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Part III

Environmental Protection Agency

**40 CFR Part 51
Criteria and Procedures for Determining
Conformity to Transportation Plans;
Proposed Rule**

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 51

[AMS-FRL-4550-7]

Criteria and Procedures for Determining Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Funded or Approved Under Title 23 U.S.C. or the Federal Transit Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed rulemaking.

SUMMARY: EPA proposes criteria and procedures for determining that transportation plans, programs, and projects which are funded or approved under title 23 U.S.C. or the Federal Transit Act conform with State or Federal air quality implementation plans. This action is required under section 176(c)(4) of the Clean Air Act Amendments of 1990.

Conformity to an implementation plan is defined in the Clean Air Act as conformity to an implementation plan'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. Federal activities may not cause or contribute to new violations of air quality standards, exacerbate existing violations, or interfere with the timely attainment or interim emission reductions towards attainment. This proposal would establish the process by which the Federal Highway Administration and the Federal Transit Administration of the United States Department of Transportation and metropolitan planning organizations determine conformity of highway and transit projects.

DATES: Written comments on this notice will be accepted for 60 days until March 12, 1993. EPA will conduct three public hearings on this proposal beginning at 10:30 a.m. on January 29, 1993 in Washington, DC; February 5, 1993 in California; and February 10, 1993 in Missouri. The hearings will continue throughout the day until all testimony has been presented.

ADDRESSES: Interested parties may submit written comments (in duplicate, if possible) to: Air Docket Section (LE-131), U.S. Environmental Protection Agency, Attention: Docket No. A-92-21, 401 M Street, SW., Washington, DC 20460. (Those desiring notification of receipt of comments must include a self-addressed, stamped postcard.)

Public hearings will be held in Washington, DC, at the Ramada Renaissance Techworld, 999 9th St. NW.; in Los Angeles, California at the Sheraton Grand Hotel, 333 South Figueroa; and in St. Louis, Missouri at the Stouffer Concourse Hotel, 9801 Natural Bridge Road.

Materials relevant to this proposal have been placed in Public Docket A-92-21 by EPA. The docket is located at the above address in room M-1500 Waterside Mall (ground floor) and may be inspected from 8:30 a.m. to 12 p.m. and from 1:30 p.m. to 3:30 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Kathryn Sargeant, Emission Control Strategies Branch, Emission Planning and Strategies Division, U.S. Environmental Protection Agency, 2565 Plymouth Road, Ann Arbor, MI 48105. Telephone: (313) 668-4441.

SUPPLEMENTARY INFORMATION: The contents of today's preamble are listed in the following outline:

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I. Authority

Authority for the actions proposed in this notice is granted to EPA and DOT

by section 176(c) of the Clean Air Act as amended (42 U.S.C. 7521(a)).

II. Background of Proposed Rule

A. Overview of the Transportation Planning Process

The joint Federal Highway Administration (FHWA)/Federal Transit Administration (FTA) urban transportation planning regulations codified at 23 CFR 450 require all urban areas with a population of more than 50,000 to have a continuous, cooperative, and comprehensive (3C) transportation planning process. The 3C planning process forms the basis for all local and State decisions involving Federal highway and transit assistance in urban areas. The planning process is generally carried out by State governments, metropolitan planning organizations (MPOs), and transit operators. The designation and membership of MPOs are decided by the units of local government and the State governor.

The urban transportation planning process requires each urbanized area to develop a transportation plan and a transportation improvement program (TIP). The MPO must approve the plan, and the MPO and the State governor must approve the TIP in order to receive Federal funds for transportation projects.

The transportation plan is a long-range plan describing policies, strategies, and facilities to accommodate current and future travel demands and to make more efficient use of the existing transportation system. It identifies facilities which should function as an integrated metropolitan transportation system, giving emphasis to those facilities that serve important national and regional transportation functions.

The TIP is a more specific program of transportation projects that are consistent with the transportation plan. The TIP includes a priority list of projects and project segments to be carried out within each three-year period after the initial adoption of the TIP. The TIP is developed by the MPO, in cooperation with the State and affected transit operators, and must be updated at least once every two years.

In addition to the transportation plans and TIPs, each State must annually prepare and submit to DOT a statewide program of projects which the State proposes for Federal assistance. FHWA and FTA generally require that the projects for urbanized areas be drawn from each area's TIP.

The approval actions taken by FHWA and FTA are on the statewide TIPs.

Prior to taking these actions on the metropolitan portion(s) of the statewide TIP, FHWA and FTA must find that (1) the metropolitan TIP is based on a 3C planning process carried on cooperatively by the States and local communities in accordance with the provisions of 23 U.S.C. 134 and 135 and the Federal Transit Act; and (2) in nonattainment areas, the metropolitan TIP conforms with the implementation plan and priority has been given to transportation control measures contained in the implementation plan in accordance with procedures in this conformity regulation.

Before a federally assisted transportation project is actually implemented, it must go through project development/analysis of alternatives and final design phases. The project development/analysis of alternatives phase gathers more detailed information on the impacts of several potential project alternatives. The environmental, social, and economic impacts of the alternatives are analyzed, and the environmental assessments and impact statements required by the National Environmental Policy Act (NEPA) are prepared. After the public has had an opportunity for review and comment, a final NEPA document is prepared. Although NEPA requires the consideration of reasonable alternatives which would avoid or minimize adverse environmental impacts, NEPA does not require the preferred alternative to be chosen solely on the basis of environmental impacts. The final environmental document must be approved by FHWA or FTA.

Once the environmental process is completed, the final design is developed, construction plans, specifications, and estimates are developed, cost estimates are refined, and rights-of-way are acquired. The project may then proceed to construction.

B. Overview of the Air Quality Planning Process

The Clean Air Act (CAA) as amended in 1990 (Pub. L. 101-549; 42 U.S.C. 7401, et seq.) requires each State to submit to EPA a State implementation plan (SIP). The SIP is an air quality management plan which contains rules and regulations for air pollution sources under State control and a demonstration that the State will attain the national ambient air quality standards (NAAQS) by the dates set forth in the CAA.

State air quality agencies have the primary responsibility for preparing the SIP. However, State and local air quality and transportation agencies must work together to develop SIP strategies for

transportation that are realistic, fundable, and effective in reducing emissions. The State SIP development process involves public hearings, and the SIP must be supported by adequate State legislation before the governor submits it to EPA.

Under section 107(d) of the CAA, all areas of the country are designated attainment, nonattainment, or unclassifiable with respect to the NAAQS. SIPs for most nonattainment areas must contain an inventory of current NAAQS pollutant emissions, as well as air quality modeling which demonstrates that given certain assumptions about population growth, economic growth, and growth in vehicle miles traveled (VMT), the SIP's control measures will result by a certain date in a level of emissions which is in attainment with the NAAQS. The attainment demonstration establishes a level of allowable emissions, which EPA calls an emissions budget. Attainment demonstrations for areas designated nonattainment for particulate matter less than ten microns in diameter (PM₁₀) are already due to EPA, and carbon monoxide (CO) nonattainment areas which are classified as serious or moderate with design value above 12.7 parts per million must submit attainment demonstrations by November 15, 1992. Ozone nonattainment areas which are classified as serious, severe, or extreme must submit attainment demonstrations by November 15, 1994. Moderate ozone nonattainment areas must submit such demonstrations by November 15, 1993, unless they are using regional airshed modeling, in which case they have until November 15, 1994.

In addition to the attainment demonstration, SIPs for most ozone nonattainment areas must demonstrate reasonable further progress (RFP) toward attainment for certain milestone years. Moderate, serious, severe, and extreme ozone areas must demonstrate in the SIP that emissions of volatile organic compounds (VOC) will be reduced by 15% from 1990 baseline emissions by 1996. (Certain adjustments and exclusions apply.) Serious, severe, and extreme ozone areas must also demonstrate that in milestone years occurring every three years from 1996 until the attainment date, VOC will be reduced from baseline emissions by an average of three percent per year. (Nitrogen oxides emissions reductions may in some cases substitute for all or a part of the required VOC emissions reductions.) PM₁₀ nonattainment areas must also submit SIPs with quantitative emission reduction milestones which must be achieved every three years. The

RFP requirements in effect create an emissions budget for each milestone year, in addition to the budget that applies for the attainment year.

If a State fails to make an SIP submission, if an SIP submission is disapproved by EPA, or if a requirement in an approved SIP is not being implemented, EPA may (and in some cases must) apply highway funding sanctions. These highway sanctions would prohibit DOT from approving projects or awarding grants in the affected nonattainment area, unless the project or grant was to improve a demonstrated safety problem, was one of several exempt types listed in the CAA, or was found to reduce air pollution problems by the EPA Administrator. Within two years after an EPA finding of State failure or SIP disapproval, EPA would be required to promulgate a Federal implementation plan (FIP) which would correct the SIP's deficiencies.

EPA's document "State Implementation Plans; General Preamble for the Implementation of title I of the Clean Air Act Amendments of 1990" (57 FR 13498, April 16, 1992) provides more information on the SIP process and the 1990 CAA requirements.

C. History of Conformity

Conformity provisions first appeared in the Clean Air Act Amendments of 1977 (Pub. L. 95-95). Although these provisions did not define conformity, they provided that no Federal department "shall (1) engage in, (2) support in any way or provide financial assistance for, (3) license or permit, or (4) approve any activity which does not conform to a plan [State implementation plan] after it has been approved or promulgated." Assurance of conformity was an affirmative responsibility of the head of each Federal agency. In addition, no MPO could approve any transportation project, program, or plan which did not conform to a State or Federal implementation plan.

Following enactment of the 1977 Amendments, the Department of Transportation (DOT) consulted with EPA to develop conformity procedures for programs administered by FHWA and the Urban Mass Transportation Administration (now FTA). The June 1978 Memorandum of Understanding Regarding Integration of Transportation and Air Quality Planning provided EPA an opportunity to jointly review and comment on the conformity of transportation plans and TIPs.

In April 1980, EPA published an advance notice of proposed rulemaking on conformity (45 FR 21590, April 1,

1980). EPA maintained that the Congressional intent of CAA section 176(c) was to prevent Federal actions from causing a delay in the attainment or maintenance of the NAAQS. However, no further rulemaking action was taken.

In June 1980 EPA and DOT jointly issued a guidance document entitled "Procedures for Conformance of Transportation Plans, Programs and Projects with Clean Air Act State Implementation Plans." This guidance established that in nonattainment and maintenance areas (areas experiencing NAAQS violations and required to develop air quality maintenance plans under 40 CFR part 51, subpart D), conformity determinations must be documented as a necessary element of all certifications, TIP reviews, and EIS findings. It was necessary to make certifications that the planning process had been conducted according to the 3C process and consistent with Clean Air Act requirements.

Transportation plans and programs were considered to conform with the SIP if they did not adversely affect the transportation control measures (TCMs) in the SIP, and if they contributed to reasonable progress in implementing those TCMs. A transportation project would conform if it were a TCM from the SIP, came from a conforming TIP, or did not adversely affect the TCMs in the SIP.

Subsequently, DOT developed and issued an interim final rule (46 FR 8426, January 26, 1981) based upon the joint guidance. DOT established this rule to meet its obligations under section 176(c) of the CAA, and the rule was put into effect immediately upon publication. It amended 23 CFR part 770 (FHWA Air Quality Guidelines) and added 49 CFR part 623 (UMTA Air Quality Conformity and Priority Procedures).

The rule used the joint guidance's definition of conformity, interpreting conformity in the context of TCMs rather than emissions budgets or air quality analysis. Compliance with the conformity requirements was to be demonstrated as part of the planning and NEPA processes.

D. Conformity Under the Clean Air Act Amendments of 1990

The Clean Air Act Amendments of 1990 expand the scope and content of the conformity provisions by defining conformity to an implementation plan to mean conformity to the plan'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; and that such activities

will not (i) cause or contribute to any new violation of any standards in any area; (ii) increase the frequency or severity of any existing violation of any standard in any area; or (iii) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.

In addition to this general definition which applies to all Federal actions, transportation plans, programs, and projects funded under title 23 U.S.C. or the Federal Transit Act (hereinafter "transportation plans, programs, and projects") must be found to conform before they can be approved at the local level by the MPO. Transportation plans, programs, and projects also must be found to conform at the Federal level by DOT before they can be approved, accepted, or funded.

Section 176(c)(2) of the 1990 Amendments requires the expected emissions from transportation plans and TIPs to be consistent with the implementation plan's motor vehicle emission estimates and required emissions reductions. A transportation project would conform if it came from a conforming plan and TIP, or if it was demonstrated that the projected emissions from the project, when considered together with the emissions projected for the conforming transportation plan and TIP, were consistent with the emission reduction projections and schedules in the implementation plan. Finally, TIPs must provide for the timely implementation of TCMs consistent with schedules included in the implementation plan.

The Clean Air Act Amendments of 1990 therefore emphasize reconciling the estimates of emissions from transportation plans and programs with the implementation plan, rather than simply providing for the implementation of TCMs. This integration of transportation and air quality planning is intended to protect the integrity of the implementation plan by ensuring that its growth projections are not exceeded without additional measures to counterbalance the excess growth, that progress targets are achieved, and that air quality maintenance efforts are not undermined.

Once specific emissions reduction schedules are established in the implementation plan as required by sections 182 and 187 of the 1990 Amendments, conformity requires that the emissions expected from plans and TIPs be consistent with those emissions reductions in the implementation plan. Until that time, the 1990 Amendments together with the rule proposed today

establish interim requirements for transportation plans and TIPs to provide for the expeditious implementation of TCMs in the applicable implementation plan, to contribute to VOC and CO emissions reductions, and to avoid any increase in PM₁₀ or NO_x emissions relative to 1990 emission levels of these pollutants. In carbon monoxide (CO) nonattainment areas, transportation projects must also eliminate or reduce the severity and number of violations of the CO standards in the area substantially affected by the project.

According to section 176(c)(4), EPA must promulgate criteria and procedures for determining conformity and must require each State to submit an implementation plan revision that includes such criteria and procedures. The criteria and procedures which EPA promulgates will apply as Federal law to both Federal and local (MPO) conformity determinations. The implementation plan revisions will make conformity criteria and procedures State requirements as well. States may elect to incorporate more stringent conformity criteria and procedures in their implementation plans than are contained in the Federal rule.

Section 176(c) of the CAA applies to all departments, agencies, and instrumentalities of the Federal government. This proposal applies only to the conformity of transportation plans, programs, and projects developed, funded, or approved under title 23 U.S.C. or the Federal Transit Act. Criteria and procedures for determining the conformity of all other Federal actions, including highway and transit projects which require funding or approval from a Federal agency other than FHWA or FTA, will be promulgated in a forthcoming rule.

E. Interim EPA/DOT Conformity Guidance

On June 7, 1991, EPA and DOT jointly issued guidance for determining conformity of transportation plans, programs, and projects during the period before the final rule is promulgated. This guidance is based on the interim conformity requirements in § 176(c)(3) of the CAA.

According to the interim guidance, a transportation plan or TIP conforms if it supports the implementation plan's purpose of achieving the NAAQS; has no goals, directives, recommendations, or projects which will have adverse impacts on the implementation plan; provides for the expeditious implementation of TCMs in the implementation plan; contributes to ozone and CO emission reductions; and

does not increase the frequency or severity of existing violations of the NAAQS for which the area is designated nonattainment.

Transportation projects conform if they come from a conforming plan and TIP and, in CO nonattainment areas, if they eliminate or reduce the number and severity of CO violations. Projects which are not from a TIP (e.g., projects outside metropolitan areas but still in nonattainment areas, and projects whose design concept and scope have changed significantly since TIP adoption) conform if they do not interfere with TCMs, if they contribute to regional emissions reductions, and in CO nonattainment areas, if they reduce local CO violations.

F. Public Consultation in the Development of This Proposal

Because the Clean Air Act Amendments of 1990 significantly broadened the scope of transportation conformity, EPA involved potentially affected parties early in its process of developing conformity criteria and procedures. EPA, FHWA, and FTA jointly funded a grant to the National Association of Regional Councils (NARC), in part to establish a technical review panel which would provide a framework for education of the affected State and local agencies and coordination of their comments to EPA. The technical review panel for conformity is comprised of representatives from the affected government entities, including representatives from NARC (which represents MPOs), the American Association of State Highway and Transportation Officials, the American Public Transit Association, the State and Territorial Air Pollution Program Administrators, and the Association of Local Air Pollution Control Officials. EPA staff have by invitation attended several panel meetings.

EPA circulated concept papers to the conformity technical review panel and other interested parties, including representatives of the environmental community and the development community. EPA also hosted a roundtable discussion in Ann Arbor, Michigan in October 1991. EPA received a substantial number of comments, which are available in the docket. The agency welcomes comments from all interested parties on the contents of this specific proposal.

III. Applicability Issues

A. Geographic Applicability

EPA has heard a wide range of opinion on the legal and public policy

issues associated with whether conformity must apply in areas which have been designated as attainment or unclassifiable areas continuously since initial designation, as opposed to areas that were one designated as nonattainment areas and have since been redesignated to attainment. Some MPOs in such attainment areas believe that Congress did not intend such areas to be brought under the conformity requirements; they are also concerned that the regulatory burden associated with analyzing transportation-related emissions is not justified in areas without air quality problems. Small MPOs in particular have limited staff, planning resources, and air quality modeling experience. However, some members of the environmental community are concerned that rapidly growing attainment areas that have never before been designated nonattainment may begin violating the NAAQS unless the long-range transportation and air quality planning associated with conformity is performed.

The CAA as amended in 1990 now defines conformity in section 176(c)(1)(B)(i) as meaning, among other things, that activities will not "cause or contribute to any new violation of any standard in any area." This language can be taken to imply applicability of conformity requirements to all attainment and nonattainment areas. However, some ambiguity is introduced by the section's placement within part D of the CAA, entitled "Plan Requirements for Nonattainment Areas," and by other details of the phrasing of the conformity requirement.

After extensive review of the statutory provisions and the legislative history on this issue, EPA has concluded that a reasonable, and therefore permissible, reading of section 176(c) is that it applies only to nonattainment areas and those attainment areas subject to the maintenance plans required by section 175A of the CAA, as described below. Because the statutory language itself is ambiguous, there is no clear indication on the face of section 176(c) as to where the provision should apply. EPA has therefore looked to the statute as a whole to determine the appropriate application of the provision.

EPA believes that an important piece of evidence is the placement of section 176(c) within part D of the CAA, entitled "Plan Requirements for Nonattainment Areas," and specifically within subpart 1, entitled "Nonattainment Areas in General." EPA believes that all provisions within these parts should apply only in nonattainment areas, unless the overall

weight of the evidence in a given section indicates some other legislative intent. As described here, EPA can find no such intent in section 176 to apply the conformity requirement to the full universe of attainment areas.

Certain participants in the discussion on this issue have indicated that section 176(c)(1)(B)(i), which requires that Federal activities not lead to any new violation of any standard in any area, must be interpreted as applying to all areas, including all attainment areas. However, the provision can be read, within the context of EPA's interpretation of section 176(c), as applying only to all areas subject to the provision—that is, all nonattainment and (for the reasons discussed further below) maintenance areas.

Despite extensive legislative history on section 176(c), no mention is made of the areas subject to the provision. Because of the significant burden that imposing conformity requirements will have, especially on smaller areas outside large urban centers, EPA believes that Congress would have discussed the provision's applicability to all attainment areas if it intended the provision to apply there despite its location within part D.

In contrast, EPA believes that both the statutory language itself and the legislative history support application of the conformity requirement to those attainment areas subject to maintenance plans under section 175A of the CAA. Section 176(c)(4)(B)(iii) explicitly requires EPA's conformity procedures to address how conformity determinations will be made with respect to maintenance plans. Further in describing section 176(c), one of the lead sponsors of the 1990 CAA Amendments stated that "to the extent that the transportation plan includes a period that extends beyond the attainment deadline for an area, section 176(c)(1)(B)(i) also requires that mobile sources not cause violations of a NAAQS during the maintenance period" (136 Congressional Record, S16073, October 27, 1990). In addition, the Senate Committee Report indicates that "[t]he conformity determination applies to each pollutant for which an attainment or maintenance plan is required" (Senate Report 101-228, page 29). These pieces of statutory and legislative evidence lead EPA to conclude that under a reasonable, and therefore permissible, reading of section 176(c), conformity should apply in all areas subject to maintenance plans, despite the general limitation of conformity requirements to designated nonattainment areas.

Application of conformity to only nonattainment areas and maintenance areas was the approach historically taken by EPA and DOT with respect to transportation activities. EPA does not see any reason to alter this approach in light of the 1990 CAA Amendments. It is true that EPA has in the past indicated that section 176(c) might apply to attainment areas with respect to other types of Federal activities (45 FR 21590, April 1, 1980, Advance Notice of Proposed Rulemaking on section 176(c) in general). However, EPA never took any formal rulemaking action based on such a legal interpretation of section 176(c). As explained above, based on section 176(c) as amended, EPA believes that it would be reasonable to interpret section 176(c) so that conformity applies only in nonattainment and maintenance areas.

EPA believes that the section 176(c) and legislative references to "maintenance plans" and the legislative reference to "maintenance periods" refer to the maintenance plans and maintenance periods described in CAA section 175A, the preceding section of the CAA. That section refers to maintenance plans required for redesignation under the CAA as amended in 1990, and the maintenance period to be provided by such plans. Thus, under the interpretation EPA is proposing to adopt today, the conformity requirements would apply, with respect to a particular pollutant, only to (1) those areas designated nonattainment for that pollutant and (2) those areas that, while designated attainment for that pollutant, are subject to a maintenance plan required by section 175A because they had been redesignated from nonattainment to attainment under the 1990 amendments.

EPA believes therefore that maintenance areas include all areas designated nonattainment pursuant to the 1990 CAA Amendments and subsequently redesignated to attainment subject to the requirement to develop a maintenance plan under section 175A of the amended CAA. EPA proposes that all of these areas be subject to the requirements of section 176(c).

Furthermore, conformity applies pollutant-by-pollutant; for example, an area designated nonattainment only for ozone must consider ozone impacts in its conformity reviews. EPA notes that presently there are relatively few maintenance areas for the criteria pollutants for which conformity does apply.

B. Non-Federal Projects

This proposal would apply only to those projects which receive Federal

funds or approval under title 23 U.S.C. or the Federal Transit Act. EPA is proposing that non-federal highway and transit projects—those which receive no Federal funding and require no Federal approvals or actions—are not subject to conformity. However, the emissions analyses required for conformity determinations on transportation plans and TIPs would be required to account for the impacts of all regionally significant non-federal projects.

In the event of a nonconformity determination, only Federally assisted or approved projects would be delayed. However, State and local officials are encouraged to review and revise the total mix of projects in order to bring the area into conformity.

The CAA is ambiguous regarding the applicability of conformity to non-federal projects. Section 176(c)(2)(C) of the CAA says that "transportation projects" must be found to conform if they are adopted or approved by an MPO or any recipient of funds designated under title 23 U.S.C. or the Federal Transit Act. This could be read to apply conformity to any transportation project approved by a recipient of DOT funds, regardless of the project's actual source of funding. Under this interpretation, all projects by State Departments of Transportation would require conformity determinations, because the State Departments of Transportation receive some DOT funds. An alternative reading is that "transportation project," which is not defined anywhere in the CAA, means a Federally funded or approved project, and the "any recipient of funds" provision is included to cover Federal projects which will be built outside the jurisdiction of any MPO. The title of section 176, "Limitations on Certain Federal Assistance," suggests that Congress intended only Federally approved or assisted projects to be affected by the provisions of section 176(c). None of the legislative history clearly indicates that non-federal projects were meant to be subject to conformity, but none of it clearly contradicts such applicability.

EPA concludes that the better reading of the ambiguous statutory language is that section 176(c) only covers projects supported in some way or approved by FHWA or FTA. This conclusion is bolstered by the reference to title 23 or Urban Mass Transportation Act funds in defining the project sponsors whose projects will be subject to the conformity requirement, which indicates that the requirement should apply only to those of their projects which are funded through such sources; applicability to projects which are

approved by FHWA or FTA, even if they are not FHWA/FTA funded, follows from the general requirement for Federal actions (including approvals) to conform to the applicable implementation plan. Further, the requirement to find transportation projects in conformity is located in section 176(c)(2)(C) following the introductory words "in particular" at the end of the first paragraph of section 176(c)(2). Those words indicate that all that follows merely expands on and clarifies the preceding text. The preceding sentence in the body of section 176(c)(2) restates the obligation of Federal agencies to make conformity findings, and thus clearly applies only to Federally supported or approved projects.

In addition, the introductory paragraph of section 176(c) clearly imposes the requirements of the provision only on Federal agencies and MPOs, which are entities created by Federal law to distribute Federal monies to Federally funded transportation projects. Finally, the one piece of legislative history that appears to speak most directly to this point states that the law "clarifies what is meant by requiring that activities assisted, supported or licensed by Federal agencies 'conform to' a [SIP]" (Senate Report 101-228, page 28). These indications, coupled with the title of section 176(c) applying only to Federal assistance, lead EPA to conclude that the term "project" in section 176(c) only refers to federally supported or approved projects.

In the past, EPA has interpreted the ambiguous general language in the initial paragraph of section 176(c) as it appeared in the 1977 CAA Amendments as covering all projects approved by MPOs, whether or not they were Federally funded or approved. See, for example, Arizona Federal Implementation Plan, 56 FR 5458, 5474 (February 11, 1991). However, detailed language was added to section 176(c) in the 1990 CAA Amendments which required EPA to reanalyze this issue. Although EPA concluded that the ambiguity should be resolved in favor of covering all projects under the introductory paragraph of section 176(c) as it stood alone in 1977, EPA's review of the new detailed language added in 1990 lead EPA to conclude the opposite. As described above, on reading the section as a whole, EPA believes that section 176(c) in its entirety applies only to federally supported or approved projects.

EPA believes that applying conformity only to federally funded or approved projects will not significantly

reduce the protection of air quality, and thus is consistent with the purpose of the CAA as a whole. State governments have the power to regulate non-federal projects. Further, many regionally important highways will require Federal approvals for connections to interstate highways or under other statutes, for example, wetlands protection permits under the Clean Water Act. Finally, as explained in the next paragraph, the transportation plan and TIP will be required to compensate for any adverse impact of regional emissions from non-federal projects.

The collective impact of non-federal projects will eventually affect the conformity of transportation plans and TIPs, because Federal and non-federal projects share the "budget" of motor vehicle emissions which meets implementation plan emission reduction milestones and demonstrates attainment. Therefore, there is a practical need for transportation and air quality planners to consider the emissions impacts of regionally significant non-federal projects in making conformity determinations. As a result, EPA would require regionally significant non-federal projects to be addressed in the regional air quality analyses of plans and TIPs, although these non-federal projects would not require project-level conformity determinations.

Although it would still be possible for non-federal project sponsors to add or modify projects without additional analysis after the plan has been found to conform, the next plan would have to offset any emissions increases above the implementation plan's emissions budgets. States which are concerned about the impact of non-federal projects may, of course, extend conformity criteria and procedures to them, with no formal involvement of DOT.

C. Regional Significance

EPA's proposal would require the impacts of "regionally significant" projects to be considered in the regional emissions analyses for plans and TIPs. EPA's use of the term "regionally significant" is intended to limit emissions analysis to those projects which would have significant impacts on regional travel, emissions, and air quality. EPA believes that the emissions and air quality impacts of regionally insignificant projects can be considered de minimis in relation to the plan and TIP regional emissions analysis.

EPA is proposing that a "regionally significant" transportation facility is a facility with an arterial or higher functional classification, or any other facility regardless of functional

classification that serves regional travel needs and would normally be included in the modeling for the transportation network. Regional travel needs would include, for example, access to major activity centers in the region, to transportation terminals, and to and from the area outside the region.

EPA considered several options for defining "regionally significant," including a definition only according to functional level or a quantifiable threshold such as average daily traffic. Definition solely by functional level would pose difficulties because regional significance does not correspond exactly with functional level. Some collectors could be considered regionally significant, but defining all collectors as regionally significant would increase required analysis resources to impracticable levels. (Collectors are surface streets providing land access and traffic circulation service within residential, commercial, and industrial areas.)

Definition according to a quantifiable threshold would eliminate ambiguity. However, although transportation professionals have an intuitive understanding of which facilities are regionally significant, the choice of an appropriate threshold is not obvious. Definition according to a precise threshold could prevent transportation and air quality professionals from using their best judgment in cases where a facility is clearly significant or insignificant.

The proposed definition refers to functional classification, the intuitive understanding of regional significance, and professional judgment. Therefore, EPA believes it is the most likely to include truly significant facilities and exclude insignificant facilities.

IV. Actions Covered by This Rule

This rule addresses only transportation plans, programs, and projects which are developed, funded, accepted or approved under title 23 U.S.C. or the Federal Transit Act. For such highway (FHWA) and transit (FTA) projects which also require action by other Federal agencies (e.g., wetlands permits), the other Federal agencies will not be required to do a separate air analysis. Those Federal agencies may adopt the air analysis of the lead agency, or agency with primary responsibility, in order to make a conformity determination of their own.

Highway and transit projects which need approval from other Federal agencies but which are not funded or approved by FHWA or FTA are not covered by this rule, but they will be addressed in a forthcoming proposed

rule. That proposed rule will provide that satisfaction of the criteria and procedures in today's rule would be sufficient for the highway and transit aspects of such other projects also.

This rule would require DOT and the MPO to make conformity determinations in order to adopt, accept, or approve a transportation plan or TIP developed pursuant to 23 U.S.C. 134 or the Federal Transit Act.

The conformity of existing transportation plans would have to be determined within eighteen months of the date of publication of the final rule. After eighteen months, the conformity status of the existing or previous transportation plan would automatically lapse.

This rule would also require conformity determinations for highway or transit projects which are proposed to receive funding assistance and approval through the Federal-Aid Highway program or the Federal mass transit program, or which require FHWA or FTA approval for some aspect of the project. For such projects, conformity determinations would be made by DOT, based on information provided by the project sponsor.

Certain highway and transit projects which by their nature are neutral in terms of emissions impacts would be exempt from conformity determinations, including most safety projects and operating assistance to transit agencies. However, implementation of these projects must not interfere with the timely implementation of TCMs. These neutral projects are listed in § 51.373 of the proposed rule.

As defined in this proposal, the term "transit project" would specifically not encompass operational actions such as route changes, service schedule adjustments, or fare changes.

Conformity determinations on such activities would be cumbersome, and they are associated with Federal action only indirectly through general operating assistance. FTA is specifically prohibited from becoming involved in these types of local decisions (49 U.S.C. app. 1608(d)). EPA believes that FHWA and FTA do not have sufficient control over the use of general operating funds to justify conformity findings with respect to each individual use of such funds. However, conformity determinations for plans, TIPs, and some projects would be required to consider the most recent and planned transit routes, fares, tolls, and other highway and transit system operational policies as background assumptions.

EPA is aware that in some areas transit routes and policies play an important role in total regional emission

levels, and some people believe that proposed changes in transit routes and fares should be subject to conformity review. EPA believes such an approach would not be feasible if applied to all types of changes to transit system operational policies. However, EPA invites comment on what type of limited application of conformity might be appropriate.

Although changes in road or bridge tolls which do not require Federal approval could significantly affect travel on the transportation network, the agencies adjusting road or bridge tolls should have flexibility, and conformity determinations on such activities would be cumbersome. Again, the link to Federal support of such activities does not appear sufficient to justify application of § 176(c). Such changes would in any case have to be considered in background modeling assumptions.

Pre-existing projects which received final NEPA approval (a categorical exclusion, Finding of No Significant Impact, or a record of decision on a Final Environmental Impact Statement) and a final conformity determination by FHWA or FTA prior to the effective date of the final rule would need no further conformity determinations unless there were a significant change in design concept and scope or a supplemental environmental document for air quality purposes were required. Otherwise, such pre-existing projects which are subject to this rule could not be implemented without a new conformity determination consistent with the requirements of the final rule.

V. Implementation Plan Revision

Section 176(c)(4)(C) of the CAA requires each State to submit an implementation plan revision which includes criteria and procedures for assessing conformity. The CAA directs EPA to require submittal of these implementation plan revisions by November 15, 1992, which is twelve months after the final rule was to have been promulgated. Because the promulgation of the final rule has been delayed and will not even be effective by November 15, 1992, and because the implementation plan revisions cannot reasonably be prepared without the final rule, it is not possible for EPA to require States to submit implementation plan revisions by that date. Therefore, EPA is proposing that the plan revisions be submitted within twelve months of promulgation of the final rule. EPA believes it is appropriate to give the States a year to develop and submit implementation plan revisions, as Congress anticipated. The direct requirements of the final rule will apply

as a matter of Federal law to Federal agencies and MPOs, and will not depend upon the completion or approval of the State plan revision. Therefore, EPA believes it is reasonable to allow the States twelve months to submit their plan revisions, as the CAA originally intended.

EPA requests comment on the acceptable forms which the criteria and procedures may take, for example, a State statute or a State agency rule binding on MPOs. EPA notes that the CAA requires the criteria and procedures to be legally enforceable, and a public hearing must be held prior to their adoption by the State.

A State may include procedures in its conformity plan revision which are more stringent than those in the final Federal rule. For example, a State may choose to apply conformity statewide, in all its attainment areas as well as nonattainment areas. The Ozone Transport Commission may also recommend to EPA the application of conformity throughout the transport region, under § 184(c) of the CAA. To apply conformity in attainment areas, States would need State authorizing legislation and would have to develop appropriate criteria and procedures. The criteria and procedures in this rule were designed for nonattainment areas.

VI. Interagency Consultation and Public Participation

A. Interagency Consultation

This rule proposes that the implementation plan revision addressing conformity shall include well-defined interagency consultation procedures. Specifically, development of the implementation plan, the transportation plan, and the TIP would require consultation between representatives of the MPOs; State and local air quality planning agencies; State and local transportation agencies; other organizations with responsibilities for developing, submitting, or implementing provisions of an implementation plan required by the CAA; and local or regional offices of the EPA, FHWA, and FTA.

EPA believes that the consultation process will be most successful if it accommodates the structure of involved organizations and addresses existing relationships. By proposing that the States develop the details of their own consultation procedures, EPA is allowing States the flexibility to tailor the consultation process so it can be most effective in each State. To ensure that the procedures are thorough and well-considered, EPA has included in the proposed rule a list of issues which

States must address through the design and operation of the consultation process.

EPA is proposing interagency consultation during the development of implementation plans as well as during the development of transportation plans and TIPs because it believes the early and continuous involvement of air quality and transportation agencies is crucial. For example, consultation during the development of motor vehicle emissions budgets is necessary to insure that the budgets are reasonable and to allow the transportation community to begin adjusting its planning. In addition, transportation and air quality planning documents use interdependent assumptions and analyses. Delaying consultation until planning documents are already developed does not allow enough opportunity for meaningful exchange or settlement of disputes. Furthermore, if consultation on a conformity determination were not begun until the draft conformity determination was released, the conformity finding could be delayed and transportation activities could be disrupted pending resolution of any disagreement over the basis for the final conformity determination.

Although it is not feasible to require EPA concurrence on conformity determinations themselves, EPA recognizes the importance of reaching agreement on the methodology of the analyses supporting conformity determinations. Therefore, EPA invites comment on whether to adopt this proposal's approach of simply requiring consultation with EPA on the choice of the models and associated methodologies to be used in hot-spot analyses and regional air quality modeling, or whether EPA concurrence with these decisions should be required.

EPA invites comment on what if any consequences the implementation plan should impose if the implementation plan's consultation process is not observed by the MPO or State and local air quality agencies. The proposed rule does not specifically address this question.

Today's proposal requires that the implementation plan revision establishing consultation procedures address the process for obtaining comment on draft documents prior to adoption. EPA expects that memoranda of understanding will be developed between DOT and EPA and/or the State air quality agencies which will address how comments on proposed conformity determinations will be handled. However, EPA requests comment on whether this rule should specifically require DOT to explicitly consider

EPA's (or the State air quality agencies') comments on proposed conformity determinations and notify EPA (or State agencies) of the disposition of its comments before taking final action on the conformity determination. This would be consistent with DOT's interim final rule on conformity (46 FR 8426, January 26, 1981).

B. Public Participation

EPA would also require the conformity implementation plan revision to include procedures which would provide a reasonable opportunity for public review and comment on conformity determinations and their supporting materials prior to formal action on a conformity determination, where otherwise required by law.

Public consultation procedures for the development of plans and TIPs (which will include the conformity determination) are being developed by DOT in response to requirements in the Intermodal Surface Transportation Efficiency Act (ISTEA) (Pub. L. 102-240). Therefore, EPA is not proposing specific public consultation procedures in this rule. However, States may need to adopt public consultation procedures in their implementation plan revisions before DOT publishes the ISTEA requirements.

VII. Description of the Proposal

A. Frequency of Conformity Determinations

EPA is proposing that events which would fundamentally affect the basis of a conformity determination—specifically, changes to transportation plans, TIPs, or air quality implementation plans—would automatically trigger a requirement for a new conformity determination. However, in no case could more than three years elapse between determinations on transportation plans and TIPs. If conformity were not redetermined according to these requirements, the conformity status of the plan and TIP would automatically lapse, and projects could not be approved.

The three-year timeframe is the least frequent allowed by the CAA. However, EPA believes it will adequately ensure that if triggering events are infrequent, conformity determinations would still be periodically updated to reflect the current transportation system and the most recent model revisions and planning assumptions.

EPA believes conformity determinations should be made frequently enough to ensure that the conformity process is meaningful. At

the same time, EPA believes it is important to limit the number of triggers for conformity determinations in order to preserve the stability of the transportation planning process.

EPA is proposing that all amendments to transportation plans and TIPs involving non-exempt projects would require conformity determinations for the plans and TIPs. Plans and TIPs are the focus of regional emissions analyses, so any changes to these documents must be analyzed for their impact on transportation-related emissions in the aggregate before one can be assured of continued conformity.

A new transportation plan or plan revision would also require a new conformity determination for the TIP, because the TIP's conformity is determined in the context of the areawide transportation system. Changes to the plan, which describes the predicted areawide transportation system, could change the conformity status of a TIP. A new regional emissions analysis would not necessarily be required of the TIP's conformity redetermination if it could be qualitatively demonstrated that the plan's changes would not affect the analyses in the previous TIP conformity determination. Because plan revisions can be anticipated, EPA expects that MPOs will be able to coordinate plan revisions and new TIPs so that only one conformity determination on a TIP would be necessary. EPA's proposal allows a reasonable interval of six months after a plan is amended or a new plan is adopted during which the TIP could be revised and a new conformity determination made by the MPO and DOT.

EPA is proposing that certain other events would trigger a new conformity determination on the transportation plan within eighteen months. EPA believes eighteen months allows timely consideration of new information without disrupting or unreasonably compressing the transportation planning cycle. The triggers would not apply to TIPs because new TIPs or TIP amendments, which require conformity determinations, would already be occurring every one or two years. The triggering events include publication of the final rule and an implementation plan revision which changes a transportation-related emissions budget or which adds, changes or deletes TCMs.

Publication of the final rule on transportation conformity would trigger a conformity determination for the plan, in order to ensure that the plan conforms according to the final criteria and procedures. Otherwise, it is

possible that a plan found to conform immediately before the publication of the final rule would remain in effect for up to three years without its conformity being redetermined according to the requirements of the final rule.

Another proposed trigger is EPA approval of an implementation plan revision which changes a transportation-related emissions budget or which adds or deletes TCMs. Because conformity exists in reference to the implementation plan, any changes to the implementation plan's emissions budget or TCMs necessitate a new determination. If the transportation plan must be revised to conform with the implementation plan revision, EPA believes eighteen months from the implementation plan approval would allow a reasonable period of time for the revision and the new emissions analysis. If the existing emissions analysis for the current transportation plan demonstrates that the current plan is consistent with the new implementation plan budget, a conformity finding can be made for the current plan. The transportation plan would not need to be revised and a new regional emissions analysis would not be necessary. However, such an action would not renew the life of the plan for three years; emissions analysis must occur at least every three years.

EPA requests comment on whether the triggering event should be EPA approval of the implementation plan revision, or the governor's submission of the implementation plan revision to EPA. This proposal would make the trigger EPA approval, because EPA believes transportation plans should not be required to conform to an implementation plan which does not have the force of Federal law and which may still need revisions to make it approvable under the CAA. Section 176(c)(1) specifically requires conformity to "an implementation plan" after it has been approved. However, because the implementation plan revision has undergone a public consultation process prior to its submission to EPA, the content of the revision is known before EPA approval. Therefore, it would be possible to use the implementation plan revision as the basis for conformity determinations even before EPA approval. There may be advantages to avoiding the delay associated with EPA processing of the implementation plan revision, particularly for additional TCMs which are already adopted or committed to by local agencies. However, more caution may be appropriate for revisions to emissions budgets and deletion or substitution of TCMs.

EPA is not proposing that other changes which could affect conformity determinations, such as the publication of new emissions models or the adoption of changes in planning assumptions, would necessarily trigger conformity determinations for the transportation plan. These changes would be incorporated as other triggers occur or at the time of the next periodic conformity determination, which will occur at intervals of no more than three years. Although ideally new conformity determinations would be made whenever new information becomes available, the stability of the transportation planning process requires that triggers for determinations be limited and predictable. Changes in emissions models or planning assumptions may occur too frequently to justify triggering a new determination.

B. Content of Transportation Plans

EPA is proposing requirements for how specifically projects must be defined in the transportation plan in order for their emissions to be estimated sufficiently for a conformity demonstration. EPA believes that transportation plans should be sufficiently specific to allow meaningful regional emissions estimates. However, the specificity necessary to quantify regional emissions depends on the sensitivity of an area's modeling capabilities. EPA is proposing two-tiered specificity requirements in order to accommodate the differing capabilities and resources of MPOs.

EPA is proposing the most specificity for plans in serious, severe, and extreme ozone areas and serious CO areas. After January 1, 1995, the proposed rule would require plans in these areas (hereinafter referred to as specific plans) to be specific enough to be analyzed using state-of-the-art travel demand network models. Because these areas have the worst air quality, they have the most need for accurate regional analyses.

In other areas, EPA would require that the transportation system envisioned for the future specifically enough to allow emissions from the plan to be quantified. Because they may not have network models, these areas would not require transportation plans which are as highly specific as those EPA is proposing for the serious and above areas. However, areas which have already been developing specific plans would be required to continue doing so.

EPA is proposing to allow areas which are "bumped up" to a serious classification two years to meet the more rigorous plan content

requirements. This will allow these areas time to specify their networks and perform the other research and data collection activities necessary to develop network models and specific plans.

The proposed requirements would supplement other regulations governing the format or content of transportation plans. Furthermore, the degree of specificity required in the plan would not preclude the consideration of alternatives in the NEPA process or other project development studies. If the NEPA process were to result in a project with a design concept and scope significantly different from that in the plan or TIP, the project could still be found to conform under the proposed conformity criteria and procedures for projects which are not from a conforming plan and TIP.

C. Fiscal Constraints on Plans and TIPs

ISTEA requires that the transportation plan include a financial plan that demonstrates how the transportation plan can be implemented, indicates resources from public and private sources that are reasonably expected to be available throughout the plan's timeframe, and recommends any innovative financing. ISTEA also requires that prior to a project's inclusion in a TIP, full funding must be reasonably anticipated to be available within the time period contemplated for completion of the project. EPA anticipates that DOT will issue a rule or interpretation to more specifically implement these provisions.

EPA believes these ISTEA requirements will adequately ensure that the transportation activities analyzed for conformity can realistically be built, and therefore is proposing that plans and TIPs comply with the ISTEA requirements.

D. Summary of Proposed Criteria and Procedures

1. Pollutants and Types of Analyses

Because the definition of conformity in CAA section 176(c)(1)(B) refers to an activity's impact on the NAAQS, EPA would require conformity determinations to include analyses of local CO concentrations ("hot spots") in CO nonattainment and maintenance areas; analyses of PM₁₀ hot spots in PM₁₀ nonattainment and maintenance areas; regional analyses of CO in CO nonattainment and maintenance areas; regional analyses of ozone precursors (volatile organic compounds and nitrogen oxides) in ozone nonattainment and maintenance areas; regional analyses of nitrogen oxide (NO_x) in NO₂

nonattainment and maintenance areas; and regional analyses of PM₁₀ and PM₁₀ precursors such as VOC and NO_x if the applicable implementation plan identifies transportation-related precursor emissions within the area as a significant contributor to the PM₁₀ nonattainment problem) in PM₁₀ nonattainment and maintenance areas. Projects also would be required to be designed and funded to comply with PM₁₀ control measures for control of fugitive dust from construction activities and any other transportation-related PM₁₀ control measures in the applicable PM₁₀ implementation plan. EPA would not require analyses of local ozone or NO₂ concentrations or precursor emissions because they are regional-scale pollutants.

Based on available emissions information, EPA believes highway and transit motor vehicles are not significant sources of lead or sulfur dioxide. Therefore, transportation plans, TIPs, and projects are presumed to conform to the applicable implementation plans for these pollutants.

If a fully approved implementation plan demonstrates that a constraint on regional PM₁₀, PM₁₀ precursors, or CO emissions is not necessary to ensure attainment, those regional emissions tests would not apply for conformity. This would be the case if historical PM₁₀ or CO violations were attributable to sources other than motor vehicles, or if CO violations can and will be solved by localized small-scale actions only.

2. Difference in Criteria and Procedures by Period of Time

The criteria and procedures for determining conformity would vary according to the period of time in which the determination is made. There are three periods of time outlined in this rule: the interim period (Phase I and Phase II), the control strategy period, and the maintenance period. A given area may be in different periods with respect to different pollutants.

Phase I of the interim period, which lasts until the effective date of the final rule, is governed directly by the provisions of the CAA. The EPA/DOT interim conformity guidance of June 7, 1991 is available as an informal joint interpretation of the statute with respect to those provisions. Phase II of the interim period would begin on the effective date of the final rule and would last until EPA approves or promulgates implementation plan revisions with reasonable further progress and attainment demonstrations. (Note: Phase II will terminate on different dates for different areas.) Approval of these

implementation plan revisions would begin the control strategy period, which would continue until the area is redesignated as an attainment area. After an area is redesignated to attainment, it would be considered in the maintenance period. Although the CAA requires no further planning actions or changes in control strategies after a certain number of years as a maintenance area (a maximum of twenty), there is no explicit end of the maintenance period.

The control strategy period and the maintenance period would have the same criteria and procedures for determining conformity. However, the interim period would have different criteria and procedures for regional analysis and project-level analysis from those that apply during the control strategy and maintenance periods.

EPA is proposing interim period criteria and procedures because the emissions budget test required in section 176(c)(2)(A) of the CAA cannot be applied until emissions budgets are established in the implementation plan. The CAA acknowledges the need for an interim period and establishes interim requirements in section 176(c)(3). Although the interim period discussed in the CAA lasts until the conformity plan revisions are approved, EPA is proposing that the interim requirements be extended until the control strategy plan revisions are approved, because it would be impossible to apply the emissions budget test prior to such approval. The interim criteria proposed today differ somewhat from those in the joint EPA/DOT June 7, 1991, guidance, particularly in the treatment of non-federal projects.

The statutory interim period criterion requiring regional analysis, which is in section 176(c)(3)(A)(iii) of the CAA, applies only to ozone and CO areas. EPA is now also proposing a requirement for regional analysis of PM₁₀ and NO_x, with a somewhat different criterion, to ensure that there is no increase in the frequency or severity of existing violations and to ensure timely attainment of the standards for these pollutants during the interim period, as required by section 176(c)(1)(B).

3. Overview of Criteria by Type of Action

All actions. Conformity determinations for all actions would be required to use the most recent planning assumptions, as required by section 176(c)(1) of the CAA, and the most recent motor vehicle emission estimation model.

Plans and TIPs. Conformity demonstrations for plans and TIPs would be required to include regional emissions analyses or tests and demonstrate timely implementation of TCMs in applicable implementation plans. Regional analyses would be required for plans and TIPs because these documents address the areawide transportation system.

In the control strategy and maintenance periods, regional emissions from plans and TIPs would need to be consistent with the implementation plan's emissions budgets. This criterion is required by section 176(c)(2)(A) of the CAA. In the interim period, regional analysis would need to demonstrate that each plan and TIP contributes to reductions in emissions of volatile organic compounds (an ozone precursor) and CO. In PM₁₀ and NO₂ nonattainment areas, regional analysis would also need to demonstrate that PM₁₀ and NO_x emissions would not be increased from 1990 levels. Regional analysis in the interim period is required by sections 176(c)(1)(B) and 176(c)(3)(A)(iii) of the CAA.

Regional analysis requirements for TIPs would differ according to the specificity of the area's transportation plan. In some circumstances in areas with specific plans, the regional emissions criteria could be satisfied without a new regional emissions analysis, as described further below.

In all periods, plans and TIPs would be required to provide for the timely implementation of TCMs consistent with the schedules included in the air quality implementation plan. Provision for the implementation of TCMs in the implementation plan is required for plans and TIPs in the interim period by section 176(c)(3)(A)(ii) of the CAA, and for TIPs in all other periods by section 176(c)(2)(B). EPA is proposing that plans must also satisfy this requirement during the control strategy and maintenance periods in order to ensure conformity to the purpose of the implementation plan (see section 176(c)(1)(A)). During the control strategy period, requiring the plans to provide for the timely implementation of TCMs would also prevent delay in the timely attainment of any milestones, as required by section 176(c)(1)(B)(iii) of the CAA.

Projects which are from a conforming plan and conforming TIP. In areas with a specific plan, a regionally significant project would be considered to be "from a conforming plan" if the project were specifically identified in the currently conforming plan. A project which is not regionally significant in an area with a

specific plan, and any type of project in an area without a specific plan, would be considered to come from a conforming plan if it were identified in the plan, or if it were consistent with the policies and purpose of the plan and would not interfere with other projects specifically included in the plan. The content requirements for transportation plans do not require these types of projects to be specifically identified in the transportation plan, although they may be.

A project of any type would be considered to be from a conforming TIP only if the project were specifically included in the currently conforming TIP, if the project's design concept and scope were adequate at the time of the TIP conformity determination to determine its contribution to the TIP's regional emissions, and if the project's design concept and scope had not changed significantly from those described in the TIP.

In areas other than CO and PM₁₀ nonattainment and maintenance areas, projects would require no further analysis if it could be demonstrated that they were from a conforming plan and TIP. They would not require regional analysis because it would already have been performed for the conformity determinations on the plan and TIP. Section 176(c)(2)(C) of the CAA provides for this approach.

In CO and PM₁₀ nonattainment and maintenance areas, conformity determinations for projects which are from a conforming plan and TIP would also need to be analyzed for their impacts on local CO and PM₁₀ concentrations. During all periods, a finding would need to be made by the MPO and DOT that a project would not cause or contribute to any new localized CO or PM₁₀ violation or worsen existing CO or PM₁₀ violations, in order to satisfy the requirements of CAA section 176(c)(1)(B). During the interim period in CO nonattainment areas, projects would also need to eliminate or reduce the severity and number of localized CO violations. This is required in section 176(c)(3)(B)(ii) of the CAA.

All projects would have to be designed and funded to comply with PM₁₀ control measures in the implementation plan, as required independently by the implementation plan.

Projects which are not from a conforming plan and conforming TIP. Projects which are not from a conforming plan and TIP would be those projects not identified in a conforming TIP, projects whose design concept and scope are significantly different than those described in the TIP

or were inadequate to determine emissions at the time of the TIP conformity determination, and in areas with specific plans, those regionally significant projects which are not specifically included in the plan.

Demonstrations of conformity for these projects would need to include regional analyses, analyses of local impacts in CO and PM₁₀ nonattainment and maintenance areas, and an examination of the impacts on timely implementation of TCMs. These projects would be required to comply with PM₁₀ control measures in the implementation plan, and there would need to be a conforming plan and TIP in place.

Case-by-case approval for projects which are not from a conforming plan and TIP is provided for in section 176(c)(2)(D) of the CAA. These projects would require a regional analysis which considers emissions from the project together with emissions from the plan and TIP. The analysis would have to demonstrate that if the project were added to the plan and TIP, the plan and TIP would still conform. This regional analysis could be performed at the time of the plan or TIP conformity demonstrations if so desired.

In CO and PM₁₀ nonattainment and maintenance areas, the local impacts of all projects would need to be considered. Therefore, the proposed requirements for projects not from a conforming plan and TIP are the same as those discussed for projects which are from a conforming plan and TIP.

In any area, projects which are not from a conforming plan and TIP could not conform if they would interfere with the implementation of any TCM in the implementation plan.

E. Discussion of Criteria and Procedures

1. Latest Planning Assumptions

Conformity determinations for all actions would need to be based upon the estimates of current and future population, employment, travel, and congestion which have been most recently developed by the MPO or other agency authorized to make such estimates and approved by the MPO. In addition, the most recent road and bridge tolls, transit routes, fares, and other transit system operational policies would have to be considered in conformity determinations.

Authorization to make estimates may be a matter of State law, and the implementation plan revision establishing conformity procedures should document the agency authorized to make the estimates.

Although revisions to planning assumptions would not trigger a

conformity determination, the transportation and air quality modeling required for future conformity determinations would need to reflect the revised assumptions.

When a conformity determination is based on a previous analysis and no new transportation or air quality modeling is otherwise required (as may occur for TIPs which are from a specific plan), EPA would not require new modeling solely to incorporate revised assumptions.

2. Latest Emissions Model

EPA is proposing a grace period after the release of a new motor vehicle emissions model in order to allow planners time to install it and understand its changes. EPA and DOT would consult to determine the length of the grace period, which would be a minimum of three months and a maximum of two years. In this way, EPA and DOT could allow a longer grace period within the two-year limit when it might be necessary for States to revise their implementation plans to establish new emissions budgets consistent with the new models, or when transportation plans must be revised very substantially.

EPA believes that this grace period is consistent with the four-part test for grandfathering established in *Sierra Club v. EPA*, 719 F.2d 436 (D.C. Cir. 1983). These tests include whether the new rule represents an abrupt departure from previously established practice, the extent to which a party relied on the previous rule, the degree of burden which application of the new rule would impose on the party, and the statutory interest in applying the new rule immediately. In this case, use of a new emissions model is clearly an abrupt departure from use of the prior emissions model. Ongoing planning using the prior model would clearly have relied on the existence of and ability to use the old model. Furthermore, it would impose a significant burden on planners to stop in midstream and immediately redo ongoing planning using the new model. These factors taken together appear to outweigh any statutory interest in requiring use of the new emissions model effective immediately upon release.

EPA believes that the appropriate amount of time for planners to incorporate use of the new emissions model will vary according to the circumstances of the individual situation, and is thus providing for a variable grace period keyed to the needs of the situation. For instance, if the new model produces emissions estimates

which are significantly higher than had been expected using the previous model, States may wish to revise their attainment demonstration to allow an increased motor vehicle emissions budget. EPA believes that while States are making this decision, consistency with the implementation plan's emissions budget should be demonstrated using the previous model, which was also used to develop the implementation plan. Such a grace period would last no more than two years and would allow States time to reconcile the emissions budget with the new model without disrupting ongoing transportation activities.

States may also wish to revise the implementation plan's motor vehicle emissions budget if the new model produces emissions estimates which are significantly lower than had been expected. In this case, the State may wish to allocate the budget windfall to stationary sources. A grace period would prevent new transportation activities from consuming the budget windfall before the State had made its allocation decisions.

3. Timely Implementation of TCMs

In order for a TCM to be considered to be implemented "consistent with schedules included in the applicable implementation plan," as required by section 176(c)(2)(B) of the CAA, the TCM would have to be planned and programmed consistently with both the definition and schedule included in the implementation plan. That is, the TCM's physical arrangement, legal provisions, pricing policies, and other action items would have to be consistent with those described for the TCM in the implementation plan. However, the TCM would not be required to demonstrate that it has achieved the predicted effect on emissions or personal behavior in order to be considered consistent with the implementation plan, unless the implementation plan explicitly provided such a requirement.

EPA believes that the requirement for timely implementation in section 176(c)(2)(B) applies only to those TCMs which are eligible for funding under title 23 U.S.C. or the Federal Transit Act. The plan and TIP must avoid interfering with non-federally funded TCMs, however, and in this sense provide for their implementation to the extent of the plan and TIP's authority.

TCMs which are being implemented consistent with the schedules in the implementation plan could be provided for in any manner, including funding solely by State, local, or private sources. If the TIP does not include projects

which are non-federally funded, the conformity determination can be made if there is material accompanying the TIP which provides documentation that those TCMs which are eligible but not proposed for Federal funding are being implemented consistent with the schedules in the implementation plan.

EPA considered several mechanisms by which a plan and TIP could provide for the expeditious implementation of TCMs which have been delayed and are therefore currently planned and programmed on a schedule which is not consistent with the schedule in the implementation plan. The central issues involve how much effort should be required to close the schedule gap, and how to prevent further delays from occurring.

One means of providing for the expeditious implementation of TCMs involves the use of Federal funds. For example, EPA considered requiring TCMs which are eligible for Federal funding and are behind the schedule in the implementation plan to receive maximum priority in Federal funding. However, DOT reports that a requirement for Federal funds to be set aside for TCMs is not statutorily permissible under title 23 U.S.C. and the Federal Transit Act. At the same time, EPA believes that simply requiring Federally fundable TCMs which are behind schedule to be included in the next plan and TIP would not be sufficient, because this approach would not address the sources of the delays in implementation.

Therefore, EPA is proposing that if TCMs which are in the implementation plan and eligible for Federal funding are behind schedule, the TIP may be found to conform only if past obstacles to implementation have been identified and are being overcome, and if State and local agencies with influence over approvals or funding are giving TCMs maximum priority. This approach accommodates unforeseen obstacles to implementation, but prevents a positive conformity determination until all possible actions to overcome the obstacles are being pursued.

In addition, if Federal funds have been programmed for a TCM but the funds have not been obligated and the TCM is behind schedule, this proposal would not allow those funds to be reallocated to any TIP projects which are not TCMs. If there were no other TCMs in the TIP, those funds could be reallocated to projects which are eligible for Federal funding under ISTEA's Congestion Mitigation and Air Quality Improvement Program (CMAQ). Under ISTEA, no CMAQ funds may be provided for a project which will result

in the construction of new capacity available to single occupant vehicles, unless the project consists of a high occupancy vehicle facility available to single occupant vehicles only at other than peak travel times.

EPA believes it is unreasonable to find a plan or TIP in nonconformity (and therefore withhold Federal funds for all TIP projects) until TCM implementation is returned to its schedule. Such an approach does not allow for uncontrollable delays in TCM implementation. However, EPA requests comment on whether the rule should require that when a TCM falls behind the schedule in the implementation plan, the State must submit an implementation plan revision with a new schedule for implementation of the TCM and the required demonstration that adequate legal authority and resources exist to carry it out.

Although today's proposal would not prohibit a finding of conformity simply because a TCM is behind schedule, the regional emissions analysis would not be permitted to assume emissions reduction credit from a TCM which is behind schedule until its implementation is assured. This would prevent conformity findings from being based on unrealistic assumptions, and it would provide an incentive to implement the TCM which is behind schedule or some other TCM with similar emissions reduction potential.

EPA's proposal would not allow TCMs to be approved or funded in the absence of a conforming plan and TIP. The effects of TCMs must be analyzed in the context of the entire transportation system, because the effects of TCMs may depend on how they are incorporated in that overall scheme.

Definition of a TCM. As defined in this proposal, "transportation control measures" would include those transportation measures specifically identified and committed to in the applicable implementation plan. In order to ensure that all such TCMs can be clearly identified by all affected units of government and other interested parties, States are encouraged to specifically designate such measures as TCMs in their implementation plans.

In order to facilitate early agreement on the responsibilities of the transportation community, EPA would require the interagency consultation process to develop a list of TCMs in the implementation plan. EPA believes that TCMs need to be clearly and specifically defined in order for the transportation community to effectively provide for their timely implementation. Therefore, EPA believes TCMs in the

implementation plan must be specific in terms of scale, location, and the process of implementation, enforcement, monitoring, and maintenance. The CAA requires States to hold public hearings before they may adopt an implementation plan. Because of the conformity implications associated with including TCMs in the implementation plan, EPA believes it is especially important for the public to be made aware of the TCMs in the implementation plan.

4. Projects From a Conforming Plan and Program

Section 176(c)(2)(C) of the CAA allows projects which come from a conforming plan and TIP to be found to conform without further regional analysis. Federal projects which are not demonstrated to come from a conforming plan and TIP would require regional analysis consistent with the requirements of section 176(c)(2)(D). EPA believes that the proposed interpretation of "from a conforming plan and TIP" would ensure that those projects which have already been considered in the plan and TIP's regional analysis would be exempted from further regional analysis.

5. Localized CO or PM₁₀ Violations

EPA is proposing to require quantitative hot-spot analyses only when qualitative demonstrations cannot clearly demonstrate that the project would not cause or contribute to a new localized CO or PM₁₀ violation or increase the frequency or severity of an existing violation. Not every project needs quantitative modeling to determine its impacts on localized concentrations, and allowing qualitative analyses in some circumstances would allow conservation of analysis resources. Because any possibility of a new or worsened violation would require a quantitative analysis, allowing the option for qualitative analysis would not diminish air quality protection.

A seemingly new violation could be considered to be a relocation and reduction of an existing violation only if it were in the area substantially affected by the project and if the predicted design value for the site would be less than the design value without the project—that is, if there would be a net air quality benefit. (The design value is the standardized representation of the current ambient pollution level.)

EPA firmly believes that some reasonable allowance of this sort is necessary to accommodate projects which may move a hot spot a short distance, but which improve air quality

overall. EPA is aware of concerns that this allowance may be vague due to the lack of definition of "area substantially affected by the project." If that area is too large, it would not be appropriate to consider a violation a relocation of an existing one. However, EPA believes that the size of the area cannot be established upfront for all situations, as it will depend heavily upon local circumstance and meteorology. Consequently, EPA believes that this must be determined on a case-by-case basis in the context of the conformity determination. EPA requests comment on other approaches or definitions which also provide a reasonable interpretation of "new" violations.

This criterion could be satisfied for a project from a conforming transportation plan or TIP regardless of any impact which the project may have on actual or potential regional-scale emissions, provided all other applicable criteria are satisfied.

EPA and DOT plan to develop guidance on methods for modeling PM₁₀ hot spots.

Construction-related activities. EPA believes that conformity should address long-term emissions from the transportation system, and that conformity should not prevent project implementation because of temporary emissions increases. In addition, the NEPA process provides the most appropriate forum to analyze construction-related emissions impacts and to establish mitigation measures.

Analyses and findings regarding localized CO and PM₁₀ concentration impacts would not have to include construction-related activities which cause temporary and self-correcting increases in local concentrations. Temporary and self-correcting increases are defined as those which occur only during the construction phase and last five years or less at any individual site. Each site which is affected by construction-related activities would be considered separately, using established "Guideline" methods.

Although construction-related fugitive dust contributes to PM₁₀ nonattainment in many areas, the extent of the problem is not well known. Nonattainment areas differ greatly in their potential for hot spots, and within an area there may be variations according to the season and the site. Areas with dust problems have been crafting strategies to demonstrate attainment utilizing available emissions estimation techniques and modeling, but there are continuing efforts to better quantify construction dust emissions and control measure effectiveness. EPA requests comment on what evidence must be developed and considered

when determining that no new violations will be caused or existing violations worsened. The interagency consultation process would have to address what procedures are appropriate.

PM₁₀ hot spots from bus terminals and transfer points. Although EPA expects that typically-sized diesel bus terminals and transfer points will not cause or contribute to new PM₁₀ violations, EPA believes it is practical to require a determination to that effect. EPA requests comment on allowing DOT to make a categorical determination based on appropriate modeling of various terminal sizes and configurations if it believes this would make the planning process more certain and efficient. The modeled scenarios used to make the categorical determinations would need to be derived in consultation with EPA, and more refined analysis would be necessary for projects which do not meet the parameters of the modeled scenario.

Other PM₁₀ hot spots. Generally, EPA believes that direct vehicle PM₁₀ emissions are capable of causing violations only in situations of unusually heavy diesel truck/bus traffic and limited dispersion, such as street canyons. FHWA and FTA projects may affect the density of diesel vehicle traffic on such streets. EPA requests comment on requiring quantitative analyses in order to satisfy this hot-spot criterion only for sites at which violations have been verified by monitoring and others which have essentially identical dispersion conditions and diesel vehicle traffic (including sites near one at which a violation has been monitored).

Increased diesel transit bus service at sites with known violations may be a concern. However, the only relevant Federally-supported activity which is subject to conformity is the purchase of new buses for a major expansion of the fleet. EPA believes that new bus purchases are not causally related to the worsening of PM₁₀ hot spots. EPA therefore proposes that conformity determinations for new bus purchases would not be required to address localized PM₁₀ violations. In addition, because of the more stringent PM₁₀ standard now in effect for urban buses, which is being phased in from 1991 to 1994, all current and future bus purchases will put significantly cleaner vehicles on city streets.

6. Consistency With Emissions Budgets

Emissions budgets. The implementation plan's demonstration of reasonable further progress and attainment will be based on certain

projected motor vehicle emission levels for future years. These motor vehicle emissions will be the emissions budget for later conformity determinations. Thus, the budget will be defined for a number of future dates, depending on the reasonable further progress and attainment showings required for the area.

States will need to make sure that the motor vehicle emissions budget is stated clearly and unambiguously in the implementation plan to facilitate future conformity determinations. EPA would allow an area to have a single areawide budget for each criteria pollutant or precursor for which it is in nonattainment. However, because photochemical grid models estimate vehicle emissions for many small grid squares, States would also have the option to specify subregional emissions budgets. Thus, the implementation plan could either establish a budget using the sum of vehicle emissions from all grids in the area, or it could divide the area into major subareas and establish a budget for each. Subregional budgets would provide additional assurance that through future conformity determinations transportation plans and programs will produce emission patterns that will achieve attainment.

In some nonattainment areas the implementation plan's attainment demonstration may show that motor vehicle emissions are not an important part of the nonattainment problem. This is most likely with PM₁₀ violations near industrial sources. In such a situation, the implementation plan may establish no budget for motor vehicles and explicitly provide that no regional emissions tests are needed for conformity determinations. EPA will closely scrutinize such claims before approving the implementation plan.

Need for analysis of long-term regional emissions. Because emissions budgets will address a timeframe which is longer than any single TIP, demonstration of the TIP's consistency with the implementation plan's budget should be done in the context of the long-term transportation system. Therefore, EPA's proposal would require regional analyses of TIPs to include all expected regionally significant projects in the timeframe of the plan, regardless of their funding source.

In some areas, plans will describe future actions specifically enough to allow comprehensive regional analysis with network models. In these areas, as described below, EPA would require the TIP's conformity determination to use the plan's regional analysis. In areas without specific plans, the plan's

regional analysis will most likely rely on demographically-based projections and adjustments to current VMT and emissions (based on planned TCMs and any regionally significant projects that are identified). These regional analyses would not define projects and estimate emissions with sufficient detail to ensure that any TIP derived from the plan is consistent with the emissions budget. In addition, there would be much flexibility to place newly conceived projects in the TIP which were not identified in the plan. Therefore, EPA would also require a regional analysis of the TIP in areas without specific plans.

TIPs from specific plans. Under this proposal, a TIP which is from a specific plan could demonstrate consistency with the emissions budget without additional regional analysis. EPA believes that if the TIP is financially feasible and consistent with the plan, it is appropriate to rely on the regional analysis which has been performed for the plan.

For the TIP to be considered financially feasible, the TIP would have to be consistent with the Federal funding which may be reasonably expected for the timeframe of the TIP. Necessary State/local matching funds would also have to be consistent with the revenue sources expected over the same period.

For the TIP to be considered consistent with the plan, the following conditions would have to be satisfied: (1) The TIP would have to contain all regionally significant projects which must be started in the TIP's timeframe in order to achieve the highway and transit system envisioned by the plan in its horizon years; (2) all TIP projects which add or modify regionally significant highway or transit facilities would have to be part of the specific highway or transit system envisioned in the plan's horizon years; and (3) there could be no regionally significant TIP projects which have a design concept or scope different from those in the plan.

The tests for financial feasibility and consistency with the plan would help ensure that the projects assumed in the plan will be built, and that the TIP includes no projects different from those assumed in the plan's analysis.

If the TIP is not financially feasible, EPA would require the TIP to be amended until feasibility can be demonstrated.

If the TIP's consistency with the plan cannot be demonstrated, EPA is proposing that either the TIP or the plan must be amended. Thus, if the TIP includes projects which are not from the plan or if the TIP does not include

projects necessary for the plan's envisioned network, either the plan would need to be amended and reanalyzed for conformity, or the TIP would need to be amended to be consistent with the current plan. If the plan is amended to be consistent with the proposed TIP, and the plan is found to conform after a new regional analysis, no further analysis of the TIP would be required.

EPA would require the plan and/or TIP to be amended to be consistent before a conformity determination can be made for the TIP so that the plan's regional analysis can be the basis for TIP and project conformity determinations in the future. Because the conformity of each future TIP will depend on its relationship to the plan, additions or deletions to the envisioned transportation network must be reflected in the plan.

EPA requests comment on whether there should be a distinction in the regional emissions analysis requirements between specific plans and non-specific plans, because metropolitan planning under ISTEA will require future transportation plans to define project design concept and scope sufficient to determine conformity.

Projects not from a conforming plan and conforming TIP. In areas without specific plans, EPA would require all projects not from a conforming plan and TIP to be regionally analyzed. The regional analysis would have to estimate the emissions expected from the transportation network if the proposed project, the currently conforming plan and TIP, and all other regionally significant projects expected in the nonattainment or maintenance area are implemented. The analysis would also have to account for the emissions of previously approved projects which were not from a plan and TIP. This approach is consistent with section 176(c)(2)(D) of the CAA.

In areas with specific plans, EPA is proposing that projects could be found to conform without additional regional analysis if they are consistent with the plan, even if they are not specifically included in the latest conforming TIP. A demonstration of consistency would require that regionally significant projects are part of the specific system envisioned in the plan's horizon years which has been analyzed for emissions, even though the projects are not formally included in both the plan and TIP. A demonstration of consistency with the plan would also have to show that allocating funds to the project would not delay the implementation of those projects in the transportation plan

or TIP which are necessary to achieve the highway and transit system envisioned by the plan.

If a project is not consistent with a specific plan, EPA would require additional regional analysis as described for projects which are not from a conforming plan and TIP in areas without specific plans.

EPA anticipates that projects not from a conforming plan and TIP will be either newly conceived projects not expected when the TIP was prepared, or projects which are in the nonattainment or maintenance area but outside the metropolitan planning area. When the projects which are not from a plan and TIP are known at the time of the plan and TIP conformity determination, as in the latter case, only one regional analysis may be necessary. In that case, the plan or TIP's regional analysis would include those projects which are not from a TIP, and the analysis would have to demonstrate that the plan or TIP together with the extra projects is consistent with the emissions budget.

Special provisions for areas not required to demonstrate reasonable further progress and attainment. Nonattainment areas which are not required to demonstrate reasonable further progress and attainment may not have an emissions budget. Therefore, EPA is proposing special provisions for rural ozone nonattainment areas, marginal ozone areas, submarginal ozone areas, transitional ozone areas, incomplete data ozone areas, moderate CO areas with a design value of 12.7 ppm or less, and not classified CO areas. In addition, maintenance areas may not have a motor vehicle emissions budget in the applicable maintenance plan if that plan was approved under the provisions of the 1977 CAA, rather than the new provisions of the 1990 CAA.

During the control strategy and maintenance periods, these areas would continue under the interim requirement to contribute to emissions reductions, unless they choose to submit an implementation plan revision with an attainment demonstration and emissions budget. If an area establishes an emissions budget, it would have to demonstrate that plans, TIPS, and projects not from a plan and TIP are consistent with the emissions budget.

The interim requirement to contribute to emissions reductions may be stricter than an emissions budget test. For example, an attainment demonstration may show that an area could have some emissions increases and still meet its attainment deadline.

7. Eliminate or Reduce the Severity and Number of Localized CO Violations

During the interim period, all projects in CO nonattainment areas would have to demonstrate that they would eliminate or reduce the severity and number of localized CO violations in the area substantially affected by the project. The number of violations resulting from the project's implementation would have to be less than the number of violations predicted without the project. The predicted design value for the site after the project's implementation would have to be less than the design value without the project.

As described above, EPA is proposing to require quantitative hot-spot analyses only when qualitative demonstrations cannot clearly indicate that the project would eliminate or reduce the severity and number of localized CO violations.

This interim requirement for CO nonattainment areas is established in section 176(c)(3)(B)(ii) of the CAA. EPA is proposing this requirement only in the context of localized CO violations, because regional violations are addressed by the requirement to contribute to reductions in CO emissions, as discussed below. This criterion could be satisfied for a project from a conforming transportation plan or TIP regardless of any impact which the project may have on actual or potential regional-scale emissions, provided all other applicable criteria were satisfied.

8. Contribute to Emission Reductions in Ozone and CO Areas

Overview. EPA is proposing that during the interim period, plans, TIPs, and projects not from a conforming plan and TIP would have to contribute to reductions in ozone precursor emissions (VOC) in ozone nonattainment areas and in CO emissions in CO nonattainment areas. A regional analysis would have to demonstrate that emissions from the transportation system if the proposed action(s) were implemented would be less than the emissions from the transportation system without the proposed action(s).

The regional analysis would establish a "Baseline" and "Action" scenario and analyze emissions from each scenario for certain future years. The analysis years would depend on the action being proposed, but would always include the attainment year. For each analysis year, the emissions predicted from the "Action" scenario would have to be less than those predicted from the "Baseline" scenario.

Although EPA is not proposing to require NO_x reductions in ozone areas

during the interim period, States may require such reductions in their implementation plan revisions which establish the criteria and procedures for determining conformity.

Rationale. Section 176(c)(3)(A)(iii) of the CAA establishes the interim requirement for regional analysis in ozone and CO areas, which will eventually be replaced by a requirement for emissions budget tests during the control strategy and maintenance periods. The CAA requires plans and TIPs to "contribute to annual emissions reductions consistent with sections 182(b)(1) and 187(a)(7)," which require reasonable further progress and attainment demonstrations.

However, the implementation plan revisions including these demonstrations will not exist during the interim period. Thus, the exact percentage reduction required from mobile sources will not be known. Therefore, reductions consistent with the reasonable further progress and attainment demonstrations could mean either the entire fifteen percent reduction by 1996 required for moderate and above ozone nonattainment areas for reasonable further progress, and arbitrary annual percentage reduction, or any nonzero reduction.

EPA does not believe that Congress intended the entire fifteen percent emission reduction to be achieved in motor vehicle emissions. Such an extreme measure would have been clearly stated. Sections 182(b)(1) and 187(a)(7) refer only to reasonable further progress, not the fifteen percent requirement; there is not a fixed percentage required for CO areas to demonstrate reasonable further progress.

In addition, EPA does not believe it is appropriate to require specific annual emissions reductions before they have been established in the reasonable further progress and attainment demonstrations. EPA believes the States should be allowed to decide how much reduction to require from motor vehicles and how much to require from stationary sources. Furthermore, until the implementation plan's emissions inventories are submitted, it will not be possible to determine the baseline from which emissions must be reduced. Therefore, EPA is interpreting the CAA's interim requirement to mean that plans, TIPs, and projects not from a conforming plan and TIP must contribute to emission reductions by any amount.

EPA believes that this interpretation is consistent with the statutory requirement. Section 176(c)(3)(A)(iii) requires contributions to annual emissions reductions consistent with

sections 182(b)(1) and 187(a)(7). Section 187(a)(7) does not require any specific numerical amount of emission reduction, merely requiring such annual emission reduction as is necessary to demonstrate attainment. Section 182(b)(1) actually imposes two separate requirements. It first requires VOC reductions of 15% over six years, and then in a separate sentence requires such annual reductions as necessary to provide for attainment. EPA believes that the proper interpretation of § 176(c)(3)(A)(iii) is that by its own terms it refers only to the annual emission reductions in the second sentence of § 182(b)(1). Thus, areas are not constrained by any predefined percentage reduction for purposes of demonstrating conformity. Areas must simply demonstrate that activities contribute to annual emission reductions, which they may do by simply producing some positive emission reductions.

There is some reference in the legislative history that appears to indicate that Congress intended to impose a 15% reduction requirement on conformity demonstrations (136 Congressional Record, S16972, October 27, 1990). However, this legislative language simply misinterprets the clear reference in the statutory language to the annual emission reduction requirements in sections 182(b)(1) and 187(a)(7), rather than the 15% over six years requirement in section 182(b)(1). EPA agrees with the legislators that mobile source emissions should not be allowed to increase during the development of implementation plan emission budgets, but EPA believes that this requirement is met by showing some positive emission reduction.

A concern has been expressed that there may be long delays in establishing emission reduction targets for conformity purposes. These delays could occur because of delays in submitting emission budgets, because of the time which can elapse between adoption of budgets and formal revision of the implementation plan by EPA, or for other reasons. Because emission reduction targets are a key aspect of the conformity requirements, EPA is requesting comment on ways to alleviate the potential problems associated with delays. One specific suggestion which has been offered would place a cap on CO and ozone precursors during the interim period which is equal to the 1990 base year inventory of these pollutants, and no credit would be given for reductions in emissions from tailpipe standards. EPA notes that in the General Preamble for the Implementation of title 1 of the

Clean Air Act Amendments of 1990 (57 FR 13498, April 16, 1992), EPA rejected such an approach in the context of CAA section 182(d)(1)(A), which requires TCMs to offset growth in emissions from growth in VMT in severe and extreme ozone nonattainment areas and serious CO nonattainment areas. EPA believes this approach would have drastic implications. Since VMT is growing at rates as high as four percent per year in some cities, draconian measures such as mandatory no-drive restrictions would be necessary to achieve reductions from 1990 emission levels without credit for tailpipe standards. However, EPA is interested in other more workable approaches to handle the potential problems with delayed emissions budgets.

"Baseline" and "Action" scenarios. The regional emissions analysis would have to demonstrate that the emissions from the transportation system in the milestone and attainment years, if it included the proposed action and all other expected regionally significant projects (the "Action" scenario), would be less than the emissions from the current transportation system in the milestone and attainment years (the "Baseline" scenario). This "Baseline"/"Action" comparison would be required only during the interim period, except in areas which are not required to demonstrate reasonable further progress and attainment, as described above.

The "Baseline" scenario would include all in-place regionally significant highway and transit facilities, services, and activities; all ongoing travel demand management or transportation system management activities; and completion of all regionally significant projects in the nonattainment area that are currently under construction, undergoing right-of-way acquisition, come from the first three years of a previously conforming plan and/or TIP, or have completed the NEPA process (regardless of funding source).

If no major steps to advance a project have occurred within three years after completion of the NEPA process, 23 CFR 771.129 requires a written reevaluation of the final NEPA document. If the written reevaluation requires a new NEPA document for design concept and scope or air quality reasons, a new conformity determination would be required for the project. This would deter an area from artificially inflating the "Baseline" scenario by including projects which are not actually being built.

The "Action" scenario is the future transportation situation that will result from the implementation of the action

(i.e., plan, TIP, or project not from a plan and TIP) and other planned highway and transit projects, regardless of funding source. This would include all facilities, services, and activities in the "Baseline" scenario (unless the "Action" scenario specifies the deletion of some "Baseline" facilities, services, or activities); the completion of all TCMs and regionally significant facilities, services, and activities associated with the proposed action which will be operational by the analysis year; and the completion of expected regionally significant non-FHWA/FTA highway and transit projects that have clear funding sources and commitments leading to their implementation and completion by the analysis year. Although these non-FHWA/FTA projects may not be included in the plan or TIP, the "Action" scenario must account for all regionally significant projects in the aggregate in order to give a realistic approximation of the regional emissions burden.

Because the "Action" scenario would include non-FHWA/FTA projects, EPA would also allow the "Action" scenario to include non-FHWA/FTA TCMs which have been fully adopted and/or funded since the last conformity determination on the action. The "Action" scenario could also include the incremental effects of any non-FHWA/FTA TCMs which have been modified since the last conformity determination on the action to be more stringent or effective. These TCMs would not have to be identified in the implementation plan, but they would have to be fully adopted and/or funded in order to receive emissions reduction credit.

9. No Increase in Emission in PM₁₀ and NO₂ Areas

EPA is proposing that emissions in PM₁₀ and NO₂ nonattainment areas could not increase above 1990 levels during the interim period. EPA is proposing this requirement, rather than the "Baseline"/"Action" comparison proposed for ozone and CO areas, because the CAA does not include specific interim requirements for contributions to regional emission reductions in PM₁₀ and NO₂ nonattainment areas. Furthermore, EPA believes that requiring a build/no-build comparison in PM₁₀ and NO_x areas could have undesirable consequences which were unanticipated by Congress. A ceiling on NO_x and PM₁₀ emissions at their 1990 level is proposed because the definition of conformity prohibits any increase in the frequency or severity of existing violations.

EPA believes it is reasonable to assume that when Congress was addressing ozone and CO, it established a build/no-build test under the then-accepted belief that a well-designed "build" scenario could reduce emissions without reducing VMT itself. In fact, the available emissions models of that time indicated that congestion relief measures can reduce ozone and CO emissions in any area by improving speeds. EPA notes that Congress reserved its VMT-oriented TCM requirements for only the areas with the very worst air quality. (See, for example, sections 182(d)(1)(A) and 187(b)(2).) This indicates that Congress expected most areas affected by conformity to have some tolerance for VMT growth.

There is no indication that Congress was aware that in many cases, NO_x emissions and PM₁₀ emissions (depending on roadway type and classification and surface particulate loadings) increase with improved traffic flow and increased speeds. Also, there is no indication that Congress considered the potential for increased PM₁₀ emissions from increased use of diesel transit buses. Both of these effects may make it difficult for a "build" scenario to demonstrate emissions reductions, other than by reducing VMT itself below what would otherwise occur. EPA does not believe Congress intended difficult VMT reductions in the interim period. Because EPA is not certain what degree of VMT reduction might be needed to pass a build/no-build comparison, and because the CAA Amendments do not appear to require it, EPA is not proposing a build/no-build comparison during the interim period in PM₁₀ and NO_x nonattainment areas.

Instead, EPA believes that preventing emissions from increasing above 1990 levels would be sufficient to prevent the exacerbation of existing violations during the interim period. This will allow speed increases and associated increases in emissions, if these are offset by fleet turnover and other elements of the plan or program, such as paving or cleaning roads. Because PM₁₀ and NO_x modeling for plans and TIPs is less common than VOC and CO modeling, EPA is not certain of the emissions impact and compliance difficulty of this approach as compared to a build/no-build approach. EPA therefore invites comment on whether the proposed approach is appropriate and feasible.

EPA believes 1990 is the most reasonable year to use as a baseline because it is the year the CAA amendments were enacted. Although there has been some decrease in NO_x emissions due to fleet turnover since

1990, this decrease is less than that in CO and VOC emissions. Therefore, there is a more limited opportunity for transportation actions to claim NO_x reductions from fleet turnover since 1990 in order to allow increased NO_x emissions from future development activities.

However, EPA notes that there is no requirement for a 1990 inventory in PM₁₀ and NO₂ nonattainment areas. EPA invites comment on allowing other years to be used as the baseline, such as the year(s) of the ambient data upon which the designation was based (or, for PM₁₀ nonattainment areas, upon which the moderate or serious classification was based).

F. Procedures for Estimating Emissions and Ambient Concentrations

1. Regional Emissions Analysis

Serious CO and serious, severe, and extreme ozone areas. After January 1, 1995, this proposal would require these areas to use network-based transportation demand models or models relating travel demand and transportation system performance to land-use patterns, population demographics, employment, transportation infrastructure, and transportation policies. The proposal includes detailed procedural requirements, and additional useful guidance on modeling practices may be found in EPA's section 187 VMT Forecasting and Tracking Guidance (March 1992) and the forthcoming National Association of Regional Councils' "Manual of MPO Modeling Practice."

Areas which are not serious CO or serious, severe, or extreme ozone. Unless these areas have been using network models, these areas could estimate regional emissions using methods which do not explicitly or comprehensively account for the influence of land use and transportation infrastructure on vehicle miles traveled (VMT) and traffic speeds and congestion. Such methods could extrapolate historical VMT or project future VMT by considering growth in population and historical growth trends for VMT per person. These methods would also adjust this extrapolated VMT in consideration of future economic activity, transit alternatives and other TCMs, specific major highway changes, and transportation system policies which make the demographically-based extrapolation alone inappropriate. Population growth has the largest influence on regional motor vehicle emissions and should be a sufficient predictor.

Rationale. EPA believes the proposed network modeling procedures reflect the current consensus in the transportation and air quality planning professions on minimum acceptable modeling practices. EPA welcomes comments on the proposed procedures and is monitoring developments from the National Association of Regional Councils' MPO Modeling Practices project.

EPA is reserving the most rigorous requirements for those areas which have the most extensive air quality planning needs and which are already encouraged to develop network models by other sections of the CAA. EPA is not proposing to require network models in all areas because it would be impractical for these areas to obtain the necessary financial and technical resources before their attainment date, which is 1996 at the latest. Areas which are currently using network models would be required to continue using them for conformity analyses. In addition, the new planning requirements associated with ISTEA are expected to encourage more areas to develop network models.

EPA requests comment on whether serious PM₁₀ nonattainment areas should be required to use network models and develop specific transportation plans. Specifically, EPA requests comment on whether the air quality benefits from using network models to perform conformity analyses justify the financial investment which would be required.

Transportation control measures. Areas will need to project the effect of TCMs as part of performing the regional emissions analysis. The changes in travel time of day, mode choice, trip length, trip frequency, and travel speed will result in creditable emissions reductions. For the purposes of plan and TIP conformity, areas must assume a prospective level of TCM effectiveness which is consistent with the implementation plan. Those TCMs which are in place must be modeled consistent with the available information on the degree of compliance with the measures.

Construction-related activities. EPA believes that temporary emissions increases of VOC and CO due to construction-related traffic congestion will not cause violations at the regional level. These emissions changes are small increases due to traffic speed changes and are not associated with VMT growth, which is the primary concern with regional violations. Also, the NEPA process considers the construction-related impacts of projects and is intended to ensure that appropriate mitigation measures are

considered. Therefore, EPA believes that emissions increases from construction-related congestion are not significant at the regional level, and such increases will not cause any new regional-scale violations or exacerbate existing ones.

However, construction activity can be a significant direct source of fugitive PM₁₀ due to the disturbance of ground cover and the movement of construction vehicles on unpaved areas. In addition, construction vehicles can carry soil onto paved roads, where it can be re-entrained into ambient air by other passing vehicles.

EPA is proposing to require regional PM₁₀ emissions analyses to consider construction-related fugitive PM₁₀ in those areas with implementation plans which identify it as a contributor to the nonattainment problem. The regional analysis would have to account for the level of construction activity, the fugitive PM₁₀ control measures in the implementation plan, and the dust-producing capacity of the proposed activities. Those areas with implementation plans which do not identify construction-related fugitive PM₁₀ as a contributor to the nonattainment problem do not have to consider it in their regional emissions analysis.

2. Hot-spot Analysis

If consideration of local factors clearly demonstrates that the hot-spot criteria are satisfied, EPA would not require quantitative modeling. EPA believes that quantitative modeling is not necessary to demonstrate satisfaction of the hot-spot criteria in every case, since the range of FHWA and FTA projects includes many which could not reasonably be argued to have any significant CO emissions effect. However, at this time EPA cannot propose cutoffs on project size, geography, or other characteristics above which modeling is always required. Therefore, EPA requests comment on whether and how to more clearly define when quantitative modeling is and is not required. EPA also invites comment on specific procedures or evidence which should be considered for qualitative hot-spot analysis.

CO hot-spot modeling. EPA is proposing that when quantitative modeling is required, the choice of a hot-spot model and associated methods and assumptions must be the subject of interagency consultation. However, EPA would require quantitative CO hot-spot analyses to be based on the applicable air quality models, data bases, and other requirements specified in the most recent version of the "Guideline on Air

Quality Models (Revised)" (EPA publication no. 450/2-78-027R), including all Supplements finally published in the *Federal Register* by the date of this final rule, in those locations, areas, or categories of sites which the implementation plan identifies as sites of current violation or possible current violation, and at other sites if the use of the "Guideline" models is practicable and reasonable given the potential for violations. The "Guideline on Air Quality Models" is used in the implementation plan's attainment demonstration, and EPA believes it is advisable to use consistent modeling techniques at sites which are the same as or similar to those sites addressed in the attainment demonstration. Other quantitative models could be used at such sites only if after the interagency consultation process and with the approval of the EPA Regional Administrator, it is determined that "Guideline" models are not practicable or not reasonable.

At sites which are not identified as violations and at which the use of "Guideline" models is not practicable or reasonable, EPA would allow other quantitative methods to be used if they represent reasonable and common professional practice. Where "Guideline" and non-"Guideline" models are both available, "Guideline" models would have to be given the greatest consideration. EPA is proposing this flexibility because it is not clear that sites which are not identified as current violations or possible current violations need the same modeling techniques as those used in the implementation plan.

G. Exempt Projects

EPA is proposing that certain highway and transit projects would not require a conformity determination and could proceed toward implementation even without a conforming transportation plan and TIP because of the nature of such projects and their inherent lack of impact on air emissions. *Alabama Power v. EPA*, 636 F.2d 323, 360, D.C. Cir. 1979, gives EPA the authority to create such de minimis exemptions. Examples of such projects include various safety projects; certain mass transit projects, such as rehabilitation of transit vehicles and construction of small passenger shelters; continuation of ride-sharing and vanpooling promotional activities; bicycle and pedestrian facilities; landscaping; and sign removal. Any specific project in these categories may be made non-exempt if the MPO and other agencies in the interagency consultation process

concur that it has potentially adverse emissions impacts.

By exempting these projects with neutral air quality impacts, EPA would minimize the resource use and project delays which could be associated with the conformity process. EPA also believes that areas without a currently conforming plan and TIP should be permitted to implement projects with neutral air quality impact. Although no conformity determination would be required of exempt projects, States and MPOs should ensure that exempt projects would not interfere with TCM implementation. If TCM implementation is delayed because of exempt projects, future TIPs and plans may not be able to receive a conformity finding.

EPA also proposes that certain projects be exempt from regional emissions analyses. These projects, which EPA believes have no regional emissions impacts, would include intersection channelization and signalization projects; interchange reconfiguration projects; changes in vertical and horizontal alignment; truck size and weight inspection stations; and bus transfer terminals.

These projects would require analysis of local impacts for project-level conformity determinations, but could be excluded from regional analyses of plans, TIPs, and projects which are not from a conforming plan and TIP. EPA believes that exempting these projects from regional analyses would simplify regional analysis and minimize the burden of conformity. Because these projects have no impact on regional emissions, they cannot cause an emissions budget to be exceeded, and they therefore satisfy the requirements of CAA section 176(c)(2)(D). Therefore, these projects could proceed even in the absence of a conforming plan and TIP.

However, this provision would not waive any planning requirements established by ISTEA.

VIII. Environmental and Health Benefits

This rule will help ensure that the implementation plan achieves its goal of attaining air quality standards. The environmental and health benefits of attaining the national ambient air quality standards are attributable to the strategies contained in the implementation plan rather than to this rule directly.

IX. Economic Impact

The primary impact of this rule involves the increased requirements for MPOs to perform regional transportation and emissions modeling and document

the regional air quality impacts of transportation plans and programs. Because conformity requirements have existed in some form since 1977, the framework for consultation and TCM tracking has already been established.

The impact of today's proposed conformity requirements on MPOs may vary widely depending on the pollutant for which an area is in nonattainment, the classification of the nonattainment area, the population of the area, and the technical capabilities already developed in the area.

The approximately 25 MPOs which will be subject to the most stringent modeling requirements—which are also among the largest MPOs—have been spending during Phase I of the interim period approximately \$150,000 for a conformity determination on the transportation plan and TIP. Costs for smaller MPOs in nonattainment areas which are not classified as serious or above have ranged from \$10,000 to \$60,000.

These estimates do not necessarily reflect the costs which will result from today's proposed rule. On one hand, these may be overestimates of the costs, because determinations will probably become less expensive as the MPOs gain experience. For example, for future determinations it may be possible to perform the modeling with fewer runs. On the other hand, these estimates do not reflect the more specific requirements of today's rule and may therefore underestimate the cost of determinations in the control strategy period. EPA is continuing to research the costs of conformity to MPOs.

Estimates of conformity costs among the larger MPOs vary from as low as \$50,000 to as high as \$725,000 (for a TIP, a plan, and TIP amendments associated with the plan), which illustrates the difficulty of estimating the costs specifically associated with conformity's increased requirements. Because ISTEA and other CAA provisions also indirectly require increased modeling, it is difficult to separate the costs attributable to the conformity requirements. For example, ISTEA assigns more responsibility to the MPOs and shifts the planning focus to intermodalism and congestion management. This will require more sophisticated transportation modeling. The VMT tracking and forecasting requirements in sections 182 and 187 of the CAA will also promote the use of transportation demand network models in some nonattainment areas.

In addition, although the conformity requirements may prompt additional data collection and model development, these costs cannot be solely attributed to

conformity. It is an ongoing responsibility of MPOs to review and upgrade their analysis capabilities to reflect the most recent understanding of travel demand and transportation forecasting. Resource constraints during the 1980's prevented many MPOs from updating their analysis procedures, so conformity is in many cases simply raising the priority of modeling improvements.

Metropolitan planning is eligible for funds under ISTEA. In addition, EPA has attempted to minimize the costs of conformity in several ways. First, EPA is proposing flexible methodological requirements for regional analyses in areas which don't use network models, in order to accommodate the varying technical capabilities of MPOs. In addition, by designating projects which are exempt from conformity determinations or regional analyses, EPA is allowing project sponsors to conserve their analysis resources. Finally, EPA has attempted to minimize the frequency of conformity redeterminations by limiting the number of triggers and by allowing grace periods before the use of new emissions models and following an area's reclassification.

X. Public Participation

A. Comments and the Public Docket

EPA and DOT welcome comments on all aspects of this proposed rulemaking. All comments should be directed to the EPA Air Docket Section, Docket No. A-92-21 (see "ADDRESSES"). As noted above in section II. D., EPA is currently drafting an NPRM proposing criteria and procedures for determining conformity of general Federal actions (general conformity rule). If EPA determines it is appropriate, EPA may hold additional public hearings concurrently or consecutively with the public hearings on the general conformity rule.

B. Public Hearing

Anyone who wants to present testimony about this proposal at the public hearing (see "DATES") should, if possible, notify the contact person (see "FOR FURTHER INFORMATION CONTACT") at least seven days prior to the day of the hearing. The contact person should be given an estimate of the time required for the presentation of testimony and notification of any need for audio/visual equipment. A sign-up sheet will be available at the registration table the morning of the hearing for scheduling those who have not notified the contact earlier. This testimony will be scheduled on a first-come, first-serve

basis to follow the previously scheduled testimony.

EPA requests that approximately 50 copies of the statement or material to be presented be brought to the hearing for distribution to the audience. In addition, EPA would find it helpful to receive an advance copy of any statement or material to be presented at the hearing at least one week before the scheduled hearing date. This is to give EPA staff adequate time to review such material before the hearing. Such advance copies should be submitted to the contact person listed.

The official records of the hearing will be kept open until the close of the comment period to allow submission of rebuttal and supplementary testimony. All such submittals should be directed to the Air Docket, Docket No. A-92-21 (see "ADDRESSES").

Dick Wilson is hereby designated Presiding Officer of the hearing. The hearing will be conducted informally, and technical rules of evidence will not apply. A written transcript of the hearing will be placed in the above docket for review. Anyone desiring to purchase a copy of the transcript should make individual arrangements with the court reporter recording the proceeding.

As noted above in section II. D., EPA is currently drafting an NPRM proposing criteria and procedures for determining conformity of general Federal actions (general conformity rule). If EPA determines it is appropriate, EPA may hold additional public hearings concurrently or consecutively with the public hearings on the general conformity rule.

XI. Administrative Requirements

A. Administrative Designation

Under Executive Order 12291, EPA and DOT must judge whether a regulation is a "major" rule and, therefore, subject to the requirement that a Regulatory Impact Analysis (RIA) be prepared. Since EPA has determined that this regulation is not major, an RIA has not been prepared.

This regulation was submitted to the Office of Management and Budget (OMB) for review as required by Executive Order 12291. Any written comments from OMB and any EPA response to those comments are in the public docket for this rulemaking.

B. Reporting and Recordkeeping Requirements

This rule does not contain any information collection requirements which require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 requires federal agencies to identify potentially adverse impacts of federal regulations upon small entities. In instances where significant impacts are possible on a substantial number of these entities, agencies are required to perform a Regulatory Flexibility Analysis (RFA).

EPA has determined that the regulations proposed today will not have a significant impact on a substantial number of small entities. This regulation will affect Federal agencies and metropolitan planning organizations, which by definition are designated only for metropolitan areas with a population of at least 50,000.

Therefore, as required under § 605 of the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., I certify that this regulation does not have a significant impact on a substantial number of small entities.

List of Subjects in 40 CFR Part 51

Administrative practice and procedures, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: December 22, 1992.

William K. Reilly,
Administrator.

For the reasons set out in the preamble, title 40, chapter I, part 51 of the Code of Federal Regulations is proposed to be amended as follows.

PART 51—[AMENDED]

1. The authority citation for part 51 continues to read as follows:

Authority: 42 U.S.C. 7401(b)(1); 7407(d), 7410(k)(1), 7470-79, 7501-7508, and 7601(a)

2. Part 51 is amended by adding a new subpart T to read as follows:

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

Sec.

- 51.390 Purpose.
- 51.391 Definitions.
- 51.392 Applicability.
- 51.393 Implementation plan revision.
- 51.394 Priority.
- 51.395 Frequency of conformity determinations.
- 51.396 Consultation.
- 51.397 Content of transportation plans.
- 51.398 Relationship of plan and TIP conformity with the NEPA process.
- 51.399 Fiscal constraints for transportation plans and TIPs.

Sec.

- 51.400 Criteria and procedures for determining conformity of transportation plans, programs, and projects.
- 51.401 Procedures for determining regional transportation-related emissions.
- 51.402 Procedures for determining localized CO and PM₁₀ concentrations.
- 51.403 Exempt projects.
- 51.404 Projects exempt from regional emissions analyses.
- 51.405 Special provisions for nonattainment areas which are not required to demonstrate reasonable further progress and attainment.

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

§ 51.390 Purpose.

The purpose of this subpart is to implement section 176(c) of the Clean Air Act (CAA), as amended (42 U.S.C. 7401 *et seq.*), and the related requirements of 23 U.S.C. 109(j), with respect to the conformity of transportation plans, programs, and projects which are developed, funded, or approved by the United States Department of Transportation (DOT), and by metropolitan planning organizations (MPOs) or other recipients of funds under title 23 U.S.C. or the Federal Transit Act (49 U.S.C. 1601 *et seq.*). This subpart sets forth policy, criteria, and procedures for demonstrating and assuring conformity of such activities to an applicable implementation plan developed pursuant to section 110 and part D of the CAA.

§ 51.391 Definitions.

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

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

CAA means the Clean Air Act, as amended.

Cause or contribute to a new violation for a project means to cause or contribute to a new violation of a standard at a location or over a region which would otherwise not be in

violation of the standard during the future period in question, if the project were not implemented.

Control strategy implementation plan is the applicable implementation plan which contains specific strategies for controlling the emissions of and reducing ambient levels of pollutants in order to satisfy CAA requirements for demonstrations of reasonable further progress and attainment.

Control strategy period with respect to particulate matter less than 10 microns in diameter (PM₁₀), carbon monoxide (CO), nitrogen dioxide (NO₂), and/or ozone precursors (volatile organic compounds and oxides of nitrogen), means that period of time after EPA approves control strategy implementation plans containing strategies for controlling PM₁₀, NO₂, CO, and/or ozone, as appropriate. This period ends when a State submits and EPA approves a request under section 107(d) of the CAA for redesignation to an attainment area.

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

Design scope means the design aspects which will affect the proposed facility's impact on regional emissions, usually as they relate to vehicle or person carrying capacity and control, e.g., number of lanes to be constructed or added, length of project, signalization, access control including approximate number and location of interchanges, preferential treatment for high-occupancy vehicles, etc.

DOT means the United States Department of Transportation.

Emissions budget is that portion of the total allowable emissions defined in the applicable implementation plan for the purpose of meeting reasonable further progress milestones or attainment or maintenance demonstrations, for any criteria pollutant or its precursors, allocated by the applicable implementation plan to highway and transit vehicles.

EPA means the Environmental Protection Agency.

FHWA means the Federal Highway Administration of DOT.

FHWA/FTA project, for the purpose of this subpart, is any highway or transit project which is proposed to receive funding assistance and approval through the Federal-Aid Highway program or the Federal mass transit program, or requires Federal Highway Administration (FHWA) or Federal Transit Administration (FTA) approval for some aspect of the project, such as

connection to an interstate highway or deviation from applicable design standards on the interstate system.

FTA means the Federal Transit Administration of DOT.

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

- (1) Connect logical termini and be of sufficient length to address environmental matters on a board scope;
- (2) Have independent utility or significance, i.e., be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and
- (3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

Horizon year is a year for which the transportation plan describes the envisioned transportation system according to § 51.397 of this subpart.

Hot-spot analysis is an estimation of likely future localized CO and PM₁₀ pollutant concentrations and a comparison of those concentrations to the national ambient-air quality standards. Pollutant concentrations to be estimated should be based on the total emissions burden which may result from the implementation of a single, specific project, summed together with future background concentrations (to include emissions from facilities or actions which have completed environmental review) expected in the area. The total concentration must be estimated and analyzed at appropriate receptor locations in the area substantially affected by the project.

Incomplete data area means any ozone nonattainment area which EPA has classified, in 40 CFR part 81, as an incomplete data area.

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

ISTEA means the Intermodal Surface Transportation Efficiency Act of 1991.

Maintenance area means any geographic region of the United States designated nonattainment pursuant to the CAA Amendments of 1990 and subsequently redesignated to attainment subject to the requirement to develop a maintenance plan under section 175A of the CAA Amendments.

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

Milestone has the meaning given in section 182(g)(1) of the CAA.

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

NEPA means the National Environmental Policy Act.

NEPA process completion, for the purposes of this regulation, with respect to FHWA or FTA, means the point at which there is a specific action to make a determination that a project is categorically excluded, to make a Finding of No Significant Impact, or to issue a record of decision on a Final Environmental Impact Statement under NEPA. Other recipients of funds under title 23 U.S.C. or the Federal Transit Act must establish and document project-level conformity in an environmental document submitted to FHWA or FTA prior to Federal completion of the NEPA process.

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

Non-federal TCM is any transportation control measure implemented by a State or local transportation agency which utilizes no Federal funding and requires no Federal approval.

Not classified area means any carbon monoxide nonattainment area which EPA has not classified.

Phase II of the interim period with respect to a pollutant or pollutant precursor means that period of time after the effective date of this rule, lasting until the relevant control strategy implementation plans are approved or promulgated by EPA.

Project means a highway project or transit project.

Regional-scale with respect to an actual or potential carbon monoxide, ozone, nitrogen dioxide, or particulate matter (less than 10 microns in diameter) national ambient air quality standard violation refers to a violation which occurs on a wide geographic scale due to emissions over a wide area, possibly over an extended period of time. This is in contrast to a hot-spot violation which occurs near a specific

source and is predominantly due to recent emissions from that source being added to background concentrations.

Regionally significant, in the case of transportation facilities, means any facility with an arterial or higher functional classification, plus any other facility that serves regional travel needs (such as access to and from the area outside of the region, to major activity centers in the region, or to transportation terminals) and would normally be included in the modeling for the transportation network.

Rural area means any geographic region of the United States which has a population of less than 50,000 and which is not located within a Metropolitan Statistical Area or Consolidated Metropolitan Statistical Area as defined by the United States Census Bureau.

Standard means a national ambient air quality standard.

Submarginal area means any ozone nonattainment area which EPA has classified as submarginal in 40 CFR Part 81.

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

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

- (1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;
- (2) Have independent utility or independent significance, i.e., be a reasonable expenditure even if no additional transportation improvements in the area are made; and
- (3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

Transitional area means any ozone nonattainment area which EPA has classified as transitional in 40 CFR part 81.

Transportation control measure (TCM) is any measure that is specifically identified and committed to in the applicable implementation plan that is either one of the types listed in section 108 of the CAA, or any other measure for the purpose of reducing emissions or

concentrations of air pollutants from transportation sources by reducing vehicle use or changing traffic flow or congestion conditions. Notwithstanding the above, vehicle technology-based, fuel-based, and maintenance-based measures which control the emissions from vehicles under fixed traffic conditions are not TCMs for the purposes of this regulation.

Transportation improvement program (TIP) is a program of transportation projects drawn from or consistent with the transportation plan and developed pursuant to title 23 U.S.C. and the Federal Transit Act.

Transportation plan is the long-range plan which identifies facilities that should function as an integrated metropolitan transportation system and is developed pursuant to title 23 U.S.C. and the Federal Transit Act. It gives emphasis to those facilities that serve important national and regional transportation functions, and includes a financial plan that demonstrates how the transportation plan can be implemented.

Transportation project is a highway project or a transit project.

§ 51.392 Applicability.

(a) **Action applicability.** Except as provided for in paragraph (c) of this section or § 51.403 of this subpart, conformity determinations are required for:

(1) The adoption, acceptance, or approval of transportation plans developed pursuant to 23 U.S.C. 134 or the Federal Transit Act by an MPO or DOT;

(2) The adoption, acceptance, or approval of TIPs developed pursuant to 23 U.S.C. 134 or the Federal Transit Act by an MPO or DOT; and

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

(b) **Geographic applicability.** The provisions of this subpart shall apply in all nonattainment and maintenance areas for transportation-related criteria pollutants. The transportation-related criteria pollutants are ozone, carbon monoxide, nitrogen dioxide, and particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM₁₀). The provisions apply with respect to emissions of the criteria pollutants themselves and to emissions of precursor pollutants, i.e., volatile organic compounds and nitrogen oxides in ozone areas, nitrogen oxides in nitrogen dioxide areas, and volatile organic compounds, nitrogen oxides, and PM₁₀ in PM₁₀ areas.

(c) **Limitations.** Projects subject to this regulation for which the NEPA process and a conformity determination have

been completed by FHWA or FTA may proceed toward implementation without further conformity determinations. All phases of such projects which were considered in that action are also included, if those phases were for the purpose of funding, final design, right-of-way acquisition, construction, or any combination of these phases. However, any significant change in design concept and scope or a supplemental environmental document for air quality purposes shall also trigger a requirement for a new conformity determination of the project.

§ 51.393 Implementation plan revision.

States must submit to the EPA and DOT a revision to their implementation plan which contains criteria and procedures for DOT, MPOs and other State or local agencies to assess the conformity of transportation plans, programs, and projects, consistent with these regulations. This revision is to be submitted within 12 months of the promulgation of this rule. EPA will provide DOT with a 30-day comment period before taking action to approve or disapprove the submission.

§ 51.394 Priority.

When assisting or approving any action with air quality-related consequences, FHWA and FTA shall give priority to the implementation of those transportation portions of an applicable implementation plan prepared to attain and maintain the NAAQS. This priority shall be consistent with statutory requirements for allocation of funds among States or other jurisdictions. Where other important factors are a consideration, transportation measures which are not included in the applicable implementation plan can be funded or implemented; however, transportation measures in the applicable implementation plan must retain a high priority and funding decisions must promote their timely implementation to the extent that funds are available.

§ 51.395 Frequency of conformity determinations.

(a) *Transportation plans.* (1) Each new transportation plan must be found to conform based on the requirements of this rule and the applicable implementation plan prior to the transportation plan's adoption by the MPO.

(2) All transportation plan revisions must be found to conform based on the requirements of this rule and the applicable implementation plan, unless the revision merely adds or deletes exempt projects listed in § 51.403 of this

subpart. The conformity determination must be based on the transportation plan and the revision taken as a whole.

(3) Conformity must be redetermined within 18 months of the following:

(i) [Insert date of publication of the final rule in the Federal Register];

(ii) Any implementation plan submitted by a State which meets the completeness criteria, is approved by EPA, and which:

(A) Establishes or revises a transportation-related emissions budget (as required by CAA sections 175A(a), 182(b)(1), 182(c)(2)(A), 182(c)(2)(B), 187(a)(7), 189(a)(1)(B), and 189(b)(1)(A); and sections 192(a) and 192(b), for nitrogen dioxide); or

(B) Adds, deletes, or changes TCMs; and

(iii) Any implementation plan promulgated by EPA which establishes or revises a transportation-related emissions budget or adds, deletes, or changes TCMs.

(4) In any case, conformity determinations must be made no less frequently than every three years.

(b) *Transportation improvement programs.* (1) A new TIP must be found to conform based on the requirements of this subpart and the applicable implementation plan prior to the TIP's approval.

(2) A TIP amendment requires a new conformity determination for the entire TIP prior to its approval, unless the amendment merely adds or deletes exempt projects listed in § 51.403 of this subpart.

(3) Conformity must be redetermined by the MPO and DOT within six months of the MPO's adoption of a new or revised transportation plan, unless the new or revised plan merely adds or deletes exempt projects listed in § 51.403 of this subpart.

(4) In any case, conformity determinations must be made no less frequently than every three years.

(c) *Projects.* FHWA/FTA projects must be found to conform prior to their approval.

§ 51.396 Consultation.

The implementation plan revision required under § 51.393 of this subpart shall include consultation procedures to be undertaken by MPOs, State departments of transportation, and DOT with State and local air quality agencies before making conformity determinations, and shall also include consultation procedures for ensuring an opportunity for public participation and review of draft transportation plans and TIPs prior to final action.

(a) *Interagency consultation procedures.* States shall provide in the

implementation plan well-defined procedures whereby representatives of the MPOs; State and local air quality planning agencies; State and local transportation agencies; and other organizations with responsibilities for developing, submitting, or implementing provisions of an implementation plan required by the CAA consult with each other and with local or regional offices of EPA, FHWA, and FTA on the development of the implementation plan, the transportation plan, and the TIP. Interagency consultation procedures shall include, at a minimum:

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

(2) The organizational level of regular consultation;

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

(4) The frequency of, or process for convening, consultation meetings and responsibilities for agenda formation;

(5) A process for escalating disagreements to higher organizational levels for settlement;

(6) The development of a list of the TCMs in the applicable implementation plan;

(7) A process involving the MPO, State and local air quality planning agencies, State and local transportation agencies, EPA, and DOT for evaluating and choosing a model (or models) and associated methods and assumptions to be used in hot-spot analyses and regional air quality modeling;

(8) A process involving the MPO, State and local air quality planning agencies, and State and local transportation agencies for evaluating events which will trigger new conformity determinations in addition to those triggering events established in § 51.395 of this subpart;

(9) A process involving the MPO, State and local air quality planning and transportation agencies, EPA, and DOT for evaluating whether projects otherwise exempted from meeting the requirements of this subpart (see §§ 51.403 and 51.404 of this subpart) should be treated as non-exempt in cases where potential adverse emissions impacts may exist for any reason;

(10) Where the metropolitan planning area does not include the entire nonattainment or maintenance area, a process involving the MPO and the State department of transportation for cooperative planning and analysis for

purposes of determining conformity of all projects outside the metropolitan area and within the nonattainment or maintenance area; and

(11) A process for consulting on the design, schedule, and funding of research and data collection efforts and regional air quality model development by the MPO (e.g., household/travel transportation surveys).

(b) *Public consultation procedures.* (1) Affected agencies making conformity determinations on plans, programs, and projects shall provide a reasonable opportunity for public review and comment prior to taking formal action on a conformity determination for all plans and TIPs, and on conformity determinations for projects where otherwise required by law.

(i) The agency shall publish the proposed procedures to be used for this requirement and allow 45 days for written public comment.

(ii) An agency which revises these procedures, as determined when the need arises by the agencies involved in the process, shall publish the new procedures and allow 45 days for written public comment.

(2) The MPO shall prepare a summary and analysis of written and oral comments before taking final action on conformity determinations subject to paragraph (b)(1) of this section.

(3) If the transportation plan or TIP to be submitted to DOT is significantly different than the one which was made available for public comment by the MPO and raises new material issues which interested parties could not reasonably have foreseen from the MPO notifications, then an additional opportunity for public comment on the revised plan or TIP must be provided.

(4) New public consultation procedures for plans and TIPs are being developed by DOT in response to requirements in the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA). When a DOT regulation on this subject is published in final form, its provisions will govern and the public consultation requirements contained in paragraph (b) of this section will cease to apply.

§ 51.397 Content of transportation plans.

(a) *Transportation plans adopted after January 1, 1995 in serious, severe, or extreme ozone nonattainment areas and in serious carbon monoxide nonattainment areas.* The transportation plan must specifically describe the transportation system envisioned for certain future years which shall be called horizon years.

(1) The agency or organization developing the transportation plan may

choose any years to be horizon years, subject to the following restrictions:

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

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

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

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

(2) For these horizon years:

(i) The plan shall quantify and document the demographic and employment factors influencing expected transportation demand, including land use forecasts, in accordance with implementation plan provisions and § 51.396 of this subpart;

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

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

(b) *Moderate areas reclassified to serious.* Ozone or CO nonattainment areas which are reclassified from moderate to serious must meet the requirements of paragraph (a) of this section within two years from the date of reclassification.

(c) *Transportation plans for other areas.* Transportation plans for other areas must meet the requirements of paragraph (a) of this section at least to

the extent it has been the previous practice of the MPO to prepare plans which meet those requirements. Otherwise, transportation plans must describe the transportation system envisioned for the future specifically enough to allow determination of conformity according to the criteria and procedures of § 51.400 of this subpart.

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

§ 51.398 Relationship of plan and TIP conformity with the NEPA process.

The degree of specificity required in the transportation plan and the specific travel network assumed for air quality modeling do not preclude the consideration of alternatives in the NEPA process or other project development studies. Should the NEPA process result in a project with design concept and scope significantly different from that in the plan or TIP, the project must meet the criteria in § 51.400 of this subpart for projects not from a TIP before NEPA process completion.

§ 51.399 Fiscal constraints for transportation plans and TIPs.

(a) *Transportation plans.* The ISTEA requires that the transportation plan include a financial plan that demonstrates how the transportation plan can be implemented, indicates resources from public and private sources that are reasonably expected to be available throughout the plan's timeframe, and recommends any innovative financing techniques to finance needed projects and programs, including such techniques as value capture, tolls, and congestion pricing.

(b) *TIPs.* The ISTEA requires that full funding must be reasonably anticipated to be available for a project, or an identified phase of a project, within the time period contemplated for completion of the project prior to its inclusion in a TIP. The ISTEA also requires a financial plan that demonstrates how the TIP can be implemented, indicates resources from public and private sources that are reasonably expected to be made available for its implementation, and recommends any innovative financing techniques to finance needed projects and programs.

§ 51.400 Criteria and procedures for determining conformity of transportation plans, programs, and projects.

Transportation plans, programs, and projects must satisfy the following criteria and procedures in order to be

found to conform to the applicable implementation plan(s) for ozone, carbon monoxide (CO), nitrogen dioxide (NO₂), and particulate matter less than 10 microns in diameter (PM₁₀): The criteria for making conformity determinations may differ for plans, TIPs, and projects, for the time period in which the conformity determination is to be made, and for the relevant pollutant. An action may be found to conform to the purpose of the applicable implementation plan when the criteria in Table 1 are satisfied for the type of activity in the relevant time period, and when all applicable conformity requirements of implementation plans and of court orders for the area which pertain specifically to conformity determination requirements are fully satisfied. The procedures which correspond to each criterion in Table 1 are described in paragraphs (a) through (q) of this section.

TABLE 1.—CONFORMITY CRITERIA

Action	Criteria
Phase II of the Interim Period	
Transportation Plan	a,b,c(1),l,o.
TIP	a,b,c(2),m,p.
Project (From a conforming plan and TIP).	a,b,d,e,f,g,k.
Project (Not from a conforming plan and TIP).	a,b,c(3),d,f,g,k,n,q.
Control Strategy and Maintenance Periods	
Transportation Plan	a,b,c(1),h.
TIP	a,b,c(2),l.
Project (From a conforming plan and TIP).	a,b,d,e,f,g.
Project (Not from a conforming plan and TIP).	a,b,c(3),d,f,g,j.

- (a) The conformity determination must be based on the latest planning assumptions.
- (b) The conformity determination must be based on the latest emission estimation model available.
- (c) The transportation plan, TIP, or project which is not from a conforming plan and TIP must provide for the timely implementation of TCMs from the applicable implementation plan.
- (d) There must be a currently conforming transportation plan and currently conforming TIP at the time of project approval.
- (e) The project must come from a conforming plan and program.
- (f) The project must not cause or contribute to any new localized CO or PM₁₀ violations or increase the frequency or severity of any existing CO or PM₁₀ violations in CO and PM₁₀ nonattainment and maintenance areas.
- (g) The project must comply with PM₁₀ control measures in the applicable implementation plan.
- (h) The transportation plan must be consistent with the motor vehicle emissions budget(s) in the applicable implementation plan.
- (i) The TIP must be consistent with the motor vehicle emissions budget(s) in the applicable implementation plan.
- (j) Highway and transit projects which are not from a conforming plan and conforming TIP must be consistent with the motor vehicle emissions budget(s) in the applicable implementation plan.
- (k) The project must eliminate or reduce the severity and number of localized CO violations in CO nonattainment areas.
- (l) The transportation plan must contribute to emissions reductions in ozone and CO nonattainment areas.
- (m) The TIP must contribute to emissions reductions in ozone and CO nonattainment areas.
- (n) The project which is not from a conforming plan and TIP must contribute to emissions reductions in ozone and CO nonattainment areas.
- (o) The transportation plan must not increase emissions in PM₁₀ and NO₂ nonattainment areas.

- (p) The TIP must not increase emissions in PM₁₀ and NO₂ nonattainment areas.
- (q) The project which is not from a conforming plan and TIP must not increase emissions in PM₁₀ and NO₂ nonattainment areas.

(a) *The conformity determination must be based on the latest planning assumptions.* This criterion applies during all periods. It is satisfied if the conformity determination, with respect to all other applicable criteria in this section, is based upon the most recent planning assumptions in force at the time of the conformity determination. Assumptions must be derived from the estimates of current and future population, employment, travel, and congestion most recently developed by the MPO or other agency authorized to make such estimates and approved by the MPO. Conformity determinations must also include reasonable assumptions about transit service and increases in transit fares and road and bridge tolls over time.

(b) *The conformity determination must be based on the latest emission estimation model available.* This criterion applies during all periods. It is satisfied if the most current version of the motor vehicle emissions model specified by EPA for use in the preparation or revision of implementation plans in that State or area is used for the conformity analysis. EPA will consult with DOT to establish a grace period following the specification of any new model; any analysis begun during the grace period may use the previous version of the model. The grace period will be no less than three months and no more than 24 months after notice of availability is published in the Federal Register, depending on the degree of change in the model and the scope of re-planning likely to be necessary by MPOs in order to assure conformity. If the grace period will be longer than three months, EPA will announce the appropriate grace period in the Federal Register.

(c) *The transportation plan, TIP, or project which is not from a conforming plan and TIP must provide for the timely implementation of TCMs from the applicable implementation plan.* This criterion applies during all periods.

(1) For transportation plans, this criterion is satisfied if:

- (i) The transportation plan, in describing the envisioned future transportation system, provides for the timely completion or implementation of all TCMs in the applicable implementation plan which are eligible for funding under title 23 U.S.C. or the Federal Transit Act, consistent with schedules included in the applicable implementation plan; and
- (ii) Nothing in the transportation plan interferes with the implementation of

any TCM in the applicable implementation plan.

(2) For TIPs, this criterion is satisfied if:

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

(ii) If TCMs in the applicable implementation plan have previously been programmed for Federal funding but the funds have not been obligated and the TCMs are behind the schedule in the implementation plan, then the TIP cannot be found to conform if the funds intended for those TCMs are reallocated to projects in the TIP other than TCMs. If there are no other TCMs in the TIP, the funds may be reallocated to projects which are eligible for Federal funding under ISTEA's Congestion Mitigation and Air Quality Improvement Program.

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

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

(d) *There must be a currently conforming transportation plan and currently conforming TIP at the time of project approval.* This criterion applies during all periods. It is satisfied if the current transportation plan and TIP have been found to conform to the applicable implementation plan by the MPO and DOT according to the procedures of this subpart. Only one conforming transportation plan may exist in an area at any time; conformity determinations of previous transportation plans expire once the current plan is found to conform by DOT.

(e) *The project must come from a conforming plan and program.* This

criterion applies during all periods. It is satisfied if there is a conforming transportation plan and program in place at the time of the conformity determination for the project.

(1) A project is considered to be from a conforming plan if:

(i) For projects which are required to be identified in the plan in order to satisfy § 51.397 of this subpart, the project is specifically included in the plan; or

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

(2) A project is considered to be from a conforming program if the project is included in the conforming TIP and the design concept and scope of the project were adequate at the time of the TIP conformity determination to determine its contribution to the TIP's regional emissions and have not changed significantly from those which were described in the TIP, or in a manner which would significantly impact use of the facility. Otherwise, the project must satisfy all criteria in Table 1 for a project not from a TIP.

(f) *The project must not cause or contribute to any new localized CO or PM₁₀ violations or increase the frequency or severity of any existing CO or PM₁₀ violations in CO and PM₁₀ nonattainment and maintenance areas.* This criterion applies during all periods. It is satisfied if either:

(1) Consideration of local factors clearly demonstrates that new violations will not be created and the severity or number of existing violations will not be increased; or

(2) Hot-spot analysis demonstrates that no new local violations will be created and the severity or number of existing violations will not be increased as a result of the project.

(i) The model used shall be one selected as a result of consultation under § 51.396(a)(7) of this subpart.

(ii) Hot-spot analysis shall be performed according to the requirements of § 51.402 of this subpart.

(g) *The project must comply with PM₁₀ control measures in the applicable implementation plan.* This criterion applies during all periods. It is satisfied if control measures (for the purpose of limiting PM₁₀ emissions from the construction activities and/or normal use and operation associated with the project) contained in the applicable implementation plan are included in the plans, specifications, and estimates package for the project.

(h) *The transportation plan must be consistent with the motor vehicle emissions budget(s) in the applicable implementation plan.* This criterion applies during the control strategy and maintenance periods, except as provided in § 51.405 of this subpart. The total emissions of ozone precursors (VOC and NO_x), CO, or PM₁₀ (and its precursors if the applicable implementation plan identifies transportation-related precursor emissions within the nonattainment area as a significant contributor to the PM₁₀ nonattainment problem and establishes a budget for such emissions) expected from the transportation system as a result of implementing the new projects and activities contained in the plan or expected in the area must be estimated. This criterion is satisfied if the emissions are demonstrated to be less than or equal to each of the motor vehicle emissions budgets established in the applicable implementation plan for the milestone and attainment years. This demonstration requires that a regional emissions analysis be performed as follows:

(1) The emissions analysis methodology shall meet the requirements of § 51.401 of this subpart.

(2) The emissions analysis shall include all projects contained in the plan and all other regionally significant highway and transit projects expected in the nonattainment or maintenance area. The emissions analysis may not include for emissions reduction credit any TCMs which have been delayed beyond the scheduled date(s) until such time as implementation has been assured. TCMs which require a State or local regulation in order to be implemented and which are not specifically identified in the applicable implementation plan may not be included in the emissions analysis unless the regulation is already adopted by the enforcing jurisdiction.

(3) For areas with a transportation plan that meets the content requirements of § 51.397(a) of this subpart, the emissions analysis shall be performed for each horizon year. Emissions in milestone years which are between the horizon years may be determined by interpolation.

(4) For areas with a transportation plan that does not meet the content requirements of § 51.397(a) of this subpart, the emissions analysis shall be performed for years in the time span of the transportation plan provided they are not more than ten years apart and provided the analysis is performed for the last year of the plan's forecast period. If the attainment year is in the time span of the plan, the emissions analysis must also be performed for the

attainment year. Emissions in milestone years which are between these analysis years may be determined by interpolation.

(i) *The TIP must be consistent with the motor vehicle emissions budget(s) in the applicable implementation plan.* This criterion applies during the control strategy and maintenance periods, except as provided in § 51.405 of this subpart. The total emissions of ozone precursors (VOC and NO_x), CO, or PM₁₀ (and its precursors if the applicable implementation plan identifies transportation-related precursor emissions within the nonattainment area as a significant contributor to the PM₁₀ nonattainment problem and establishes a budget for such emissions) expected from the transportation system in general as a result of implementing the projects in the TIP and other expected projects must be estimated for the milestone and attainment years. Those estimates must be less than or equal to each of the motor vehicle emissions budgets for the milestone and attainment years in order for the TIP to conform.

(1) For areas with a conforming transportation plan that fully meets the content requirements of § 51.397(a) of this subpart, this criterion may be satisfied without additional regional analysis if:

(i) Each program year of the TIP is consistent with the Federal funding which may be reasonably expected for that year, and required State/local matching funds and funds for State/local funding-only projects are consistent with the revenue sources expected over the same period; and

(ii) The TIP is consistent with the transportation plan such that the regional emissions analysis already performed for the plan applies to the TIP also. This requires a demonstration that:

(A) The TIP contains all projects which must be started in the TIP's timeframe in order to achieve the highway and transit system envisioned by the plan in each of its horizon years;

(B) All TIP projects which add or modify regionally significant highway or transit facilities are part of the specific highway or transit system envisioned in the transportation plan's horizon years; and

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

(iii) If the requirements in paragraphs (i)(1)(i) and (i)(1)(ii) of this section are not met, then:

(A) The TIP may be modified to meet those requirements; otherwise.

(B) The transportation plan must be revised so that the requirements in paragraphs (i)(1)(i) and (i)(1)(ii) of this section are met. Once the revised plan has been found to conform, this criterion is met for the TIP with no additional analysis except a demonstration that the TIP meets the requirements of (i)(1)(i) and (ii) of this section.

(2) For areas with a transportation plan that does not meet the content requirements of § 51.397(a) of this subpart, a regional emissions analysis must be performed for the TIP. This criterion may be satisfied if:

(i) The analysis methodology meets the requirements of § 51.401(b) of this subpart;

(ii) The analysis estimates emissions from the transportation system, including all projects contained in the proposed TIP, and all other regionally significant projects expected in the nonattainment or maintenance area in the timeframe of the transportation plan. The emissions analysis may not include for emissions reduction credit any TCMs which have been delayed beyond the scheduled date(s) established until such time as implementation has been assured. TCMs which require a State or local regulation in order to be implemented and which are not specifically identified in the applicable implementation plan may not be included in the emissions analysis unless the regulation is already adopted by the enforcing jurisdiction; and

(iii) The emissions analysis is performed for the last year of the plan's forecast period and any other years in the time span of the transportation plan which are not more than ten years apart. If the attainment year is in the time span of the plan, the emissions analysis must also be performed for the attainment year. Emissions in milestone years which are between these analysis years may be determined by interpolation.

(j) *Highway and transit projects which are not from a conforming plan and a conforming TIP must be consistent with the motor vehicle emissions budget(s) in the applicable implementation plan.* This criterion applies during the control strategy and maintenance periods, except as provided in § 51.405 of this subpart. It is satisfied if emissions from the implementation of the project, when added to the emissions from the projects in the conforming transportation plan and TIP and all other regionally significant projects expected in the area, do not exceed the motor vehicle emissions budget in the applicable

implementation plan in the milestone or the attainment years.

(1) For areas with a conforming transportation plan that meets the content requirements of § 51.397(a) of this subpart:

(i) This criterion may be satisfied without additional regional analysis if the project is included in the conforming transportation plan, even if it is not specifically included in the latest conforming TIP. This requires a demonstration that:

(A) Allocating funds to the project will not delay the implementation of projects in the transportation plan or TIP which are necessary to achieve the highway and transit system envisioned by the plan in each of its horizon years;

(B) The project is not regionally significant or is part of the specific highway or transit system envisioned in the transportation plan's horizon years; and

(C) The design concept and scope of the project is not significantly different from that described in the transportation plan.

(ii) If the requirements of paragraph (j)(1)(i) of this section are not met, a regional emissions analysis must be performed as follows:

(A) The analysis methodology shall meet the requirements of § 51.401 of this subpart;

(B) The analysis shall estimate emissions from the transportation system, including the proposed project and all other regionally significant projects expected in the nonattainment or maintenance area in the timeframe of the transportation plan. The analysis must include emissions from all previously approved projects which were not from a plan and TIP. The emissions analysis may not include the emissions reduction credit any TCMs which have been delayed beyond the scheduled date(s) established until such time as implementation has been assured. TCMs which require a State or local regulation in order to be implemented and which are not specifically identified in the applicable implementation plan may not be included in the emissions analysis unless the regulation is already adopted by the enforcing jurisdiction; and

(C) The emissions analysis shall be performed for each horizon year. Emissions in milestone years which are between the horizon years may be determined by interpolation.

(2) For areas with a transportation plan that does not meet the content requirements of § 51.397(a) of this subpart, a regional emissions analysis must be performed for the project together with the conforming TIP and

all other regionally significant projects expected in the nonattainment or maintenance area. This criterion may be satisfied if:

(i) The analysis methodology meets the requirements of § 51.401(b) of this subpart;

(ii) The analysis estimates emissions from the transportation system, including the proposed project, and all other regionally significant projects expected in the nonattainment or maintenance area in the timeframe of the transportation plan. The emissions analysis may not include for emissions reduction credit any TCMs which have been delayed beyond the scheduled date(s) established until such time as implementation is assured. TCMs which require a State or local regulation in order to be implemented and which are not specifically identified in the applicable implementation plan may not be included in the emissions analysis unless the regulation is already adopted by the enforcing jurisdiction; and

(iii) The emissions analysis is performed for the last year of the plan's forecast period and any other years in the time span of the transportation plan which are not more than ten years apart. If the attainment year is in the time span of the plan, the emissions analysis must also be performed for the attainment year. Emissions in milestone years which are between these analysis years may be determined by interpolation.

(k) *The project must eliminate or reduce the severity and number of localized CO violations in CO nonattainment areas.* This criterion applies during Phase II of the interim period only. It is satisfied with respect to existing localized CO violations if either:

(1) Consideration of local factors clearly indicates that existing CO violations will be eliminated or reduced in severity and number; or

(2) Hot-spot analysis indicates that existing CO violations will be eliminated or reduced in severity and number as a result of the project.

(i) The model used shall be one selected as a result of consultation under § 51.396(a)(7) of this subpart.

(ii) CO hot-spot analysis shall be performed according to the requirements of § 51.402 of this subpart.

(l) *The transportation plan must contribute to emissions reductions in ozone and CO nonattainment areas.* This criterion applies during Phase II of the interim period only, except as otherwise provided in § 51.405 of this subpart. It applies to the net effect on emissions of all projects contained in a new or revised transportation plan. This

criterion may be satisfied if the regional emissions analysis is performed as follows:

(1) Determine the analysis years for which emissions are to be estimated. The first analysis year shall be no later than the first milestone year (1995 in CO nonattainment areas and 1996 in ozone nonattainment areas). The second analysis year shall be either the attainment year for the area, or if the attainment year is the same as the first analysis year or earlier, the second analysis year shall be at least five years beyond the first analysis year.

(2) Define the "Baseline" scenario for each of the plan's horizon years to be the future transportation system that would result from current programs, composed of the following (except that projects listed in § 51.403 of this subpart need not be explicitly considered):

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

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

(iii) Completion of all regionally significant projects, regardless of funding source, which are currently under construction or are undergoing right-of-way acquisition; come from the first three years of the previously conforming plan and/or TIP; or have completed the NEPA process.

(3) Define the "Action" scenario for each of the plan's horizon years as the transportation system that will result in that year from the implementation of the proposed transportation plan, TIPs adopted under it, and other expected regionally significant projects in the nonattainment area. It will include the following (except that projects listed in § 51.403 of this subpart need not be explicitly considered):

(i) All facilities, services, and activities in the "Baseline" scenario;

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

(iii) All non-federal TCMs known to the MPO, but not included in the applicable implementation plan, which have been fully adopted and/or funded by the enforcing jurisdiction or sponsoring agency since the last conformity determination on the transportation plan;

(iv) The incremental effects of any non-federal TCMs known to the MPO, but not included in the applicable implementation plan, which were adopted and/or funded prior to the date of the last conformity determination on the transportation plan, but which have been modified since then to be more stringent or effective;

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

(vi) Completion of all expected regionally significant non-FHWA/FTA highway and transit projects that have clear funding sources and commitments leading toward their implementation and completion by the horizon year.

(4) Estimate the emissions predicted to result in each analysis year from travel on the transportation systems defined by the "Baseline" and "Action" scenarios and determine the difference in regional VOC emissions (for all ozone nonattainment areas) and CO emissions (for CO nonattainment areas) between the two scenarios. The analysis must be performed for each of the plan's horizon years according to the requirements of § 51.401 of this subpart. The analysis must address the periods between the analysis years and the periods between 1990, the first milestone year (1996 for ozone and 1995 for CO), and the first of the analysis years. Emissions in milestone years which are between the analysis years may be determined by interpolation. The regional analysis must show that the "Action" scenario contributes to a reduction in emissions from the 1990 emissions by any nonzero amount.

(5) This criterion is met if the regional VOC emissions (for ozone nonattainment areas) and CO emissions (for CO nonattainment areas) predicted in the "Action" scenario are less than the emissions predicted from the "Baseline" scenario in each analysis year, and if this can reasonably be expected to be true in the periods between the first milestone year and the analysis years.

(m) *The TIP must contribute to emissions reductions in ozone and CO nonattainment areas.* This criterion applies during Phase II of the interim period only, except as otherwise provided in § 51.405 of this subpart. It applies to the net effect on emissions of all projects contained in a new or revised TIP. This criterion may be satisfied if a regional emissions impact analysis is performed as follows:

(1) Determine the analysis years for which emissions are to be estimated. The first analysis year shall be no later than the first milestone year (1995 in CO

nonattainment areas and 1996 in ozone nonattainment areas). The second analysis year shall be either the attainment year for the area, or if the attainment year is the same as the first analysis year or earlier, the second analysis year shall be at least five years beyond the first analysis year.

(2) Define the "Baseline" scenario as the future transportation system that would result from current programs, composed of the following (except that projects listed in § 51.403 of this subpart need not be explicitly considered):

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

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

(iii) Completion of all regionally significant projects, regardless of funding source, which are currently under construction or are undergoing right-of-way acquisition; come from the first three years of the previously conforming TIP; or have completed the NEPA process.

(3) Define the "Action" scenario as the future transportation system that will result from the implementation of the proposed TIP and other expected regionally significant projects in the nonattainment area. It will include the following (except that projects listed in § 51.403 of this subpart need not be explicitly considered):

(i) All facilities, services, and activities in the "Baseline" scenario;

(ii) Completion of all TCMs and regionally significant facilities, services, and activities included in the proposed TIP, except that regulatory TCMs may not be assumed to begin at a future time unless the regulation is already adopted by the enforcing jurisdiction or the TCM is contained in the applicable implementation plan;

(iii) All non-federal TCMs known to the MPO, but not included in the applicable implementation plan, which have been fully adopted and/or funded by the enforcing jurisdiction or sponsoring agency since the last conformity determination on the TIP;

(iv) The incremental effects of any non-federal TCMs known to the MPO, but not included in the applicable implementation plan, which were adopted and/or funded prior to the date of the last conformity determination on the TIP, but which have been modified since then to be more stringent or effective;

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

(vi) Completion of all expected regionally significant non-FHWA/FTA highway and transit projects that have clear funding sources and commitments leading toward their implementation and completion by the horizon year.

(4) Estimate the emissions predicted to result in each analysis year from travel on the transportation systems defined by the "Baseline" and "Action" scenarios, and determine the difference in regional VOC emissions (for all ozone nonattainment areas) and CO emissions (for CO nonattainment areas) between the two scenarios. The analysis shall consider the period between 1990 and the analysis years and shall meet the requirements of § 51.401 of this subpart.

(5) This criterion is met if the regional VOC emissions (for ozone nonattainment areas) and CO emissions (for CO nonattainment areas) predicted in the "Action" scenario are less than the emissions predicted from the "Baseline" scenario in each analysis year, and if this can reasonably be expected to be true in the period between the analysis years. The regional analysis must show that the "Action" scenario contributes to a reduction in emissions from the 1990 emissions by any nonzero amount.

(n) *The transportation project which is not from a conforming plan and TIP must contribute to emissions reductions in ozone and CO nonattainment areas.* This criterion applies during Phase II of the interim period only, except as otherwise provided in § 51.405 of this subpart. This criterion is satisfied if a regional emissions impact analysis is performed which meets the requirements of paragraph (1) of this section and which includes the plan and project in the "Action" scenario. If the project which is not from a conforming plan and TIP is a modification of a project currently in the plan or TIP, the "Baseline" scenario must include the project with its original design concept and scope, and the "Action" scenario must include the project with its new design concept and scope.

(o) *The transportation plan must not increase emissions in PM₁₀ and NO₂ nonattainment areas.* This criterion is satisfied if it is demonstrated that when the projects in the transportation plan and TIP and all other regionally significant projects expected in the area are implemented, the transportation system's total highway and transit emissions of PM₁₀ in a PM₁₀ nonattainment area (and transportation-related precursors of PM₁₀ in nonattainment areas for which the Administrator has made a finding or approved a finding in the applicable

implementation plan that such precursor emissions from within the nonattainment area are a significant contributor to the PM₁₀ nonattainment problem) and of NO_x in an NO₂ nonattainment area will not be greater than 1990 levels. This criterion applies only during Phase II of the interim period. This criterion may be satisfied if the regional emissions analysis is performed as follows:

(1) Determine the 1990 regional emissions of PM₁₀ (for PM₁₀ nonattainment areas) and NO_x (for NO₂ nonattainment areas) from highway and transit sources.

(2) Determine the analysis years for which emissions are to be estimated. The first analysis year shall be no later than the first milestone year (1995 in NO₂ nonattainment areas and 1996 in PM₁₀ nonattainment areas). The second analysis year shall be either the attainment year for the area, or if the attainment year is the same as the first analysis year or earlier, the second analysis year shall be at least five years beyond the first analysis year.

(3) Define the "Action" scenario in each of the analysis years as the transportation situation that will result in that year from the implementation of the proposed transportation plan and TIPs adopted under it. It will include the following (except that projects listed in § 51.403 and § 51.404 of this subpart need not be explicitly considered):

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

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

(iii) Completion of all regionally significant projects, regardless of funding source, which are currently under construction or are undergoing right-of-way acquisition; come from the first three years of the previously conforming plan and/or TIP; or have completed the NEPA process;

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

(v) All non-federal TCMs known to the MPO, but not included in the applicable implementation plan, which have been fully adopted and/or funded by the enforcing jurisdiction or sponsoring agency since the last

conformity determination on the transportation plan;

(vi) The incremental effects of any non-federal TCMs known to the MPO, but not included in the applicable implementation plan, which were adopted and/or funded prior to the date of the last conformity determination on the transportation plan, but which have been modified since then to be more stringent or effective; and

(vii) Completion of all expected regionally significant non-FHWA/FTA highway and transit projects that have clear funding sources and commitments leading toward their implementation and completion by the horizon year.

(4) Estimate the emissions predicated to result in the attainment year from travel on the transportation systems defined the "Action" scenario.

(5) This criterion is met if the emissions from the "Action" scenario in the attainment year are no greater than 1990 emissions of PM₁₀ (for PM₁₀ nonattainment areas) or NO_x (for NO₂ nonattainment areas) from highway and transit sources.

(p) *The TIP must not increase emissions in PM₁₀ and NO₂ nonattainment areas.* This criterion is satisfied if it is demonstrated that when the projects in the transportation plan and TIP and all other regionally significant projects expected in the area are implemented, the transportation system's total highway and transit emissions of PM₁₀ in a PM₁₀ nonattainment area (and transportation-related precursors of PM₁₀ in nonattainment areas for which the Administrator has made a finding or approved a finding in the applicable implementation plan that such precursor emissions from within the nonattainment area a significant contributor to the PM₁₀ nonattainment problem) and of NO_x in an NO₂ nonattainment area will not be greater than 1990 levels. This criterion applies only during Phase II of the interim period. This criterion may be satisfied if a regional emissions impact analysis is performed as follows:

(1) Determine the 1990 regional emissions of PM₁₀ (for PM₁₀ nonattainment areas) and NO_x (for NO₂ nonattainment areas) from highway and transit sources.

(2) Determine the analysis years for which emissions are to be estimated. The first analysis year shall be no later than the first milestone year (1995 in NO₂ nonattainment areas and 1996 in PM₁₀ nonattainment areas). The second analysis year shall be either the attainment year for the area, or if the attainment year is the same as the first analysis year or earlier, the second

analysis year shall be at least five years beyond the first analysis year.

(3) Define the "Action" scenario in each of the analysis years as the transportation situation that will result in that year from the implementation of the proposed transportation plan and TIPs adopted under it. It will include the following (except that projects listed in § 51.403 and § 51.404 of this subpart need not be explicitly considered):

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

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

(iii) Completion of all regionally significant projects, regardless of funding source, which are currently under construction or are undergoing right-of-way acquisition; come from the first three years of the previously conforming TIP; or have completed the NEPA process;

(iv) Completion of all TCMs and facilities, services, and activities included in the plan and the proposed TIP, except that regulatory TCMs may not be assumed to begin at a future time unless the regulation is already adopted by the enforcing jurisdiction or the TCM is identified in the applicable implementation plan;

(v) All non-federal TCMs known to the MPO, but not included in the applicable implementation plan, which have been fully adopted and/or funded by the enforcing jurisdiction or sponsoring agency since the last conformity determination on the TIP;

(vi) The incremental effects of any non-federal TCMs known to the MPO, but not included in the applicable implementation plan, which were adopted and/or funded prior to the date of the last conformity determination on the TIP, but which have been modified since then to be more stringent or effective; and

(vii) Completion of all regionally significant non-FHWA/FTA projects that have clear funding sources and commitments leading toward their implementation and completion by the analysis year.

(4) Estimate the emissions predicted to result in the attainment year from travel on the transportation systems defined by the "Action" scenario. If the attainment year and the analysis year do not coincide, the regional emissions analysis must be performed for the first analysis year after the attainment year. The attainment year may then be considered by interpolating between 1990 and the analysis year. The regional emissions analysis shall meet the requirements of § 51.401 of this subpart.

(5) This criterion is met if the emissions from the "Action" scenario in the attainment year are less than 1990 emissions of PM₁₀ (for PM₁₀ nonattainment areas) or NO_x (for NO₂ nonattainment areas) from highway and transit sources.

(q) *The transportation project which is not from a conforming plan and TIP must not increase emissions in PM₁₀ and NO₂ nonattainment areas.* This criterion is met if a regional emissions impact analysis is performed which meets the requirements of paragraph (o) of this section and which includes the plan and project in the "Action" scenario. If the project which is not from a conforming plan and TIP is a modification of a project currently in the plan or TIP, the "Baseline" scenario must include the project with its original design concept and scope, and the "Action" scenario must include the project with its new design concept and scope.

§ 51.401 Procedures for determining regional transportation-related emissions.

(a) *Serious, severe, and extreme ozone nonattainment areas and serious carbon monoxide areas after January 1, 1995.*

Estimates of regional transportation-related emissions used to support conformity determinations must be made according to procedures which meet the requirements in paragraphs (a)(1) through (5) of this section.

(1) A network-based transportation demand model or models relating travel demand and transportation system performance to land-use patterns, population demographics, employment, transportation infrastructure, and transportation policies must be used to estimate travel within the metropolitan planning area of the nonattainment area. Such a model shall possess the following attributes:

(i) The modeling methods and the functional relationships used in the model(s) shall in all respects be in accordance with acceptable professional practice, and reasonable for purposes of emission estimation;

(ii) The network-based model(s) must be validated against ground counts for a base year that is not more than 10 years prior to the date of the conformity determination. Land use, population, and other inputs must be based on the best available information and appropriate to the validation base year;

(iii) For peak-hour or peak-period traffic assignments, a capacity sensitive assignment methodology must be used;

(iv) Zone-to-zone travel times used to distribute trips between origin and destination pairs must be in reasonable agreement with the travel times which

result from the process of assignment of trips to network links. Where use of transit currently is anticipated to be a significant factor in satisfying transportation demand, these times should also be used for modeling mode splits;

(v) Free-flow speeds on network links shall be based on empirical observations;

(vi) Peak and off-peak travel demand and travel times must be provided;

(vii) The model(s) must utilize and document a logical correspondence between the assumed scenario of land development and use and the future transportation system for which emissions are being estimated, but reliance on a formal land-use model is not specifically required;

(viii) A dependence of trip generation on the accessibility of destinations via the transportation system is not specifically required, unless the network model is capable of such determinations and the necessary information is available;

(ix) A dependence of regional economic and population growth on the accessibility of destinations via the transportation system is not specifically required, unless the network model is capable of such determinations and the necessary information is available; and

(x) Consideration of emissions increases from construction-related congestion is not specifically required.

(2) Highway Performance Monitoring System (HPMS) estimates of vehicle miles traveled shall be considered the primary measure of vehicle miles traveled within the portion of the nonattainment area and for the functional classes of roadways included in HPMS, for urban areas which are sampled on a separate urban area basis. A factor (or factors) shall be developed to reconcile and calibrate the network-based model estimates of vehicle miles traveled in the base year of its validation to the HPMS estimates for the same period, and these factors shall be applied to model estimates of future vehicle miles traveled. In this factoring process, consideration will be given to differences in the facility coverage of the HPMS and the modeled network description. Departure from these procedures is permitted with the concurrence of DOT and EPA.

(3) Reasonable methods shall be used to estimate nonattainment area vehicle travel on off-network roadways within the urban transportation planning area, and on roadways outside the urban transportation planning area.

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

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

(5) Ambient temperatures shall be consistent with those used to establish the emissions budget in the applicable implementation plan. Factors other than temperatures, for example the fraction of travel in a hot stabilized engine mode, may be modified after interagency consultation according to § 51.396 of this subpart if the newer estimates incorporate additional or more geographically specific information or represent a logically estimated trend in such factors beyond the period considered in the applicable implementation plan.

(b) *Other situations.* (1) Procedures which satisfy some or all of the requirements of paragraph (a) of this section shall be used in all areas not subject to paragraph (a) of this section in which those procedures have been the previous practice of the MPO.

(2) Regional emissions may be estimated by methods which do not explicitly or comprehensively account for the influence of land use and transportation infrastructure on vehicle miles traveled and traffic speeds and congestion. Such methods may extrapolate historical VMT or may project future VMT by considering growth in population and historical growth trends for vehicle miles travelled per person. These methods must also consider future economic activity, transit alternatives, and transportation system policies.

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

(2) In PM₁₀ nonattainment and maintenance areas with implementation plans which identify construction-related fugitive PM₁₀ as a contributor to the nonattainment problem, the regional PM₁₀ emissions analysis shall consider construction-related fugitive PM₁₀ and shall account for the level of construction activity, the fugitive PM₁₀ control measures in the applicable implementation plan, and the dust-producing capacity of the proposed activities.

§ 51.402 Procedures for determining localized CO and PM₁₀ concentrations.

(a) CO hot-spot analyses must be based on the applicable air quality

models, data bases; and other requirements specified in the most recent version of the "Guideline on Air Quality Models (Revised)" (EPA publication No. 450/2-78-027R), including Supplements, which is hereby incorporated by reference as it exists on the date of approval (a notice of any change will be published in the **Federal Register**), in the following cases unless, after the interagency consultation process described in § 51.396(a) and with the approval of the EPA Regional Administrator, it is determined to be inappropriate:

(1) In locations, areas, or categories of sites which are identified in the SIP as sites of current violation or possible current violation; and

(2) Where use of the "Guideline" models is practicable and reasonable given the potential for violations.

(b) In cases other than those described in paragraphs (a)(1) and (a)(2) of this section, other quantitative methods may be used if they represent reasonable and common professional practice. Where both "Guideline" and non-"Guideline" models are available, "Guideline" models must be given the greatest consideration.

(c) CO hot-spot analyses must include the entire project, and may be performed only after the major design features which will significantly impact CO concentrations which have been identified. The background concentration must reflect emissions from all existing facilities and emissions expected from future projects which have completed environmental review.

(d) Hot-spot analysis assumptions must be consistent with those in the regional emissions analysis for those inputs which are required for both analyses.

(e) PM₁₀ or CO mitigation or control measures shall be assumed in the hot-spot analysis only where there is a commitment in the NEPA document to incorporate such measures into the design and funding of the project.

(f) CO and PM₁₀ hot-spot analyses are not required to consider construction-related activities which cause temporary and self-correcting increases in emissions. Each site which is affected by construction-related activities shall be considered separately, using established "Guideline" methods. Temporary and self-correcting increases are defined as those which occur only during the construction phase and last five years or less at any individual site.

§ 51.403 Exempt projects.

Notwithstanding the other requirements of this subpart, highway and transit projects of the types listed in

Table 2 are exempt from the requirement that a conformity determination be made. Such projects may proceed toward implementation even in the absence of a conforming transportation plan and TIP. A particular action of the type listed in Table 2 is not exempt if the MPO in consultation with other agencies (see § 51.396(a)(8) of this subpart), the EPA, and the FHWA (in the case of a highway project) or the FTA (in the case of a transit project) concur that it has potentially adverse emissions impacts for any reason. States and MPOs must ensure that exempt projects do not interfere with TCM implementation.

Table 2.—Exempt Projects

Safety

Railroad/highway crossing
 Hazard elimination program
 Safer non-Federal-aid system roads
 Shoulder improvements
 Increasing sight distance
 Safety improvement program
 Traffic control devices and operating assistance other than signalization projects
 Railroad/highway crossing warning devices
 Guardrails, median barriers, crash cushions
 Pavement resurfacing and/or rehabilitation
 Pavement marking demonstration
 Emergency relief (23 U.S.C. 125)
 Fencing
 Skid treatments
 Safety roadside rest areas
 Adding medians
 Truck climbing lanes outside the urbanized area
 Lighting improvements
 Widening narrow pavements or reconstructing bridges (less than one travel lane)

Mass Transit

Operating assistance to transit agencies
 Purchase of support vehicles
 Rehabilitation of transit vehicles
 Purchase of office, shop, and operating equipment for existing facilities
 Purchase of operating equipment for vehicles (e.g., radios, fareboxes, lifts, etc.)
 Construction or renovation of power, signal, and communications systems
 Construction of small passenger shelters and information kiosks
 Reconstruction or renovation of transit buildings and structures (e.g., rail or bus buildings, storage and maintenance facilities, stations, terminals, and ancillary structures)
 Rehabilitation or reconstruction of track structures, track, and trackbed in existing rights-of-way

Purchase of new buses and rail cars to replace existing vehicles or for minor expansions of the fleet
Construction of new bus or rail storage/maintenance facilities categorically excluded in 23 CFR 771

Air Quality

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

Other

Engineering to assess social, economic, and environmental effects of the proposed action or alternatives to that action

Noise attenuation

Advance land acquisitions (23 CFR 712 or 23 CFR 771)

Acquisition of scenic easements

Plantings, landscaping, etc.

Sign removal

§ 51.404 Projects exempt from regional emissions analyses.

Notwithstanding the other requirements of this subpart, highway and transit projects of the types listed in Table 3 are exempt from regional CO or VOC emissions analysis requirements. The local effects of these projects with respect to CO or PM₁₀ concentrations must be considered to determine if a

hot-spot analysis is required prior to making a project-level conformity determination. These projects may then proceed to the project development process even in the absence of a conforming plan and TIP. A particular action of the type listed in Table 3 is not exempt from regional emissions analysis if the MPO in consultation with other agencies (see § 51.396(a)(8) of this subpart), the EPA, and the FHWA (in the case of a highway project) or the FTA (in the case of a transit project) concur that it has potential regional impacts for any reason.

Table 3.—Projects Exempt From Regional Emissions Analyses

Intersection channelization projects

Intersection signalization projects

Interchange reconfiguration projects

Changes in vertical and horizontal alignment

Truck size and weight inspection stations

Bus transfer terminals

§ 51.405 Special provisions for nonattainment areas which are not required to demonstrate reasonable further progress and attainment.

(a) *Application.* This section applies in the following areas:

- (1) Rural ozone nonattainment areas;
- (2) Marginal ozone areas;

(3) Submarginal ozone areas;

(4) Transitional ozone areas;

(5) Incomplete data ozone areas;

(6) Moderate CO areas with a design value of 12.7 ppm or less; and

(7) Not classified CO areas.

(b) *Default conformity procedures.*

The criteria and procedures in § 51.400(l)–(n) of this subpart will remain in effect throughout the control strategy period for transportation plans, TIPs, and projects (not from a conforming plan and TIP) in lieu of the procedures in § 51.400(h)–(j) of this subpart, except as otherwise provided in paragraph (c) of this section.

(c) *Optional conformity procedures.*

The State or MPO may voluntarily develop an attainment demonstration and corresponding motor vehicle emissions budget like those required in areas with high nonattainment classifications. In this case, the State must submit an implementation plan revision which contains that budget and attainment demonstration. Once EPA has approved this implementation plan revision, the procedures in § 51.400(h)–(j) of this subpart apply in lieu of the procedures in § 51.400(l)–(n) of this subpart.

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