years for existing NAAQS in one paragraph (revised paragraph (e)). Today's action also revises 40 CFR 93.119 to define the baseline year for any NAAQS promulgated after 1997 by reference to another requirement. Rather than naming a specific year, the conformity rule defines the baseline year for conformity purposes as the most recent year for which EPA's Air Emissions Reporting Requirements (AERR) (40 CFR Part 51.30(b)) requires submission of on-road mobile source emissions inventories, as of the effective date of EPA's nonattainment designations for any NAAQS promulgated after 1997. AERR requires on-road mobile source emission inventories to be submitted for every third year, for example, 2002, 2005, 2008, 2011, 2014, etc.<sup>14</sup>

Today's rule is consistent with the baseline year definition finalized for the 2006 PM<sub>2.5</sub> NAAQS in the PM Amendments final rule. In the PM Amendments final rule, this definition applied to only areas designated for any PM<sub>2.5</sub> NAAQS other than the 1997 PM<sub>2.5</sub> NAAQS. Today's action amends the

<sup>12</sup> If EPA subsequently finds a different SIP budget adequate or approves a SIP containing a budget, then that budget would be used for conformity purposes, as applicable, under 40 CFR 93.118.

<sup>13</sup> See the November 29, 2005 Phase 2 Ozone Implementation rulemaking for the 1997 ozone NAAQS (70 FR 71644–71646), 40 CFR 51.918, and the April 25, 2007 Clean Air Fine Particle Implementation Rule for the 1997 PM<sub>2.5</sub> NAAQS (72 FR 20603–20605), 40 CFR 1004(c).

<sup>14</sup> These are known as Three-Year Cycle Inventories. See 40 CFR Part 51.30(b) and the EPA's December 17, 2008 final rule (73 FR 76539) for more details.

conformity rule to establish the same baseline year definition for new or revised NAAQS of any pollutant promulgated after 1997, not just the PM<sub>2.5</sub> NAAQS. See the March 24, 2010 p.m. Amendments final rule (75 FR 14265–14266) for further details.

This definition will automatically establish a relevant baseline year for conformity purposes for any areas designated nonattainment for all future NAAQS. For all future NAAQS, EPA will identify the baseline year that results from today's rule in guidance and will maintain a list of baseline years on EPA's Web site.<sup>15</sup> Once the baseline year is established according to this provision, it will not change (i.e., the baseline year would not be a rolling baseline year for a given NAAQS). Today's final rule does not change any baseline years already established for conformity purposes prior to today's action.

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

As described in earlier rulemakings, the baseline year interim emissions test can be completed with a submitted or draft baseline year motor vehicle emissions SIP inventory, if the SIP reflects the latest information and models.<sup>16</sup> An MPO or state DOT, in consultation with state and local air agencies, could also develop baseline year emissions as part of the conformity analysis. EPA believes that a submitted or draft SIP baseline inventory may be the most appropriate source for completing the baseline year tests for an area's first conformity determination under a new or revised NAAQS. This is due to the fact that SIP inventories are likely to be under development at the same time as these conformity determinations, and such inventories must be based on the latest available data at the time they are developed (CAA section 172(c)(3)).

### C. Rationale and Response to Comments

EPA believes that today's final rule results in an environmentally protective and legal baseline year for conformity for any NAAQS promulgated after 1997 and best accomplishes several important goals.

First, as described in the August 13, 2010 proposed rule (75 FR 49440), EPA believes it is important to coordinate the conformity baseline year with the year used for SIP planning and an emissions inventory year. This was EPA's rationale for using 2002 as the baseline year for interim emissions tests in nonattainment areas for the 1997 ozone and PM<sub>2.5</sub> NAAQS (69 FR 40014–40015). It was also EPA's rationale for finalizing the same baseline year definition in today's final rule for 2006 PM<sub>2.5</sub> nonattainment areas in the March 24, 2010 final rule: this definition resulted in a conformity baseline year of 2008 for the 2006 PM<sub>2.5</sub> NAAQS (75 FR 14265–14266). Therefore, today's conformity baseline year is consistent with how EPA has implemented the conformity baseline year for new or revised NAAQS in the past.

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

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

Finally, today's rule for the baseline year definition provides implementers

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

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

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

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

<sup>15</sup> See [www.epa.gov/otaq/stateresources/transconf/baseline.htm](http://www.epa.gov/otaq/stateresources/transconf/baseline.htm).

<sup>16</sup> See the March 24, 2010 final rule (75 FR 14265) and the July 1, 2004 final rule (69 FR 40015).

established for the 1997 ozone and PM<sub>2.5</sub> NAAQS.

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

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

#### VI. How do these amendments affect conformity SIPs?

Today's action does not affect existing conformity SIPs that were prepared in accordance with current CAA requirements since the final rule does not affect the provisions that are required to be in a conformity SIP. CAA section 176(c)(4)(E) requires a conformity SIP to include the state's criteria and procedures for interagency consultation (40 CFR 93.105) and two additional provisions related to written commitments for certain control and mitigation measures (40 CFR 93.122(a)(4)(ii) and 93.125(c)).

However, the conformity rule also requires states to submit a new or revised conformity SIP to EPA within 12 months of the **Federal Register** publication date of any final conformity amendments if a state's conformity SIP includes the provisions of such final amendments (40 CFR 51.390(c)). Therefore, such a conformity SIP

revision is required to be submitted by March 14, 2013 in states with approved conformity SIPs containing provisions addressed by today's action. EPA encourages these states to revise their conformity SIP to include only the three required sections so that future changes to the conformity rule do not require further revisions to conformity SIPs. EPA will continue to work with states to approve such revisions as expeditiously as possible through flexible administrative techniques, such as parallel processing and direct final rulemaking.

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

For additional information on conformity SIPs, please refer to the January 2009 guidance entitled, "Guidance for Developing Transportation Conformity State Implementation Plans" available on EPA's Web site at [www.epa.gov/otaq/stateresources/transconf/policy/420b09001.pdf](http://www.epa.gov/otaq/stateresources/transconf/policy/420b09001.pdf).

#### VII. Statutory and Executive Order Reviews

##### A. Executive Order 12866: Regulatory Planning and Review

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

##### B. Paperwork Reduction Act

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

2060-0561. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

##### C. Regulatory Flexibility Act

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

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

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

##### D. Unfunded Mandates Reform Act

This action does not contain a Federal mandate that may result in expenditures of \$100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year. This final rule implements already established law that imposes conformity requirements and does not itself impose requirements that may result in expenditures of \$100 million or more in any year. Thus, this rule is not subject to the requirements of Sections 202 and 205 of the UMRA.

This final rule is also not subject to the requirements of Section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This rule will not significantly or uniquely

impact small governments because it directly affects federal agencies and metropolitan planning organizations that, by definition, are designated under federal transportation laws only for metropolitan areas with a population of at least 50,000.

#### *E. Executive Order 13132: Federalism*

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

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). The CAA requires conformity to apply in any area that is designated nonattainment or maintenance by EPA. Because today's amendments to the conformity rule do not significantly or uniquely affect the communities of Indian tribal governments, Executive Order 13175 does not apply to this action.

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

This action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it is not economically significant as defined in EO 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children.

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

This action is not a "significant energy action" as defined in Executive Order 13211 (66 FR 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.

#### *I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104-113, Section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

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

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

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

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it maintains or increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population.

#### *K. Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the

Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a major rule as defined by 5 U.S.C. 804(2). This rule will be effective April 13, 2012.

#### **List of Subjects in 40 CFR Part 93**

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

Dated: March 8, 2012.

**Lisa P. Jackson,**  
*Administrator.*

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

#### **PART 93—[AMENDED]**

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

**Authority:** 42 U.S.C. 7401–7671q.

■ 2. Section 93.101 is amended by removing paragraphs (1) through (6) of the definition for "National ambient air quality standards (NAAQS)" and by revising the definition for "Clean data" to read as follows:

#### **§ 93.101 Definitions.**

\* \* \* \* \*

*Clean data* means air quality monitoring data determined by EPA to meet the applicable requirements of 40 CFR Parts 50 and 58 and to indicate attainment of a NAAQS.

\* \* \* \* \*

#### **§ 93.105 [Amended]**

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

■ 4. Section 93.109 is amended as follows:

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

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

■ c. In newly redesignated paragraph (g)(2) introductory text, by removing the

citation “paragraphs (c) through (m)” and adding in its place “paragraph (c)”;

■ d. In newly redesignated paragraph (g)(2)(iii), by removing the citation “paragraph (n)(2)(ii)” and adding in its place “paragraph (g)(2)(ii)”;

■ e. In newly redesignated paragraph (g)(2)(iii), by removing the citation “paragraph (n)(2)(ii)(C)” and adding in its place “paragraph (g)(2)(ii)(C)”;

■ f. In newly redesignated paragraph (g)(2)(iii), by removing the citation “§ 93.105(c)(1)(vii)” and adding in its place “§ 93.105(c)(1)(vi)”.

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

\* \* \* \* \*

(b) Table 1 in this paragraph indicates the criteria and procedures in §§ 93.110 through 93.119 which apply for transportation plans, TIPs, and FHWA/FTA projects. Paragraph (c) of this section explains when the budget and interim emissions tests are required for each pollutant and NAAQS. Paragraph (d) of this section explains when a hot-spot test is required. Paragraph (e) of this section addresses conformity requirements for areas with approved or adequate limited maintenance plans. Paragraph (f) of this section addresses nonattainment and maintenance areas which EPA has determined have insignificant motor vehicle emissions. Paragraph (g) of this section addresses isolated rural nonattainment and maintenance areas. Table 1 follows:

\* \* \* \* \*

(c) *Regional conformity test requirements for all nonattainment and maintenance areas.* This provision applies one year after the effective date of EPA’s nonattainment designation for a NAAQS in accordance with § 93.102(d) and until the effective date of revocation of such NAAQS for an area. In addition to the criteria listed in Table 1 in paragraph (b) of this section that are required to be satisfied at all times, in such nonattainment and maintenance areas conformity determinations must include a demonstration that the budget and/or interim emissions tests are satisfied as described in the following:

(1) In all nonattainment and maintenance areas for a NAAQS, the budget test must be satisfied as required by § 93.118 for conformity determinations for such NAAQS 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 such NAAQS is

adequate for transportation conformity purposes;

(ii) The publication date of EPA’s approval of such a budget in the **Federal Register**; or

(iii) The effective date of EPA’s approval of such a budget in the **Federal Register**, if such approval is completed through direct final rulemaking.

(2) Prior to paragraph (c)(1) of this section applying for a NAAQS, in a nonattainment area that has approved or adequate motor vehicle emissions budgets in an applicable implementation plan or implementation plan submission for another NAAQS of the same pollutant, the following tests must be satisfied:

(i) If the nonattainment area covers the same geographic area as another NAAQS of the same pollutant, the budget test as required by § 93.118 using the approved or adequate motor vehicle emissions budgets for that other NAAQS;

(ii) If the nonattainment area covers a smaller geographic area within an area for another NAAQS of the same pollutant, the budget test as required by § 93.118 for either:

(A) The nonattainment area, using corresponding portion(s) of the approved or adequate motor vehicle emissions budgets for that other NAAQS, where such portion(s) can reasonably be identified through the interagency consultation process required by § 93.105; or

(B) The area designated nonattainment for that other NAAQS, using the approved or adequate motor vehicle emissions budgets for that other NAAQS. If additional emissions reductions are necessary to meet the budget test for the nonattainment area for a NAAQS in such cases, these emissions reductions must come from within such nonattainment area;

(iii) If the nonattainment area covers a larger geographic area and encompasses an entire area for another NAAQS of the same pollutant, then either (A) or (B) must be met:

(A)(1) The budget test as required by § 93.118 for the portion of the nonattainment area covered by the approved or adequate motor vehicle emissions budgets for that other NAAQS; and

(2) The interim emissions tests as required by § 93.119 for one of the following areas: the portion of the nonattainment area not covered by the approved or adequate budgets for that other NAAQS; the entire nonattainment area; or the entire portion of the nonattainment area within an individual state, in the case where separate adequate or approved motor

vehicle emissions budgets for that other NAAQS are established for each state of a multi-state nonattainment or maintenance area.

(B) The budget test as required by § 93.118 for the entire nonattainment area using the approved or adequate motor vehicle emissions budgets for that other NAAQS.

(iv) If the nonattainment area partially covers an area for another NAAQS of the same pollutant:

(A) The budget test as required by § 93.118 for the portion of the nonattainment area covered by the corresponding portion of the approved or adequate motor vehicle emissions budgets for that other NAAQS, where they can be reasonably identified through the interagency consultation process required by § 93.105; and

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

(3) In a nonattainment area, the interim emissions tests required by § 93.119 must be satisfied for a NAAQS if neither paragraph (c)(1) nor paragraph (c)(2) of this section applies for such NAAQS.

(4) An ozone nonattainment area must satisfy the interim emissions test for NO<sub>x</sub>, as required by § 93.119, if the implementation plan or plan submission that is applicable for the purposes of conformity determinations is a 15% plan or other control strategy SIP that does not include a motor vehicle emissions budget for NO<sub>x</sub>. The implementation plan for an ozone NAAQS will be considered to establish a motor vehicle emissions budget for NO<sub>x</sub> if the implementation plan or plan submission contains an explicit NO<sub>x</sub> motor vehicle emissions budget that is intended to act as a ceiling on future NO<sub>x</sub> emissions, and the NO<sub>x</sub> motor vehicle emissions budget is a net reduction from NO<sub>x</sub> emissions levels in the SIP’s baseline year.

(5) Notwithstanding paragraphs (c)(1), (c)(2), and (c)(3) of this section, nonattainment areas with clean data for a NAAQS that have not submitted a maintenance plan and that EPA has determined are not subject to the Clean Air Act reasonable further progress and attainment demonstration requirements

for that NAAQS must satisfy one of the following requirements:

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

(ii) The budget test as required by § 93.118, using the adequate or approved motor vehicle emissions budgets in the submitted or applicable control strategy implementation plan for the NAAQS for which the area is designated nonattainment (subject to the timing requirements of paragraph (c)(1) of this section); or

(iii) The budget test as required by § 93.118, using the motor vehicle emissions in the most recent year of attainment as motor vehicle emissions budgets, if the state or local air quality agency requests that the motor vehicle emissions in the most recent year of attainment be used as budgets, and EPA approves the request in the rulemaking that determines that the area has attained the NAAQS for which the area is designated nonattainment.

(6) For the PM<sub>10</sub> NAAQS only, the interim emissions tests must be satisfied as required by § 93.119 for conformity determinations made if the submitted implementation plan revision for a PM<sub>10</sub> nonattainment area is a demonstration of impracticability under CAA Section 189(a)(1)(B)(ii) and does not demonstrate attainment.

(d) *Hot-spot conformity test requirements for CO, PM<sub>2.5</sub>, and PM<sub>10</sub> nonattainment and maintenance areas.* This provision applies in accordance with § 93.102(d) for a NAAQS and until the effective date of any revocation of such NAAQS for an area. In addition to the criteria listed in Table 1 in paragraph (b) of this section that are required to be satisfied at all times, project-level conformity determinations in CO, PM<sub>10</sub>, and PM<sub>2.5</sub> nonattainment and maintenance areas must include a demonstration that the hot-spot tests for the applicable NAAQS are satisfied as described in the following:

(1) FHWA/FTA projects in CO nonattainment or maintenance areas must satisfy the hot-spot test required by § 93.116(a) at all times. Until a CO attainment demonstration or maintenance plan is approved by EPA, FHWA/FTA projects must also satisfy the hot-spot test required by § 93.116(b).

(2) FHWA/FTA projects in PM<sub>10</sub> nonattainment or maintenance areas must satisfy the appropriate hot-spot test as required by § 93.116(a).

(3) FHWA/FTA projects in PM<sub>2.5</sub> nonattainment or maintenance areas

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

\* \* \* \* \*

#### § 93.116 [Amended]

■ 5. Section 93.116(b) is amended by removing the citation “§ 93.109(f)(1)” and adding in its place the citation “§ 93.109(d)(1)”.

■ 6. Section 93.118 is amended:

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

■ b. By revising paragraph (b) introductory text.

#### § 93.118 Criteria and procedures: Motor vehicle emissions budget.

\* \* \* \* \*

(b) Consistency with the motor vehicle emissions budget(s) must be demonstrated for each year for which the applicable (and/or submitted) implementation plan specifically establishes a motor vehicle emissions budget(s), and for each year for which a regional emissions analysis is performed to fulfill the requirements in paragraph (d) of this section, as follows:

\* \* \* \* \*

■ 7. Section 93.119 is amended as follows:

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

■ b. In paragraph (b) introductory text, by removing “1-hour ozone and 8-hour”;

■ c. By revising paragraphs (b)(1)(ii) and (b)(2)(ii);

■ d. By revising paragraphs (c)(1)(ii) and (c)(2)(ii);

■ e. By revising the heading of paragraph (d);

■ f. In paragraph (d) introductory text, by removing “PM<sub>10</sub> and NO<sub>2</sub>” and adding in its place “PM<sub>2.5</sub>, PM<sub>10</sub>, and NO<sub>2</sub>”;

■ g. By revising paragraph (d)(2);

■ h. By revising paragraph (e); and

■ i. In paragraph (g)(2), by removing “(b)(2)(i), (c)(2)(i), (d)(1), and (e)(1)” and adding in its place “(b)(2)(i), (c)(2)(i), and (d)(1)”.

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

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(ii) The emissions predicted in the “Action” scenario are lower than emissions in the baseline year for that NAAQS as described in paragraph (e) of this section by any nonzero amount.

(2) \* \* \*

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

(c) \* \* \*

(1) \* \* \*

(ii) The emissions predicted in the “Action” scenario are lower than emissions in the baseline year for that NAAQS as described in paragraph (e) of this section by any nonzero amount.

(2) \* \* \*

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

(d) *PM<sub>2.5</sub>, PM<sub>10</sub>, and NO<sub>2</sub> areas.* \* \* \*

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

(e) *Baseline year for various NAAQS.* The baseline year is defined as follows:

(1) 1990, in areas designated nonattainment for the 1990 CO NAAQS or the 1990 NO<sub>2</sub> NAAQS.

(2) 1990, in areas designated nonattainment for the 1990 PM<sub>10</sub> NAAQS, unless the conformity implementation plan revision required by § 51.390 of this chapter defines the baseline emissions for a PM<sub>10</sub> area to be those occurring in a different calendar year for which a baseline emissions inventory was developed for the purpose of developing a control strategy implementation plan.

(3) 2002, in areas designated nonattainment for the 1997 ozone NAAQS or 1997 PM<sub>2.5</sub> NAAQS.

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

\* \* \* \* \*

#### § 93.121 [Amended]

■ 8. Section 93.121 is amended:

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

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

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