ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 93

[EPA–HQ–OAR–2004–0491; FRL–8511–6]

RIN 2060–AH93

Revisions to the General Conformity Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to revise its regulations relating to the Clean Air Act (CAA) requirement that Federal actions conform to the appropriate State, Tribal or Federal implementation plan for attaining clean air (''general conformity''). EPA has only revised the General Conformity Regulations once since they were promulgated in 1993 to include de minimis emission levels for fine particulate matter and its precursors (July 17, 2006). Over this period, EPA and other Federal agencies have gained experience with the implementation of the existing regulations and have identified several issues with their implementation. In addition, in 2004 EPA issued regulations to implement the revised ozone standard and in 2007 issued regulations to implement the new fine particulate matter standard. These regulations could affect the timing and process for general conformity determinations. State and other air quality agencies are in the process of developing revised plans to attain the new standards and the proposed revisions to the General Conformity Regulations will be helpful to the State, Tribe, and local agencies as well as the Federal agencies in developing and commenting on the proposed SIP revisions. This proposed rule revision provides for a streamline process for Federal agencies and States and Tribes to ensure Federal activities are incorporated in these State implementation plans (SIPs). Where that is not possible it provides an efficient and effective process for Federal agencies to ensure their actions do not cause or contribute to a violation of the national ambient air quality standards (NAAQS) or interfere with the purpose of a State, Tribal or Federal implementation plan to attain or maintain the NAAQS.

DATES: *Comments.* Comments must be received on or before March 10, 2008.

Public Hearing. If anyone contacts EPA requesting a public hearing by January 23, 2008, we will hold a public hearing. Additional information about the hearing would be published in a subsequent **Federal Register** notice.

ADDRESSES: Submit comments, identified by Docket ID No. EPA–HQ–OAR–2004–0491, by one of the following methods:

- *www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *E-Mail: a-and-r-docket@epa.gov*.
- *Fax:* (202) 566–9744.
- *Mail:* Air and Radiation Docket and Information Center, Environmental Protection Agency, Docket ID No. EPA–HQ–OAR–2004–0491, Mail Code: 6102T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Please include duplicate copies, if possible.
- *Hand Delivery:* General Conformity Revisions, Docket ID No. EPA–HQ–OAR–2004–0491, Environmental Protection Agency Docket Center, EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. Please include duplicate copies, if possible. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct comments to Docket ID No. EPA–HQ–OAR–2004–0491. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is ''anonymous access'' systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm*. For additional instructions go to section I.B. of the **SUPPLEMENTARY INFORMATION** section of this docket.

Docket: All documents in the docket are listed in the EDOCKET index at *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

Public Hearing. If a public hearing is held at 9 a.m. in Washington, DC, or at an alternate site nearby. Details regarding the hearing (time, date, and location) will be posted on EPA's Web site at *http://www.epa.gov/oar/genconform*_not later than 15 days prior to the hearing date. People interested in presenting oral testimony or inquiring as to whether a hearing is to be held should contact Ms. Pam Long, Air Quality Planning Division, Office of Air Quality Planning and Standards (C504–03), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, telephone (919) 541–0641, fax number (919) 541–5509, e-mail address *long.pam@epa.gov*, at least 2 days in advance of the public hearing (see **DATES**). People interested in attending the public hearing must also call Ms. Long to verify the time, date, and location of the hearing. The public hearing will provide interested parties the opportunity to present data, views, or arguments concerning the proposed action.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas Coda, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Mail Code C539–02, Research Triangle Park, NC 27711, phone number (919) 541–3037 or by e-mail at *coda.tom@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

Entities affected by this rule include Federal agencies and public and private entities that receive approvals or funding from Federal agencies such as airports and ports.

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

1. *Submitting CBI.* Do not submit this information to EPA through *http://www.regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information claimed as CBI; a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions. The agency may ask you to respond to specific questions or organize comments by referencing a CFR part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

C. Where Can I Get a Copy of This Document and Other Related Information?

In addition to being available in the docket, an electronic copy of this proposal will also be available on the worldwide web. Following signature by the EPA Administrator, a copy of this notice will be posted at *http://www.epa.gov/oar/genconform/regs.htm.*

D. How Is This Preamble Organized?

The information presented in this preamble is organized as follows:

II. Background

A. What Is General Conformity and How Does It Affect Air Quality?

The intent of the General Conformity requirement is to prevent the air quality impacts of Federal actions from causing or contributing to a violation of the national ambient air quality standards (NAAQS) or interfering with the purpose of a State implementation plan (SIP), Tribal implementation plan (TIP) or Federal implementation plan (FIP).

In the CAA, Congress recognized that actions taken by Federal agencies could affect State, Tribe, and local agencies' ability to attain and maintain the NAAQS. Congress added section 176(c) (42 U.S.C. 7506) to the CAA to ensure Federal agencies proposed actions conform to the applicable SIP, TIP or FIP for attaining and maintaining the NAAQS. That section requires Federal entities to find that the emissions from the Federal action will conform with the purposes of the SIP, TIP or FIP or not otherwise interfere with the State's or Tribe's ability to attain and maintain the NAAQS.

The CAA Amendments of 1990 clarified and strengthened the provisions in section 176(c). Because certain provisions of section 176(c) apply only to highway and mass transit funding and approvals actions, EPA published two set of regulations to implement section 176(c). The Transportation Conformity Regulations, first published on November 24, 1993 (58 FR 62188) and recently revised on July 1, 2004 at 69 FR 40004, May 6, 2005 at 70 FR 24280 and March 10, 2006 at 71 FR 12468, address Federal actions related to highway and mass transit funding and approval actions. The General Conformity Regulations,

published on November 30, 1993 (58 FR 63214), cover all other Federal actions.

B. Why Is EPA Proposing Revisions to These Regulations at This Time?

The EPA recently revised the General Conformity Regulations to include de minimis emission levels for particulate matter with an aerodynamic diameter equal to or less than 2.5 microns ($PM_{2.5}$) and its precursors (July 17, 2006 at 71 FR 40420). Otherwise, EPA has not revised the General Conformity Regulations since they were promulgated in 1993. Since that time, EPA and other Federal agencies have gained experience with the implementation of the existing regulations and have identified several issues with their implementation. Therefore, EPA initiated a process to review, revise and streamline the regulations. In addition, EPA has recently issued regulations to implement the revised ozone standard (69 FR 23951, April 30, 2004 and 70 FR 71612, November 29, 2005) and regulations to implement the new particulate matter standard (72 FR 20586, April 25, 2007). These regulations could affect the timing and process for general conformity determinations. State and local air quality agencies are in the process of developing revised SIPs to attain the new standards and knowledge of the proposed revisions to the General Conformity Regulations may be helpful to the State, Tribal, and local agencies as well as the Federal agencies in developing and commenting on the proposed SIP revisions.

III. How Are the Existing Regulations Implemented?

The existing regulations do not specifically identify the roles of Indian Tribes nor the applicability of the regulations to TIPs.

Federal agencies and other parties involved in the conformity process have found that in implementing the existing General Conformity Regulations their process falls in to three phases: (A) Applicability analysis, (B) Conformity determination, and (C) Review process. Besides ensuring that the Federal actions are in conformance with the SIP, the regulations encourage consultation between the Federal agency and the State or local air pollution control agencies before and during the environmental review process.

A. Applicability Analysis

The National Highway System Designation Act of 1995, (Pub. L. 104–59) added section 176(c)(5) to the CAA to limit applicability of the conformity programs to areas designated as nonattainment under section 107 of the CAA and maintenance areas under section 175A of the CAA only. Therefore, only actions in designated nonattainment and maintenance areas are subject to the regulation. In addition, the regulations recognize that the vast majority of Federal actions do not result in significant increase in emissions and, therefore, include a number of exemptions such as de minimis emission levels based on the type and severity of the nonattainment problem.

In the applicability analysis phase, the Federal agency determines:

1. Whether the action will occur in a nonattainment or maintenance area;
2. Whether one of the specific exemptions apply to the action;
3. Whether the Federal agency has included the action on its list of ''presumed to conform'' actions; or
4. Whether the total direct and indirect emissions are below or above the de minimis levels.

Under the current regulations, the applicability analysis phase requires Federal agencies to determine if the action is considered ''regionally significant,'' i.e., equal to or greater than ten percent of the area's emission inventory for the pollutant. If the action is regionally significant, Federal agencies must conduct a conformity determination for the action even though the emissions caused by the action are below the de minimis levels, the action is presumed to conform or the action is otherwise exempt.

B. Conformity Determination

When the applicability analysis shows that the action must undergo a conformity determination, Federal agencies must first show that the action will meet all SIP control requirements such as reasonably available control measures, and the emissions from the action will not interfere with the timely attainment of the standard, the maintenance of the standard or the area's ability to achieve an interim emission reduction milestone. Federal agencies then must demonstrate conformity by meeting one or more of the methods specified in the regulation for determining conformity:

1. Demonstrating that the total direct and indirect emissions are specifically identified and accounted for in the applicable SIP,
2. Obtaining a written statement from the State or local agency responsible for the SIP documenting that the total direct and indirect emissions from the action along with all other emissions in the area will not exceed the SIP emission budget,
3. Obtaining a written commitment from the State to revise the SIP to include the emissions from the action,
4. Obtaining a statement from the metropolitan planning organization (MPO) for the area documenting that any on-road motor vehicle emissions are included in the current regional emission analysis for the area's transportation plan or transportation improvement program,
5. Fully offset the total direct and indirect emissions by reducing emissions of the same pollutant or precursor in the same nonattainment or maintenance area, or
6. Conducting air quality modeling that demonstrates that the emissions will not cause or contribute to new violations of the standards, or increase the frequency or severity of any existing violations of the standards. Air quality modeling cannot be used to demonstrate conformity for emissions of ozone precursors or nitrogen dioxide (NO_2). As stated in EPA's proposal of the current regulations (58 FR 13845), due to the complex interaction of the ozone precursors, the regional nature of the ozone and NO_2 problems, and limitations of current air quality models, it is not generally appropriate to use an air quality model to determine the impact on ozone or NO_2 concentrations from a single emission source or a single Federal action.

C. Review Process

As public bodies, Federal agencies must make their conformity determinations through a public process. The General Conformity Regulations require Federal agencies to provide notice of the draft determination to the applicable EPA Regional Office, the State and local air quality agencies, the local MPO and, where applicable, the Federal land manager(s). In addition, the regulations require Federal agencies to provide at least a 30-day comment period on the draft determination and make the final determination public. State agencies and the public can appeal the final determination in the U.S. Courts system. Failure by a Federal agency to follow the technical and procedural requirements can result in an adverse court decision.

IV. Summary of the Proposed Revisions to the General Conformity Regulations

A. Categories of Proposed Revisions to the General Conformity Regulations

In accordance with the requirements of section 176(c)(4)(C) of the CAA, when EPA promulgated General Conformity Regulations in 1993 it also promulgated

regulations at 40 CFR part 51, subpart W (sections 850–860) which required States to adopt and submit SIPs for General Conformity. In August 2005, Congress passed the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) which eliminated the requirement for States to adopt and submit General Conformity SIPs. Therefore, EPA is proposing to revise its regulations to make the adoption and submittal of the General Conformity SIP or TIP optional for the State or Tribe.

Because 40 CFR part 51, subpart W (§§ 51.850–51.860) essentially duplicates the regulations promulgated at 40 CFR part 93, subpart B (§§ 93.150–93.160), EPA is proposing to delete all of subpart W except for § 51.851. In the proposed revision to § 51.851, EPA would require that if a State or Tribe submits a General Conformity SIP or TIP that it be consistent with the requirements of 40 CFR part 93, subpart B. In addition, EPA is proposing to add a provision to 40 CFR 51.851 to allow the States and Tribes more flexibility to streamline the conformity process conducted under their SIP or TIP.

In 40 CFR part 93, subpart B, EPA is proposing to make only specific revisions to the regulations which (1) clarify the process, (2) delete outdated or unnecessary requirements, (3) authorize innovative and flexible approaches, (4) streamline the process and reduce the paperwork burden, (5) provide transition tools for implementing new standards, (6) incorporate revisions requested by other agencies, and (7) provide a better explanation of regulations and policies.

Several of the proposed revisions encourage both the Federal agencies and the States or Tribes to take actions in advance of the project environmental review. Such advance action should speed the review process for the individual projects and reduce the delays for the project without impairing the environmental review. The EPA invites comment on this approach.

B. What Innovative and Flexible Approaches Are Being Proposed?

1. The EPA is proposing to add a new section (40 CFR 93.161) to allow for a facility-wide emission budget approach. Under this voluntary arrangement, Federal agencies, in anticipation of future major actions, could negotiate a facility-wide emission budget with the appropriate State, Tribal, or local air quality agency responsible for the SIP or TIP. The State, Tribal, or local agency would incorporate the facility-wide emission budget into the applicable SIP or TIP and submit it to EPA for approval. Once approved, minor actions under the control of the facility where an applicability analysis results in a determination that the emissions are below a de minimis threshold could proceed with no conformity determination. Actions at the facility where the emissions from an action under the facility's control equaled or exceeded an applicable de minimis threshold could demonstrate that the emissions from the proposed action along with all other emissions at the facility are within the EPA approved facility-wide emission budget. By using the facility-wide emission test, the action would be presumed to conform and a conformity determination would not be necessary. Alternatively, a facility with an approved facility-wide emission budget could demonstrate conformity by the conventional methods afforded in the General Conformity regulations.

2. The EPA is proposing a new section (40 CFR 93.165) to explicitly incorporate the use of early emission reduction credits into the regulations. The proposal reflects the provisions of the Airport Early Emission Reduction (AERC) guidance developed in consultation with the Federal Aviation Administration (FAA) and provides a similar framework for other Federal agencies.

3. The EPA is proposing a new section (40 CFR 93.164) to allow, with certain limitations, the emission of one precursor of a criteria pollutant to be mitigated or offset by the reduction in the emissions of another precursor of that pollutant.

4. The EPA is proposing a new section (40 CFR 93.163) to allow alternate schedules for mitigating emissions increases. The mitigation timing approach could allow some flexibility for Federal agencies and States or Tribes to negotiate a program for some emissions mitigation to occur in future years. States or Tribes could consider this approach to accommodate short-term increases in emissions if there is a substantial long-term reduction in emissions.

C. What Streamlining and Burden Reduction Measures Are Being Proposed?

1. The EPA is proposing to delete the provision in the existing regulation which required Federal agencies to conduct a conformity determination for regionally significant actions even though the total direct and indirect emissions from the action were below the de minimis emission levels.

2. The EPA is proposing additional categories of actions that Federal agencies can include in their ''presume to conform'' lists and EPA is also proposing to permit States or Tribes to establish in their General Conformity SIPs or TIPs ''presume to conform'' lists for actions within their State or Tribal area.

3. The EPA is proposing to exempt the emissions from stationary sources permitted under the minor source new source review (NSR) programs as EPA's existing General Conformity regulation already provides for exemptions for emissions from major NSR sources.

D. What Revisions Provide Tools and Guidance for Transitioning to New or Revised NAAQS?

1. The EPA is proposing to revise the language in the regulation concerning conformity evaluations for existing action during a transition to new nonattainment designations or to the revised regulations.

2. The EPA is proposing requirements for the implementation of the grace period for newly designated nonattainment areas.

3. The EPA is proposing alternate methods to demonstrate conformity for time periods beyond those covered by the SIP or TIP.

4. The EPA is proposing to allow States or Tribes to include an enforceable commitment in the SIP or TIP to address future emissions from a Federal action.

E. What Revisions Are Being Proposed at the Request of Other Agencies?

1. Based on EPA's Interim Air Quality Policy on Wildland and Prescribed Fires, which was developed in consultation with Federal land managers, EPA is taking comment on two possible approaches: (1) To include a presumption of conformity for prescribed fire use that are conducted in compliance with certified smoke management plans (SMPs), and (2) for prescribed fires conducted using State approved basic smoke management practices.

2. The EPA is proposing to allow Federal agencies to obtain emission offsets for general conformity purposes from another nearby nonattainment or maintenance area of equal or higher nonattainment classification provided the emissions from that area contribute to violation of the NAAQS in the area where the Federal action is located or in the case of maintenance areas, the emissions from the nearby area contributed in the past to the violations in the area where the Federal action is occurring.

3. At the request of several Federal agencies, EPA is proposing to clarify the

language in the regulation that states that nothing in these regulations requires the release of materials and other information where disclosure is restricted by law. Also, EPA is proposing to include a similar clarification for CBI.

4. Several Federal agencies and other parties involved in the process suggested that EPA should consider exempting construction activity emissions from the conformity regulations requirements. Although the existing General Conformity Regulations do not specifically mention construction emissions, they implicitly require Federal agencies to include emissions from construction activities in the conformity evaluation.

The EPA understands the concerns of the other Federal agencies and in the discussion about the revision to the definition of ''caused by,'' has identified a number of ways that Federal agencies can work with the State, Tribe, and local agencies to ease the burden of reviewing construction emissions. In addition, EPA is seeking comment on the possibility of exempting short-term construction projects from the General Conformity Regulations. One option would be to define short-term emissions as lasting no more than 2 years. Another option would be to define short-term emissions consistent with how they are defined for Transportation Conformity. Currently under the Transportation Conformity regulations, construction emissions are not required to be included for construction that lasts no longer than 5 years at individual sites.

5. The FAA requested clarification of language in the General Conformity preamble (58 FR 63229) that stated ''the EPA believes that the following actions are illustrative of de minimis actions: * * * Air traffic control activities and adopting approach, departure and enroute procedures for air operations.''

The FAA conducted a study of ground level concentrations caused by elevated aircraft emissions released above ground level (AGL) using EPA-approved models and conservative assumptions.[1] The study concluded that aircraft operations at or above 3,000 feet AGL have a very small effect on ground level concentrations and could not directly result in a violation of the NAAQS in a local area. Consequently, this study validates the EPA's initial preamble language for air traffic control activities and adopting approach, departure and enroute procedures for aircraft operations above 3,000 feet AGL are clearly de minimis. Therefore, the list of exemptions under 40 CFR 93.153(c)(2)(xxii) has be updated in this proposal to reflect this conclusion.

F. What Are Some of the Clarifications to the Existing Regulations That Are Being Proposed?

1. The EPA is proposing to clarify that if the action would result in emissions originating in more than one nonattainment or maintenance area, the emissions in each area would be treated as if they result from a separate action.

2. The EPA is proposing to establish procedures to follow in extending the 6-month conformity exemption for actions taken in response to an emergency.

3. The EPA is proposing to revise the procedures that can be used to demonstrate conformity with the applicable SIP.

4. The EPA is proposing to revise the review process to require Federal agencies to notify Tribal governments in the nonattainment or maintenance area.

5. The EPA is proposing to clarify the definition of several terms used in the regulations.

6. The EPA is proposing to include specific language to identify the role of Indian Tribes and TIPs.

VI. Detailed Discussion of the Proposed Revisions

A. 40 CFR Part 51, Subpart W—Determining Conformity of General Federal Actions to State or Federal Implementation Plans

Section 176(c)(4) of the CAA specifies that EPA conformity regulations include a requirement for a State to adopt and submit to EPA for approval, a SIP to implement the provisions of section 176(c). Section 6011 of SAFETEA-LU revised the conformity requirements in section 176(c) of the CAA. Although most of the revisions affected the Transportation Conformity requirements, section 6011(f) and (g) also revised the General Conformity requirements. Specifically, section 6011(f) revised section 176(c)(4)(A) of the CAA by including a requirement that the regulations must be periodically updated and by deleting the requirement for the States to adopt and submit a General Conformity SIP. Section 6011(g) requires EPA to revise its conformity regulations by August 2007 to meet the revised requirements. The EPA does not interpret this provision as prohibiting States or Tribes from voluntarily adopting and submitting General Conformity implementation plans. Therefore, EPA is proposing to revise 40 CFR 51.851 to make the adoption and submittal of the General Conformity SIP optional for the State and eligible federally-recognized Tribal governments.

In promulgating the General Conformity Regulations in 1993, EPA published two sets of regulations: 40 CFR Part 51, subpart W (§§ 93.850 through 93.869) directed States to adopt and submit General Conformity SIPs to EPA for approval and 40 CFR Part 93 subpart B (§§ 93.150 through 93.160) provided the requirements for Federal agencies to follow in conducting their conformity evaluations before EPA approved the General Conformity SIP for the area. Section 40 CFR 51.851 directed States to adopt SIPs meeting the requirements of 40 CFR part 51, subpart W. The other sections in subpart W repeat the requirements found in 40 CFR part 93, subpart B. The EPA is proposing to delete 40 CFR 51.850, and 51.852 through 860 since those sections merely repeat the language in 40 CFR 93.150 and 93.152 through 160 and include a requirement in 40 CFR 51.851(a) that the General Conformity SIP or TIP must meet the requirements in 40 CFR part 93, subpart B.

In addition, EPA is proposing several revisions to § 51.851.

1. The EPA is proposing to divide paragraph (b) of 40 CFR 51.851 into four paragraphs—(b), (c), (d), and (e):

a. Paragraph (b) stating that until EPA approves the SIP revision, Federal agencies must meet the requirements of 40 CFR part 93, subpart B.

b. Paragraph (c) stating that after EPA approves a SIP or TIP meeting the requirement of 40 CFR part 93, subpart B, or portion thereof, the Federal agencies must meet the requirements of the SIP or TIP and portions of 40 CFR part 93, subpart B if not included in the approved SIP or TIP. In addition, the proposed paragraph (c) states that any conformity requirements in an existing implementation plan remain enforceable until the state submits a revision to its applicable implementation plan to specifically remove the conformity requirements and that revision is approved by EPA. Since there is no longer a requirement for State implementation plans to include conformity requirements and the applicable statutes do not grant EPA additional authorities to condition approval of a State's request to remove the general conformity requirements from an implementation plan, it is EPA's intent, once requested by a State, to expeditiously review and approve implementation plan revisions that seek

[1] Wayson, Roger, and Fleming, Gregg, ''Consideration of Air Quality Impacts by Airplane Operations at or Above 3000 feet AGL,'' Volpe National Transportations Systems Center and FAA Office of Environment & Energy, FAA–AEE–00–01–DTS–34, September 2000. *http://www.faa.gov/regulations_policies/policy_guidance/envir_policy/.*

to remove general conformity requirements.

c. Paragraph (d) contains the requirement that the SIP or TIP can be no less stringent than 40 CFR part 93, subpart B.

d. Paragraph (e) contains the requirement that the SIP or TIP can be no more stringent that the requirement in 40 CFR part 93, subpart B unless the provisions apply to non-Federal as well as Federal entities.

2. The EPA is proposing to add a new provision in § 51.851, which allows States or Tribes to include in their SIP or TIP a list of actions that are presumed to conform.

Since 40 CFR 51.850, 852 through 860 merely repeats the language in 40 CFR 93.150, 93.152 through 93.160, deleting §§ 51.850, 852 though 860 and requiring the SIP or TIP to meet the requirements in part 93 subpart B will not change the SIP or TIP requirements. However, deleting the sections will reduce the confusion on the requirements in the regulations by removing the duplicative language. In addition, EPA can revise the general conformity requirements by revising only one set of regulations. Although States or Tribes would have to revise any SIPs or TIPs which are in place when EPA revises part 93 subpart B regulations, this would not be an additional burden since they would have to revise their SIP or TIP if EPA revised the part 51, subpart W regulations.

By dividing paragraph (b) into four smaller paragraphs, EPA is attempting to simplify the language to make the requirements more understandable. The EPA did not change the requirements in paragraph (b) of the existing regulations.

The proposal to allow the States or Tribes the flexibility to adopt as part of the General Conformity SIP or TIP a list of actions that are presumed to conform resulted from the desire of some States to reduce the need to spend resources on reviewing actions which are known to conform. Although States and Tribes are not obligated to adopt a ''presume to conform'' list as part of their General Conformity SIP, if they do adopt a list they must include a list in their SIP or TIP.

B. 40 CFR 93.150—Prohibition

Section 93.150 establishes the general prohibition against Federal agencies taking actions that do not conform with the SIP and requirements for the Federal agencies to make the conformity determinations following the procedures of subpart B of part 93. The EPA is proposing to make two revisions to § 93.150. First, EPA is proposing to delete the language in paragraph (c) of that section and reserves that paragraph. Second, EPA is proposing to add a new paragraph (e) to the section to state that if an action occurs in more that one nonattainment area that each area must be evaluated separately.

In paragraph (c) of the existing regulations, EPA identified categories of actions that were not subject to the regulations based on environmental review for the action that was either completed or underway at the time the regulations were promulgated. The paragraph was based on the environmental reviews (either the conformity determination or the National Environmental Policy Act (NEPA) analysis) being completed in early 1994. Therefore, paragraph (c) is outdated and is not necessary at this time.

In the new paragraph (e) in § 93.150, EPA is specifically proposing that conformity determinations must be made for each nonattainment or maintenance area. The emissions from most Federal actions or projects occur within one nonattainment or maintenance area, however, some actions or projects could extend across area boundaries, causing emissions in more than one area. A facility (for example, a national park, military installation or an airport) could be located in multiple counties or even in multiple States. Emissions from an action at such facilities could extend across the nonattainment or maintenance area boundaries. Some Federal actions, such as rulemaking or rail merger approvals, could result in emissions in non-contiguous areas, or even nationwide, affecting multiple nonattainment or maintenance areas. The existing regulations do not specify how actions or projects affecting multiple areas should be addressed. Therefore, EPA is proposing that an action's emissions in each area would be treated as if they result from separate actions. This would result in the need for two or more separate applicability analysis and conformity determinations where general conformity is applicable. The number of conformity determinations would correlate to the number of nonattainment or maintenance areas where the action results in direct or indirect emissions originating in those areas. The analysis should provide a comprehensive emissions inventory that includes a clear and separate accounting or division of emissions by nonattainment or maintenance area. For example, an action may occur in two nonattainment areas, each with a 50 ton/year de minimis threshold. If the action would result in total direct and indirect emissions of 55 tons/year, but 30 tons/year are in one area and 25 tons/year the other area, the action would not require a conformity determination since it would be considered de minimis in both areas. If the action would result in total direct and indirect emissions of 85 tons/year, but 60 tons/year are in one area and 25 tons/year the other area, the action would require a conformity determination in the areas with emission of 60 tons/year but the area with 25 tons/year would not need a conformity determination since that portion of the action would be considered de minimis in that areas. EPA is proposing emissions from actions be treated separately for each nonattainment and maintenance area for the following reasons:

1. Federal agencies demonstrate conformity to a SIP, TIP or FIP that are developed on an area-specific basis and SIPs requirements may vary from one area to another.

2. The General Conformity Regulations exemptions are also area-specific. For example, the de minimis levels are based upon the type and classification of the nonattainment or maintenance area.

3. Section 176(c)(5) of the CAA limits the applicability of the conformity regulations to actions in nonattainment and maintenance areas. Therefore, actions, which affect broad regions encompassing several nonattainment, maintenance or attainment areas, must be evaluated based only on the portions of the emissions in the nonattainment and maintenance areas.

C. 40 CFR 93.151—State Implementation Plan (SIP) Revision

The main purpose of § 93.151 is to specify that the regulations in part 93 subpart B apply to Federal actions unless the State or Tribe adopts and EPA approves a General Conformity SIP or TIP for the area. The EPA is not proposing to change the purpose of the section, but is proposing to revise the section to clarify its wording. The existing regulations included statements about the stringency of the SIP compared to the requirements in subpart B of part 93. The EPA is proposing to delete those statements because they duplicate statements in 40 CFR 51.851 which specifies the requirements for the SIP and TIP.

D. 40 CFR 93.152—Definitions

Section 93.152 provides the definition of terms used in the regulations. The EPA is proposing to revise twelve of the definitions, add eleven new terms and delete one term as follows:

Applicable implementation plan or applicable SIP. The EPA is proposing two minor revisions to the definition. First, EPA is proposing to correct the citation for the SIP approval and second, EPA is proposing to clarify the definition by adding a parenthetical phrase to clarify that the term includes an approved Tribal implementation plan (TIP). The requirements for eligible Tribes are found in 40 CFR 49.6.

Applicability analysis. The EPA is proposing to add this new term to describe the process of determining if the Federal agency must conduct a conformity determination for its action.

Areawide air quality modeling analysis. The EPA is proposing to clarify this definition by making a minor wording change and by including photochemical grid model in the definition. Also, EPA is proposing to add an example of the type of models that could be used for the areawide air quality modeling analysis.

Caused by. The basic test established by the existing definition of ''caused by'' is that the emissions would not have occurred in the absence of the Federal action (Title I, Section 176). Since the general conformity regulations were promulgated in 1993, EPA has interpreted the regulations to require a Federal agency to include construction emissions in its conformity analysis. The EPA believes that emissions from construction activities initiated by, approved or funded by a Federal agency meets this test and should be included in the conformity evaluation.

Some Federal agencies have suggested that since construction emissions are generally excluded from consideration under the transportation conformity and EPA's NSR programs, they should not be included in the general conformity evaluation either. Furthermore, some agencies pointed out, the emissions from construction activities are not always explicitly included in some SIPs, so it is difficult to demonstrate conformity for the emissions and should not factor into the agencies' demonstrations of conformity to those SIPs. Finally, it has been suggested that construction emissions are temporary and not long-term contributors to the NAAQS violations and, therefore, may not be truly reflective of a completed project's contribution to a nonattainment or maintenance area's emissions budget.

In EPA's Transportation Conformity program (40 CFR 51.390 and part 93), construction emissions are generally not included in the conformity evaluation. The Transportation Conformity Regulations (40 CFR 93.122(e)) do require the consideration of PM_{10} from construction-related fugitive dust only in PM_{10} nonattainment and maintenance areas where the SIP identifies those emissions as a contributor to the nonattainment problem. In such a case, the regional PM_{10} emissions analysis must consider the construction-related fugitive PM_{10} emissions and account for them in the determination. The Transportation Conformity Regulations (40 CFR 93.122(f)) do not require the consideration of such regional $PM_{2.5}$ emissions unless the area's SIP identifies construction-related fugitive $PM_{2.5}$ as a significant contributor to the area's $PM_{2.5}$ problem. In addition, the Transportation Conformity Regulations (40 CFR 93.123(c)(5)) do not require construction-related carbon monoxide (CO), PM_{10}, and $PM_{2.5}$ emissions to be considered in project-level hot-spot analyses (i.e., estimations of future localized CO, PM_{10} , and $PM_{2.5}$ concentrations) unless those emissions will last for more than 5 years at an individual site. In the NSR program, only operational emissions from the source are required to be evaluated for the permit and construction emissions are not generally included.

Since the General Conformity Regulations cover a wide variety of actions and projects, the regulations were drafted to be general enough to cover the differing circumstances. While a majority of Federal actions and projects may not involve long-term construction activities, some do. For example, increasing the depth of the navigable channel in New York Harbor is expected to take 9 to 10 years to complete. In addition, the States and local agencies can reasonably anticipate and plan for construction emissions from highway and mass transit activities based upon regional transportation plans and historic activities. However, the States, Tribes and local agencies may not be aware of other Federal activities requiring construction or may not be easily able to estimate the emissions from the construction activities. Therefore, the SIPs or TIPs may not adequately account for the emissions from those activities.

In drafting and adopting a SIP and TIP, States, Tribes and local agencies generally allow for some emissions from construction activities either in a construction emission category or as part of another category, such as off-road mobile or area sources. The emission estimates for these categories are usually based upon historic activity levels or on projected future activity levels. Therefore, if at the time the SIP or TIP is being developed, the State, Tribe or local agency knows about the future actions or projects at the facility, the construction emissions can be incorporated into the SIP or TIP.

For the above reasons, EPA believes that emissions from construction activities could in some circumstances interfere with the SIP or TIP and is therefore not proposing to explicitly exclude all construction emissions from the definition of emissions ''caused by'' the Federal action. However, this proposal provides several options to allow Federal agencies and the States or Tribes to list construction emissions as ''presume to conform'' or to exempt the emissions.

1. Once included in a SIP-approved facility-wide emission budget, the construction emissions could be identified as exempt from the general conformity requirements.

2. Under the new provisions for developing a list of ''presume to conform'' actions, Federal agencies, States, or Tribes can demonstrate that emissions from certain types of construction activities at a facility would conform to the SIP.

3. Some States issue permits for construction emissions. These permits are essentially minor source NSR permits and emissions covered by them would be exempt.

Also, EPA is proposing to clarify that conformity is based on annual emissions. Therefore, Federal agencies should estimate construction emissions on an annual basis and would only have to demonstrate conformity of construction emissions during the years when the emissions occurred.

Currently under the Transportation Conformity regulations, project level construction emissions are not required to be included for construction that lasts no longer than 5 years at individual sites. EPA also recognizes that construction activities are only temporary and for some projects occur for short periods of time. Since these temporary construction activities may last between 1 to 5 years, the EPA solicits comments on whether to exempt emissions from short-term construction activities as well as the appropriate definition of a short-term project.

Confidential business information (CBI). In §§ 93.155 and 93.156, EPA is also proposing to specify how CBI used in the conformity determination is to be handled. To support those revisions, EPA is also proposing to add a definition of CBI. The definition is based upon that used to define CBI under the Freedom of Information Act.

Conformity determination. The EPA is proposing to add a new term to describe the decision that a Federal agency

official makes in determining that the action will conform with the SIP or TIP.

Conformity evaluation. The EPA is proposing to add a new definition to describe the entire conformity process from the applicability analysis through the conformity determination, if necessary.

Continuing program responsibility. In the existing regulations, EPA defined the term ''emissions that a Federal agency has a continuing program responsibility for.'' That term was awkward and confusing. The EPA is proposing to shorten the term to the ''continuing program responsibility'' and to reformat the definition to make it clearer.

Continuous program to implement. This term was used in the existing regulations but was not defined. Therefore, EPA is proposing to add a definition for this term. The definition would require the Federal agency to have a program to implement the action. That program can include a number of steps such as preparation of final design plans and can also allow for seasonal shutdowns. The definition includes a requirement that the action does not stop for more than 18 months unless such a delay is included in the original plans for the action.

Direct emissions. The EPA is proposing to revise the definition of direct emissions to include a requirement that the emissions must be reasonably foreseeable. This requirement was unintentionally left out of the definition when it was promulgated in 1993.

Emission Inventory. This term is used but not defined in the existing regulations. Therefore, EPA is proposing to add this term to the list.

EPA. Since some States have Environmental Protection Agencies, EPA is proposing to add ''U.S.'' in the definition to clarify that the regulations refer to the U.S. Environmental Protection Agency.

Indirect emissions. Some questions have arisen concerning whether emissions generated outside a nonattainment area should be accounted for when making a General Conformity determination for a Federal action. EPA is proposing to revise the definition for indirect emissions to clarify that only indirect emissions originating in a nonattainment or maintenance area need to be analyzed for conformity with the applicable SIP. Previous guidance regarding emissions generated outside of nonattainment areas was issued by EPA in 1994, prior to the 1995 statutory amendments to the CAA's conformity provisions which made conformity applicable only with respect to nonattainment and maintenance areas (42 U.S.C. 7506(c)(5)) and which eliminated any need for EPA to issue attainment area conformity regulations. The new definition clarifies that EPA interprets this statutory amendment to mean that any indirect emissions originating in an attainment or unclassifiable area do not need to be analyzed for general conformity purposes.

''In addition to addressing emissions generated outside of nonattainment areas, EPA proposes to revise the definition of ''indirect emissions'' to add the condition that emissions must be of the type that ''the agency can practically control'' and for which ''the agency has continuing program responsibility.'' The addition of this condition clarifies EPA's long standing position that Congress did not intend for conformity to apply to ''cases where, although licensing or approving action is a required initial step for a subsequent activity that causes emissions, the agency has no control over that subsequent activity, either because there is no continuing program responsibility or ability to practically control.'' 58 FR 63,214, 63,221 (Nov. 30, 1993). The Supreme Court noted this long-held position in ruling that the Department of Transportation was not required to undertake a conformity review for its so-called ''Mexican trucks'' rule. *DOT* v. *Public Citizen, 541 U.S. 752 773 (2004).* Specifically, the Supreme Court held that DOT's rule concerning safety regulations for Mexican motor carriers operating within the United States interior did not trigger conformity even though DOT approval was required for Mexican trucks to cross the border into the United States. The Court indicated, among other reasons, that DOT ''could not refuse to register Mexican motor carriers simply on the ground that their trucks would pollute excessively. (DOT) cannot determine whether registered carriers actually will bring trucks into the United States, cannot control the routes that carriers take, and cannot determine what the trucks will emit. Any reduction in emissions that would occur at the hands of (DOT) would be mere happenstance. It cannot be said that (DOT) 'practicably control[s]' or 'will maintain control' over the vehicle emissions from the Mexican trucks, and it follows that the emissions from the Mexican trucks are not 'indirect emissions.' '' Id. At 772–73.

Local air quality modeling analysis. The EPA is proposing to revise the definition to include an example of the type of models that are used in the local air quality modeling analysis.

Maintenance area. The EPA is proposing to make a minor wording change to clarify the definition by citing the regulations and the section of the CAA used to identify maintenance areas.

Metropolitan Planning Organization. The EPA is proposing to revise its regulatory definition to make it more consistent with the statutory definition in SAFETEA-LU, which was signed into law on August 10, 2005.

Mitigation measure. The existing regulations used the term ''mitigation measure'' and even had a section specifying the requirements for a mitigation measure, however the regulations did not define the term. The EPA is proposing to define a mitigation measure as a method of reducing emissions of the pollutant at the location of the action. This definition would distinguish a mitigation measure from an offset.

National ambient air quality standards. In 1997, EPA promulgated new NAAQS for both ozone and for fine particles. The definition in the existing regulations is broad enough to cover the new ozone standard. But, the definition did not cover the fine particle standard known as $PM_{2.5}$. Therefore, EPA is revising the definition of NAAQS to include $PM_{2.5}$.

Precursors of criteria pollutants. The existing regulations define precursors for both ozone and PM_{10}. Since the $PM_{2.5}$ standard was promulgated after the General Conformity Regulations, the original regulations did not include the precursors for $PM_{2.5}$. Therefore, EPA recently amended the regulation (July 17, 2006 at 71 FR 40420) to add $PM_{2.5}$ precursors, consistent with the proposed implementation program for the $PM_{2.5}$ standard (70 FR 65984).

1. Sulfur dioxide is a regulated pollutant in all $PM_{2.5}$ nonattainment and maintenance areas.[2]

2. Nitrogen oxides are a regulated pollutant in all $PM_{2.5}$ nonattainment and maintenance areas unless both the State/Tribe and EPA determine that it is not.

3. Volatile organic compounds (VOC) and ammonia are not regulated

[2] Sulfur dioxide is not required to be addressed in transportation conformity determinations before a SIP is submitted unless either the state air agency or EPA regional office makes a finding that on-road emissions of sulfur dioxide are significant contributors to the area's $PM_{2.5}$ problem. Sulfur dioxide would be addressed after a $PM_{2.5}$ SIP is submitted if the area's SIP contains an adequate or approved sulfur dioxide motor vehicle emissions budget. EPA based its decision on the de minimis amount of on-road missions of sulfur dioxide now and in the future, and on the implementation of low sulfur gasoline beginning in 2004 and low sulfur diesel fuel beginning in 2006. (70 FR 24283).

pollutants in any $PM_{2.5}$ nonattainment or maintenance area unless either the State/Tribe or EPA determines that they are.

Reasonably foreseeable emissions. As discussed above, under ''direct emissions,'' EPA is proposing to qualify the term direct emissions by stating that those emissions must be reasonably foreseeable. Therefore, EPA is proposing to revise the term ''reasonably foreseeable'' to include ''direct emissions.''

Regionally significant action. As discussed in the revisions to 93.153(i) below, EPA is proposing to delete the regionally significant requirement. Therefore, if EPA's proposed revision is promulgated, there is no need to retain this definition.

Restricted information. As discussed in §§ 93.155 and 156 on reporting and public participation, EPA, at the request of the several Federal agencies is proposing to specify how restricted information used in the conformity determination is to be handled. To support those revisions, EPA is also proposing to add a definition of restricted information. The definition is based upon applicable Executive Orders, regulations and statutes pertaining to materials and other information where disclosure is restricted by law.

Take or start the Federal action. The EPA is proposing to add a new term to define the date when an action occurs or starts. This date is important in determining what, if any, conformity requirements apply when an area is designated or re-designated as nonattainment. The EPA is proposing to define this term as the date the decision-maker signs a document such as a grant, permit, license or approval. Otherwise, EPA is proposing to define the term as the date the Federal agency physically starts the action that requires the conformity evaluation.

Tribal implementation plan (TIP). The EPA is proposing to add a definition for Tribal implementation plan to mean plans adopted and submitted by Federally recognized Indian Tribes. Under the Tribal Authority Rule (40 CFR part 49), certain Tribal bodies can adopt and submit implementation plans to attain and maintain the NAAQS set by EPA, but the Tribal bodies do not set their own ambient air standards. The CAA allows tribes to obtain the authority to run CAA programs for the regulation of ''air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction'' [CAA Section 301(d)(2)(B)]. Tribes have authority over all air resources within the exterior boundaries of their reservation (including non-Indian owned fee lands). For off-reservation areas, tribes must demonstrate the basis for jurisdiction. In some cases there may be a SIP and a TIP covering different portions of the same nonattainment area. In such cases emissions from an action that originate in a nonattainment or maintenance area that has both Tribal lands with a TIP and State land requiring a SIP, the emissions would need to be accounted for separately and the applicability and conformity analysis would need to be done separately for the TIP and the SIP. Therefore, EPA is proposing to add this definition to the regulation.

E. 40 CFR 93.153—Applicability Analysis

The EPA is seeking to clarify the process of determining if the General Conformity requirements are applicable to a Federal action. Although EPA is providing clarification on actions that are exempt or presumed to conform in this regulation, nothing in this regulation is intended to interfere with any exemptions established by law.

1. The EPA is proposing to revise the title of the section to include the word ''analysis.'' The EPA believes that adding the word would make the title more descriptive of the section's content.

2. The EPA is proposing to make a minor wording change to paragraph (a) and (b) of § 93.153. Paragraph (a) is revised to clarify the proper citations under which the Transportation Conformity program is authorized. In paragraph (b) EPA is proposing to add the word ''criteria'' before the word ''pollutant'' and ''or precursor'' after the word to clarify the paragraph.

3. The EPA is proposing to revise the table in sub-paragraph (b)(1) to include all nonattainment areas in the Ozone Transport Regions. In 1993, when the General Conformity Regulations were promulgated, all nonattainment areas in the Ozone Transport Region were classified as marginal or above for the 1-hour ozone NAAQS. However, in designating areas for the 8-hour ozone NAAQS, some nonattainment areas were identified as needing to meet only the requirements in subpart 1 of Part D of Title I of the CAA and were not classified. Therefore, EPA is proposing to revise the table in § 93.153(c)(1) to cover the subpart 1 areas by changing the category from ''Marginal and moderate NAA's inside an ozone transport region'' to ''other NAA inside an ozone transport region.''

4. In a separate notice EPA recently revised the tables in paragraphs (b)(1) and (b)(2) by adding the de minimis emission levels for $PM_{2.5}$. In July 1997, EPA promulgated two new NAAQS (62 FR 38652) one for an 8-hour ozone standard and one for fine particulate matter known as $PM_{2.5}$. The new 8-hour and old 1-hour ozone NAAQS address the same pollutant but differ with respect to the averaging time, therefore, EPA retained the existing de minimis emission levels for ozone precursors. Although $PM_{2.5}$ is a subset of PM_{10}, it differs from the rest of PM_{10}. While the majority of ambient PM_{10} results from direct emissions of the pollutant, a significant amount of the ambient $PM_{2.5}$ can result not only from direct emissions but also from transformation of precursor and condensing of gaseous pollutants in the atmosphere. Therefore, EPA in a separate action has added new de minimis emission levels of 100 tons per year for the direct emissions and precursors of $PM_{2.5}$. For completeness, the full table was updated to reflect this change.

5. The EPA is proposing to revise paragraph (d)(1) of § 93.153 to exempt emissions covered by a NSR permit for minor sources. The existing regulations exempt emissions covered by a NSR permit for major sources but not for minor sources. Since the purpose of the conformity program is to ensure that Federal actions do not interfere with the SIP, TIP or FIP, in promulgating the existing regulations EPA recognized that emissions covered by a major source NSR or prevention of significant deterioration (PSD) permit already had been reviewed to ensure that the emissions did not interfere with the SIP. Therefore, the existing regulations exempt the emissions from sources permitted under major source NSR or PSD programs. Since 1993, when the existing regulations were promulgated, States and local agencies have adopted NSR programs for minor sources as required by section 110(a)(2)(C) of the CAA. These NSR programs for minor sources also ensure that emissions from the sources (individually and collectively) will not interfere with the SIP. Therefore, EPA is proposing to revise the regulation to exempt emissions permitted under the EPA-approved NSR programs for minor sources. The EPA believes this approach will reduce the duplicate review of emissions under both minor source NSR and conformity programs and treat all NSR permitted emissions the same way.

Although operating permits issued under title V of the CAA meet some of the same requirements, EPA is not proposing to exempt the emissions covered by those permits. The conformity program is similar to the NSR program in that it evaluates new or

modified sources prior to construction, while the ''title V'' program is basically for operating emissions at existing sources. Therefore, the conformity evaluations for any project that also requires a title V permit should occur before the title V permit is issued. The EPA does note that if for some reason an operating permit covers the emissions, a Federal agency may be able to use the permit to document that the emissions are accounted for in the SIP.

6. The EPA is proposing to delete ''or natural disasters such as hurricanes, earthquakes, etc.,'' and ''or disaster'' from paragraph (d)(2) of § 93.153 because they are unnecessary words. In § 93.152 EPA defines an emergency, therefore the words in § 93.153 describing an ''emergency'' are not necessary and may be confusing since they do not include all types of emergencies.

7. The EPA is proposing to amend paragraph (e)(2) of § 93.153 to provide procedures for reviewing an extension of the exemption from making a conformity determination for actions related to responding to an emergency. A Federal agency, in responding to an emergency event such as a natural disaster, terrorist attack, or military mobilization, may find it impractical to conduct a conformity evaluation on the action before it must take the action. To address this situation, 40 CFR 93.153(d)(2) of the existing regulations provides Federal agencies with a 6-month exemption from the requirement to undertake a conformity analysis for actions taken in response to an emergency. The EPA recognizes that in rare situations it may be impractical, even after 6 months, to conduct a conformity evaluation and is proposing to amend § 93.153(e) to allow the agencies to extend the exemption for another 6 months. This section requires Federal agencies to make a written determination that it is impractical to conduct an evaluation for the action. The existing regulations are not clear about the number of additional extensions permitted nor do the regulations provide any procedures for agencies to follow in deciding on the extension.

EPA believes the only time that the extension of the 6-month exemption has been used was in New York following the terrorist attack of September 11, 2001. In responding to the shutdown of the Port Authority Trans-Hudson line between New Jersey and New York, certain Federal agencies sponsored a ferry service across the Hudson River. The service lasted 2 years until the mass transit service was restored. The Federal agencies continued with a series of 6-month extensions of the General Conformity exemption. The Federal agencies did not know what they had to do to invoke the provision and EPA and the State agencies had to request permission to review the decision. In addition, the public was not given notice of the decision to extend the exemption.

The EPA is not proposing to revise requirements for the initial exemption for actions in response to emergencies. The initial governmental actions which are typically commenced on the order of hours or days in response to emergencies or disasters would still be exempt from the General Conformity requirements for 6 months after the commencement of the response to the emergency or disaster. However, EPA is proposing requirements for Federal agencies that want to extend the exemption beyond the initial 6-month period. First, EPA is proposing to require the Federal agencies to allow EPA and the State 15 days to review and provide comments on the draft written determination to extend the exemption at the beginning of the extension period. Next, EPA is proposing to require Federal agencies to publish a notice within 30 days of making the decision. The notice must be published in a daily general circulation newspaper for the affected area. Finally, EPA is proposing to limit the maximum number of 6-month extensions an agency may declare on their own to three. Except in certain circumstances, the EPA believes an agency should be able to plan for and conduct a conformity evaluation for actions within the time allowed by three 6-month extensions following the initial 6-month exemption (i.e., a total of 2 years). In this regard, EPA acknowledges that there could be a circumstance where an agency's action in response to an emergency may need additional 6-month extensions beyond a 2 year timeframe and this proposal does not limit the number of additional 6-month extensions to the emergency provisions. In these cases, EPA is proposing that if more than three extensions of the emergency provisions are needed, for all subsequent 6-month extensions a Federal agency must provide information to EPA and the State stating: (a) The conditions that gave rise to the emergency exemption continue to exist, and (b) how such conditions effectively prevent the agency from conducting a conformity evaluation.

8. The EPA is proposing to revise paragraphs (f), (g), and (h) of § 93.153 to permit Federal agencies more flexibility in developing their list of actions that are ''presumed to conform'' and provide requirements for the materials that must be included in the documentation and draft list. Specifically, EPA is proposing to: Add a paragraph to (f) to specify when and how more than one ''presumed to conform'' exception may be taken for a Federal action; add a new paragraph (g)(3) to specify that Federal agencies can list actions that are for individual areas or SIPs or TIPs; add a sentence to paragraph (h)(1) to specify the information that must be included in the documentation; and add a sentence to paragraph (h)(2) to allow the Federal agencies to notify EPA headquarters when the presumed to conform actions would have multi-regional or national impacts. In addition, EPA is proposing to revise paragraphs (f) and (h) to include a reference to the new paragraph (g)(3).

In promulgating the existing regulations, EPA identified a number of actions that were ''presumed to conform.'' The regulations also allow Federal agencies to establish their own lists of actions that are ''presumed to conform.'' Under the existing regulations, Federal agencies must justify the inclusion of the actions on their ''presumed to conform'' list by either demonstrating: (1) That the actions will not cause or contribute to an air quality problem or otherwise interfere with the SIP, TIP, or FIP, or (2) that the actions will have emissions below the de minimis levels. The Federal agencies must provide copies of the proposed list to EPA, affected State and local air quality agencies and MPOs. In addition, the agencies must provide at least a 30-day public comment period and document its response to all comments. The notice of the proposed and final list must be published in the **Federal Register**.

Although EPA has worked with one Federal agency on its ''presumed to conform'' list, no Federal agency has published such a list. One issue that has given pause to Federal agency efforts to publish presumed to conform lists is the potential for several presumed to conform exemptions to be used in combination and result in unacceptable cumulative air quality impacts. To address this issue, EPA is proposing in § 93.153(f) that actions specified in an individual Federal agency's presumed to conform list may not be used in combination with one another when the total direct and indirect emissions from the combination of actions would equal or exceed any of the *de minimis* thresholds in the General Conformity regulations. By doing this, EPA believes it will ensure that the intent of presumed to conform actions—namely reducing the analysis burden for actions that have little or no direct or indirect

emissions—is met. For example, a Federal agency may undertake a program or project with several connected actions that must be analyzed under the environmental review requirements of NEPA. Several of those actions may individually be listed on the agency's presumed to conform list because those actions taken by themselves would typically have emissions below de minimis levels. If the agency wishes to determine the entire project or program will not require a conformity determination because it is presumed to conform, it must first determine, using the emissions predicted in establishing the presumed to conform action that the emissions from the combination of actions does not equal or exceed *de minimis* levels. Alternatively, the agency could exclude the emissions from one presumed to conform action from the applicability analysis and would only be required to perform an applicability analysis and if required, a conformity determination on the total direct and indirect emissions of the actions which are not otherwise exempt.

The EPA believes that the use of a ''presumed to conform'' list is an important tool for Federal agencies in reducing the review time for Federal actions while still ensuring air quality goals are met. For example a Federal land management agency could include on its list of presumed to conform actions prescribed fire use where the agency has formally committed to apply a list of basic smoke management practices developed in cooperation with the affected State(s) and/or air pollution control agencies or Tribal government.

EPA believes that an additional option could be added to the regulations to aid Federal agencies in adopting their presumed to conform list. The EPA is proposing to add sub-paragraph (g)(3) to clarify that the presumption could be for one facility or for facilities in a specified area and does not have to be nationally applicable. For example, if the nonattainment area's SIP includes a sector emission budget for construction activities, a facility may be able to demonstrate that construction activities of a certain size or type fits within the SIP's emission budget. With the concurrence of the State or Tribe, the Federal agencies could publish a ''presumed to conform'' list that includes the construction emissions at the specific facility.

9. The EPA is proposing to delete the regionally significant test included in paragraph (i) of § 93.153. The existing regulations in § 93.152 define ''regionally significant'' as ''a Federal action for which the direct and indirect emissions of any pollutant represent 10 percent or more of a nonattainment or maintenance area's emissions inventory.'' 40 CFR 93.153(i) and (j) require conformity determinations for all regionally significant actions, regardless of any exemptions or presumptions of conformity based on other provisions in the regulations.

The ''regionally significant'' action concept was proposed in the 1993 Notice of Proposed Rulemaking (58 FR13836) in order to ''capture those actions that fall below the de minimis emission levels, but have the potential to impact the air quality of the region.'' At that time, EPA requested comments on whether the 10 percent level was appropriate. In the discussion of comments in the preamble to the Final Rule (58 FR 63214), EPA reported that it received comments both in favor of and in opposition to the ''regionally significant'' action concept. While many respondents supported the concept, there was a diversity of opinions regarding whether 10 percent was the most appropriate level. However, EPA reported that no documentation was provided to support a different level. Some respondents felt that the de minimis cut offs would suffice. The EPA decided to retain both the concept and 10 percent level in the final rule.

For a regionally significant action, the Federal agency must conduct a full conformity determination even if the action would cause total direct and indirect emissions below the de minimis levels. In over 12 years since promulgation of the existing regulations, no action has been determined to be regionally significant. The main reason that actions with emissions below de minimis levels are not regionally significant is that the emission inventory for almost all nonattainment and maintenance areas greatly exceeds ten times the de minimis emission levels. Review of the 1999 emission inventory shows that only six (one ozone, two lead and three sulfur dioxide) of over 200 nonattainment areas had emission inventories less than ten times the de minimis levels.(See Evaluation of Potential Regionally Significant Areas Under the General Conformity Regulations, Science Applications International Corporation, March 2005, Docket Number OAR–2004–0491). In other words, except for those six areas, an action with emissions below de minimis levels would never be considered regionally significant.

Federal agencies have expressed concern that, in many cases, demonstrating that a project is not regionally significant is difficult and time consuming. First, the future total emission inventory for an area may not be readily available since the SIP may not cover the time period when the emissions will occur. In addition, most national emission inventories are published 2 to 3 years after the ''inventory'' year, so if a Federal agency is comparing the action's emissions against the most recent inventory they may be looking at an inventory that is 3 to 5 years old.

The EPA is proposing to eliminate the provision. The EPA believes that since Federal agencies have expended resources to demonstrate that actions are not regionally significant and the existing provision has not been triggered, eliminating the provision would streamline the conformity regulations and have little or no environmental impact.

10. The EPA is proposing to replace paragraph (i) of § 93.153 with a new paragraph to identify three additional groups of actions that are presumed to conform. First, EPA is proposing to allow installations with a facility-wide emission budget to presume that an action at the installation will conform provided that the emissions from that action along with all other emissions from the facility will not exceed the budget. A more detailed discussion of the facility-wide emission budget concept is found in § 93.161.

Second, EPA is taking comment on allowing Federal agencies to presume that the emissions from prescribed burns will conform provided the burning is conducted under a State certified approved SMP. EPA is also asking for comments on the approach of allowing Federal agencies to presume that the emissions from prescribed burns conducted using State approved basic smoke management practices in a nonattainment or maintenance area conform with a SIP.

In May 1998, EPA worked with States and other Federal agencies to develop and publish an interim policy on prescribed fires on wildlands. (See Interim Air Quality Policy on Wildland and Prescribed Fires, U.S.EPA, May 1998). To comply with the recommendations in the interim policy, state air regulators and land managers should develop a certified SMP which promotes regional coordination, and may include real-time air quality monitoring. A State SMP establishes a basic framework of procedures and requirements for managing smoke from a prescribed fire managed for resource benefits. A SMP is typically developed by a State or Tribe with cooperation and participation by wildland managers, both public and private, and the general public. The SMPs establish procedures

and requirements for minimizing emissions and managing smoke dispersion. The goals of SMPs are to mitigate the nuisance and public safety hazards (e.g., on roadways and at airports) posed by smoke intrusions into populated areas; to prevent deterioration of air quality and NAAQS violations; and to address visibility impacts in mandatory Class I Federal areas.

Given the fundamental purpose of the SMP, EPA believes that it is reasonable to assume that any action in compliance with the certified SMP would be in conformance with the applicable SIP. Therefore, EPA is taking comment on the approach to designate these actions as actions presumed to conform. Federal agencies would not have to conduct a conformity determination for those actions. The presumption to conform is also based on the maintenance in stringency of the existing SMPs where implemented or the implementation of new smoke management programs or practices as identified above.

As reflected in the Interim Air Quality Policy on Wildland and Prescribed Fires, States are provided flexibility on the structure of a SMP. Thus, a SMP can be extensive and detailed, or simply identify the basic smoke management practices for minimizing emissions, and controlling impacts from a prescribed fire. The EPA's final rule on the Treatment of Data Influenced by Exceptional Events published in the **Federal Register** on March 22, 2007 (Volume 72, Number 55) states that basic smoke management practices could include, among other practices, steps that will minimize air pollutant emissions during and after the burn, evaluate dispersion conditions to minimize exposure of sensitive populations, actions to notify populations and authorities at sensitive receptors and contingency actions during the fire to reduce exposure of people at such receptors, identify steps taken to monitor the effects of the fire on air quality, and identify procedures to ensure that burners are using basic smoke management practices.

The Agency plans to begin revising its Interim Air Quality Policy on Wildland and Prescribed Fires in 2007 as part of its overall Fire Strategy. The Agency believes that the conditions for prescribed fires that are presumed to conform should be conducted in accordance with programs and practices which meet the requirements of EPA's Air Quality Policy on Wildland and Prescribed Fires and those conditions should be deliberated in the formation of the revised policy. To inform the development of that policy, and the final revisions of this General Conformity rule, EPA is also requesting comment on an additional approach for allowing a presumption to conform for emissions from prescribed fires conducted in the absence of a State certified SMP, where the Federal agency submits a demonstration and obtains written permission from the State prior to the burn that the planned burn employs State approved basic smoke management practices. This approach would thereby protect public health in nonattainment and maintenance areas where a SMP has not been adopted, and allow Federal agencies the flexibility needed to conduct necessary prescribed burning.

Finally, as discussed above, EPA is also proposing to allow a State or eligible Tribe, on its own, to adopt in their SIP or TIP a list of actions for facilities in its borders that it ''presumes to conform.''

11. The EPA is proposing to revise paragraph (j) of § 93.153 by deleting the reference to regionally significant emissions, by adding a reference to paragraph (i) and by describing the criteria for requiring a conformity determination for an action that otherwise would be presumed to conform. The existing regulations state that an action cannot be presumed to conform if it was regionally significant or did not in fact meet the requirements of sub-paragraph (g)(1). As discussed above, EPA has proposed to delete the regionally significant test, therefore reference to it is proposed to be deleted from this paragraph. For clarity, instead of referring to sub-paragraph (g)(1), EPA is proposing to repeat the requirements in this paragraph.

12. The EPA is proposing to revise paragraph (k) of § 93.153 to incorporate the provisions of section 176(c)(6) of the CAA. (42 U.S.C. 7506(c)(6)). In November 2000 (Pub. L. 106–377), Congress added section 176(c)(6) to the CAA to allow for a conformity transition period for newly designated nonattainment areas. That section establishes a 1-year grace period following the effective date of the final nonattainment designation of each NAAQS before the conformity requirements must be met in the area. If an agency takes or starts the Federal action before the end of the grace period, it must comply with the applicable pre-designation conformity requirements. If an agency takes or starts the Federal action after the end of the grace period, it must comply with the post-designation conformity requirements. As discussed above in describing the new term ''take or start the Federal action,'' EPA is proposing to define the term to mean that a Federal agency takes an action when it signs a permit, license, grant or contract or otherwise starts the Federal action. From the time that an area is designated as nonattainment, agencies will have a year to take or start the Federal action. If the agency fails to take or start the Federal action during the grace period, then it must re-evaluate conformity for the project based on the requirements for the new designation and classification.

F. 40 CFR 93.154—Federal Agencies Responsibility for a Conformity Determination

1. The EPA is proposing to revise the title of this section to clarify the purpose of the section. In the existing regulations this section is entitled broadly ''Conformity Analysis.'' Since the short section only discusses the requirement for each Federal agency to make its own determination, EPA is proposing to revise the title of the section to more closely describe the section's content.

2. The EPA is proposing to add language to this section to specifically state that the conformity determination must meet the requirements of this subpart.

G. 40 CFR 93.155—Reporting Requirements

1. Since EPA is proposing to add additional sections to subpart B, it is proposing to revise the references to those sections in § 93.155.

2. Consistent with EPA Tribal Authority Rule (63 FR 7253), EPA is proposing to provide federally-recognized Indian Tribal governments the same opportunity to comment on draft conformity determinations as given to States. Therefore, EPA is proposing to require the Federal agencies to notify all the federally-recognized Indian Tribal governments in the nonattainment or maintenance area. To assist other Federal agencies in this notification, EPA is planning to place a list of the federally-recognized Indian Tribal governments in each nonattainment or maintenance areas on its General Conformity web site.

3. The EPA is proposing to add an alternative procedure for notifying EPA when the action would result in emissions originating in nonattainment or maintenance areas in three or more EPA regions. Specifically, EPA is proposing to allow agencies to notify the EPA Office of Air Quality Planning and Standards rather than each individual Regional Office. A single contact point for EPA should be more efficient for the other Federal agencies than notifying up to ten Regional Offices.

4. At the request of the several Federal agencies EPA is proposing to add a new paragraph to § 93.155 to describe how restricted information used to support conformity determinations should be handled when provided to EPA, States and Tribal governments. The existing General Conformity Regulation does not contain an explicit statement about protecting restricted information from public release. The interagency review and public participation provisions in the existing regulation require Federal agencies to make available for review the draft conformity determination with supporting materials that describe the analytical methods and conclusions relied upon in making the determination. Disclosure of classified information by a Federal employee is a criminal offense (18 U.S.C. 1905). In addition, certain unclassified information is privileged or otherwise protected from disclosure. Therefore, several Federal agencies wanted to ensure that the General Conformity Regulations clearly state that no agency or individual was required to release restricted information including, but not limited to, classified materials. Therefore, EPA is proposing to revise the regulation to add explicit language concerning the protection of restricted information. In addition, conformity determinations could, in part, be based upon confidential information received from business sources. The EPA is proposing to add specific language to the regulation to protect CBI in accordance with each Federal agency's policy and regulations for the handling of restricted information and CBI. The regulations would allow State or EPA personnel with the appropriate clearances to be able to view the restricted or confidential business information.

H. 40 CFR 93.156—Public Participation

1. The EPA is proposing to correct the section referenced in § 93.156. The existing regulations refers to § 93.158. The correct reference should be § 93.154. Section 93.158 prescribes the criteria for conducting a conformity analysis, while § 93.154 requires Federal agencies to make the determination and references the requirements in the other sections of subpart B.

2. The EPA is proposing to provide an alternative public notification procedure for actions that cause emissions above the de minimis levels in more than three nonattainment or maintenance areas. The existing regulations require that the Federal agency publish a notice in a daily newspaper of general circulation in the nonattainment or maintenance area. Some Federal actions, such as rulemaking, affect a large number of nonattainment and maintenance areas. The notification procedure for such an action could be burdensome and inefficient. Therefore, EPA is proposing to allow the Federal agencies to publish a notice in the **Federal Register** if the action would cause emissions above the de minimis levels in more than three nonattainment or maintenance areas.

3. The EPA is proposing to also add a new paragraph to § 93.156 to describe how restricted information and CBI used to support conformity determinations should be handled in providing the information to the public.

I. 40 CFR 93.157—Re-Evaluation of Conformity

1. The EPA is proposing to revise the title of this section to more appropriately describe the section's content. The existing section is entitled ''Frequency of Conformity Determinations.'' That title implies that the general conformity requirements for Federal actions must be reevaluated on a regular basis. However, the section states that conformity must be reevaluated only if the determination lapses or the action is modified, resulting in an increase in emissions.

2. If an action's emissions are below the de minimis levels or the action is not located in a nonattainment or maintenance area, a conformity determination is not required. Therefore, the Federal agency would not have a date for the conformity determination. The EPA is proposing minor wording changes in paragraphs (a) and (b) to clarify that the date of a completed NEPA analysis, as evidenced by a signed finding of no significant impact (FONSI) for an environmental assessment, a record of decision (ROD) for an environmental impact statement, or a record of a categorical exclusion can be used when a conformity determination is not required.

3. The EPA is proposing to add two new paragraphs (d and e) to § 93.157 to clarify the requirements for needing to conduct a conformity determination when the action is modified. Paragraph (d) deals with modifying an action for which the Federal agency made a conformity determination. In order to make the determination, the Federal agency had to demonstrate that all the emissions caused by the action conformed to the SIP. Therefore, the Federal agency does not have to revise its conformity determination unless the modification would result in an increase that equals or exceeded the de minimis emission levels for the area. Paragraph (e) deals with modifying an action that the Federal agency determined had emissions below the de minimis level. Since the emissions from the unmodified action were determined to be de minimis and not fully evaluated to determine conformity, EPA is proposing the Federal agency conduct a conformity determination if the total emissions (the emissions from the unmodified action plus the increased emissions resulting from the modification) equal or exceed the de minimis levels for the area. EPA seeks comment on what actions should be considered to constitute ''modifications'' for purposes of conformity and under what conditions, if any, a subsequent action should be considered to constitute a ''new'' action versus modification of an action for which a previous de minimis determination was made.

J. 40 CFR 93.158—Criteria for Determining Conformity for General Federal Actions

1. In § 93.158(a)(1), EPA is proposing to add ''precursor'' after ''any criteria pollutant'' to clarify that Federal agencies can demonstrate conformity for the precursors of the criteria pollutants if the precursor emissions are specifically identified and accounted for in the applicable SIP, TIP or FIP.

2. In § 93.158(a)(2) and (a)(5)(iii), EPA is proposing to allow Federal agencies to obtain emission offsets for the General Conformity requirements from a nearby nonattainment or maintenance area of equal or higher classification, provided that the emissions from the nearby area contribute to the violations of the NAAQS in the area where the Federal action is located or, in the case of a maintenance area, the emissions from the nearby area have contributed in the past to the violations in the area where the Federal action is located. The proposal would require such emissions offsets to be obtained through either an approved SIP revision or an equally enforceable commitment.

This revision to the offset requirements would make the General Conformity offset requirements consistent with the offset requirements in section 173(c)(1) of the CAA for the Federal NSR program. It would also provide the Federal agencies more flexibility in obtaining the offsets in areas impacted by transport from nearby areas. In light of increased knowledge concerning transport of pollutants into areas, EPA solicits comments on whether to limit the offsets to nonattainment or maintenance areas of equal or higher classifications, or permit broader application to all nonattainment and maintenance areas.

3. In § 93.158(a)(2), (a)(3) and (a)(4), EPA is proposing to revise the regulations to address the precursors of $PM_{2.5}$. The EPA does not believe that the current models are adequate to reasonably predict the project level impact of individual precursor sources of ozone or $PM_{2.5}$. Therefore, EPA is proposing to allow Federal agencies to use modeling to demonstrate conformity only for directly emitted pollutants. Precursors of $PM_{2.5}$ will be treated the same as precursors of ozone and direct emissions of $PM_{2.5}$ will be treated the same as CO and PM^{10}. The EPA solicits comment on this treatment of the precursors of $PM_{2.5}$.

4. In § 93.158(a)(3) and (5), EPA is proposing to correct two typographical errors. In sub-paragraph (3), EPA is proposing to correct ''meet'' to ''meets'' and in sub-paragraph (5), EPA is proposing to change ''paragraph (a)(3(11)'' to ''paragraph (a)(3)(ii).''

5. In § 93.158(a)(5)(i), EPA is proposing to delete the reference to the year 1990 and replace it with a generic reference to the most current calendar year with a complete emission inventory available before an area is designated unless EPA sets another year. In addition to requiring the conformity regulations, the CAA Amendments of 1990 required the designation of areas as nonattainment based on the existing air quality data. Therefore, when EPA promulgated the existing regulations in 1993, all the designations were based on a 1990 date. Since EPA promulgated the conformity regulations, it has promulgated new 8-hour ozone and $PM_{2.5}$ standards and designated a number of areas as nonattainment. By changing the regulations to reference the date when the area was designated as nonattainment, EPA is allowing for the new designations and any future designations.

6. Also in § 93.158(a)(5)(i), EPA is proposing to revise the paragraph to allow Federal agencies to make conformity determination based upon a State's or Tribe's determination that the emissions from the action along with all other emissions in the area would not exceed the emission budget in the applicable SIP or TIP. Under the existing regulations, States could only make such a determination if they had an approved attainment demonstration or maintenance SIP. This revision would allow the State or Tribe to make its determination based upon a post-designation applicable SIP or TIP even though the plan does not include an attainment demonstration. For example, the State or Tribe could base their determination on an emission budget in an EPA approved ''Reasonable Further Progress'' plan. By adopting the budget and submitting it as part of the SIP or TIP, the State or Tribe is treating the Federal action like any other source in the area. When the State or Tribal agency adopts the attainment or maintenance SIP or TIP, it will have to consider the emissions, and if necessary require additional controls on the sources. Specifically, EPA solicits comment on whether demonstrating conformity to a budget in a milestone plan (in the absence of an attainment demonstration) is adequate to ensure that the emissions from the action will not interfere with the timely attainment of the NAAQS.

7. Although not specified in the regulations, EPA believes that a State operating permit under title V of the CAA or other air quality operating permit can serve as documentation of the State's or Tribe's determination.

8. The EPA is proposing to revise § 93.158(a)(5)(i)(C) to allow the State or Tribe to commit to including the emissions from the Federal action in future SIPs. Under the existing regulations, Federal agencies can demonstrate conformity by having the State commit to revising the applicable SIP to include the emissions. If a State or Tribe agrees to such a commitment, the State or Tribe must submit a SIP revision within 18 months to include the emissions from the action and to make other necessary adjustments in the SIP to accommodate those emissions. However, the existing SIP or TIP, or a SIP or TIP required to be submitted in 18 months, may not cover the same timeframe covered by the conformity determination. For example, a SIP for a nonattainment area that demonstrates attainment may only cover the period until the attainment date while the conformity determination may cover emissions for many years beyond that date. The State or Tribe may be submitting future SIPs or TIPs to address either maintenance of the standard or to address a continuing nonattainment problem that would cover the time period of the emissions. The EPA's proposed revision to § 93.158(a)(5)(i)(C) would continue to require States to revise the SIP within 18 months of the conformity determination based upon a State's or Tribe's commitment. However, if the existing SIP or TIP, or a SIP or TIP due within 18 months, does not cover the time period of the emissions, then the State or Tribe, in the SIP revision, can include an enforceable commitment to account for the emissions in future SIP revisions. This approach will allow States and Tribes flexibility in committing to include the emissions from the Federal action in the SIP.

9. The EPA is proposing to revise § 93.158(a)(5)(iv) to delete the use of 1990 as the baseline year. As discussed above, when EPA promulgated the existing General Conformity Regulations in 1993, the designations and classifications were based upon the 1990 air quality and emissions. Since 1993, EPA has promulgated new standards and designated additional areas as nonattainment. Therefore, in many cases the 1990 date for the baseline emission inventory is inappropriate. The EPA is proposing to set the baseline year as the most current calendar year with a complete emission inventory available before an area is designated unless EPA sets another year.

In some cases, when EPA establishes a new level for a standard, an area will have an existing SIP or TIP for the pollutant that serves as the applicable SIP or TIP until a revised SIP or TIP is submitted by the State or Tribe and approved by EPA. For example, in transition from the 1-hour ozone standard to the 8-hour ozone standard, EPA revoked the 1-hour standard 1 year after the effective date of the 8-hour ozone designation. Although EPA revoked the 1-hour standard, the existing ozone SIP remains largely in place until it is replaced by the 8-hour ozone SIP. The 1-hour ozone SIP is considered the applicable SIP until it is replaced.

Finally, EPA is proposing to delete another alternate baseline year that no longer is applicable in PM_{10} areas. Specifically, we are proposing to delete in § 93.158(a)(5)(iv)(A)(3) the use of the ''year of the baseline inventory in the PM_{10} applicable SIP.'' EPA believes that the proposed deletion of this out-dated baseline year should not affect current general conformity determinations in PM10 nonattainment and maintenance areas.

K. 40 CFR 93.159—Procedures for Conformity Determinations for General Federal Actions

1. EPA is proposing to change § 93.159(b)(1)(ii) to make it more consistent with when new motor vehicle emissions factors models are used in general conformity determinations. EPA is proposing to clarify that the grace period before such new models are used will be 3 months from EPA's model release or a longer grace period as announced in the **Federal Register**. This is more consistent with 40 CFR 93.111 of the transportation conformity rule that allows grace periods for new motor

vehicle emissions factor models to be between 3–24 months.

2. The EPA is proposing to revise § 93.159(b)(2) and (c) to update the reference to the Compilation of Air Pollutant Emission Factors and for the Guideline on Air Quality Modeling. EPA has released updated versions of these documents since it promulgated the existing regulations in 1993.

3. The EPA is proposing to revise paragraph (d)(1) to clarify that analysis is first required for the attainment year specified in the SIP. In some cases, such as SIPs for marginal ozone areas, an attainment demonstration date was not required in the SIP. Therefore, EPA is also proposing that if the SIP or TIP does not specify an attainment demonstration year then the analysis is required for the latest attainment year possible under the CAA. Since the CAA requires the SIP demonstrate attainment as expeditiously as possible but no later than the CAA mandated attainment date, it is possible that a SIP or TIP could have an earlier attainment date. That earlier date would be the appropriate year for the conformity analysis.

4. The EPA is proposing a minor wording revision to paragraph (d)(2) to clarify the paragraph. The EPA is proposing to replace the word ''farthest'' with ''last.'' The maintenance plans are developed for a 10-year period and revised as necessary for the next 10-year period. The purpose is for conformity to be evaluated for the last year of the maintenance plan. The word ''last'' conveys that meaning.

L. 401 CFR 93.160—Mitigation of Air Quality Impacts

The EPA is proposing to revise paragraph § 93.160(f) to clarify its meaning. The regulations were meant to require that the mitigation measures include a written commitment from the person or organization reducing the emissions and those commitments must be fulfilled.

M. 40 CFR 93.161—Conformity Evaluations for Installations With Facility-Wide Emission Budget

The EPA is proposing to add a new section to the regulations to facilitate the use of a facility-wide emission budget in evaluating conformity. Federal agencies have stated that they would like to streamline the conformity process for individual actions or projects, while States have expressed a desire for the conformity process to help identify and reduce emissions at Federal installations. Although the existing regulations do not preclude States and Federal agencies from using this approach, the regulations do not specifically authorize its use. This approach would be entirely voluntary on the part of the Federal agency and would have to be approved by the State, Tribe or local agency responsible for the SIP or TIP. For example, States can currently adopt a facility-wide budget for a Federal installation as part of the SIP. With such a budget, a Federal agency could easily demonstrate conformity for an action at the installation provided the emissions caused by the action along with all of the other emissions subject to general conformity at the installation stays within the budget. If the State or Tribe includes the emission budget in the SIP or TIP, the emissions would be identified and accounted for in the SIP or TIP. Alternatively, a State or Tribe could provide a letter to the Federal agency stating that the emissions from the installation that are within the budget conform to the SIP or TIP. This proposed section for developing such a budget would in conjunction with a new § 93.153(j) provide a mechanism for presuming that the emissions are in conformance with the SIP or TIP. This approach allows State or Tribe and Federal agencies to identify acceptable levels of emissions from the installation before starting the environmental review for the actions and for the agencies to expedite the review of the Federal actions at the facilities.

Under this approach, a State, Tribe or local air quality agency could work with the Federal agency, or a third party authorized by the agency (e.g., an airport authority), who volunteers to develop a facility-wide emission budget for an installation or facility. In principle, at the time the States or Tribes agree to a budget, they assume responsibility for ensuring that the emissions within the budget will not interfere with the purpose of the SIP or TIP, and will be included in future SIPs or TIPs. The budget would be for a set period of time and near the end of that time the State, Tribe or local agency and Federal agencies could revise the budget for the next time period. For example, the State, Tribe or local agency and Federal agency could develop annual budgets covering a 10-year period. Two years before the end of the period, the budget would be reviewed and updated to cover the next 10-year period. (This is the same procedure used for maintenance plans under section 175A of the CAA. A maintenance plan is developed for 10-years and 8 years into that plan a new plan is developed for the next 10 years.) The budgets would be developed based upon the latest estimates of emissions and growth in the activities at the facility.

The State or Tribe would include the emission budget in the existing SIP or TIP and use the budget for any future SIP or TIP development. In including the emissions in the existing SIP or TIP, States or Tribes can either identify categories in the existing SIP or TIP that cover the emissions or can submit a revision to the SIP or TIP to include the emissions. If unusual or unforeseen circumstances warrant a revision, the State, Tribe or local agency and Federal agency could agree to revise the budget. For example, if the State, Tribe or local agency requires additional reductions to meet their attainment objective or if the facility has unexpected growth, a revised budget could be adopted into the SIP or TIP.

The EPA believes that the proposed program would encourage the State, Tribe or local air quality agency and the Federal facilities to develop an upfront emission budget for the facility, and the action or project environmental review would be streamlined as long as the facility remains within an established budget.

The program would be voluntary on the part of the Federal agency, State, Tribe and local air quality agency. No party would be required to participate. If the parties agreed to participate, an emission budget would be established based upon specific guidance and documented growth projections for the facility.

The emission budget approach would not be applicable to all situations. For example, not all Federal actions or projects occur on installations suitable for emission budgets (e.g., one-time actions on non-Federal lands such as a short-term construction project may not have facilities to have a budget). In addition, some installations with budgets may on occasion take actions or have projects that would result in the budget being exceeded. In these cases, or under any circumstances, a Federal agency may determine applicability or demonstrate conformity with the standard requirements contained in §§ 93.153 through 93.160 and 93.162 through 93.165 of the General Conformity regulations. These requirements include, but are not limited to, a State certifying emissions are included the SIP, a de minimis determination or other exemption, project level mitigation, offsetting emission reductions, or modeling. Therefore, having a facility-wide emissions budget in the SIP would not limit an agency's option for determining conformity, but adds an additional less

burdensome option for demonstrating conformity.

As discussed earlier in this preamble under the definition of ''caused by'', in developing the facility-wide emission budget, the Federal agency generally would share its plans for construction at the facility. As a result the State, Tribe or local agency could consider the emissions from the construction in its SIP or TIP and they would have three options for handling the construction emissions under the general conformity program. First, they could include the emissions in a facility-wide emission budget. Second, they could determine that the construction emissions at the facility would be covered elsewhere in the SIP or TIP (e.g., in the non-road mobile source budget or the area source budget), and thus the emissions could be presumed to conform. Finally, they could cover the construction emissions separately from the emission budget and conduct a separate conformity evaluation for those emissions.

Since the facility-wide emission budget would be used to develop the SIP or TIP for the area, any Federal action at the installation that remains within its budget would not interfere with the SIP or TIP. By developing a facility-wide emission budget for the installation, the Federal agency would generate a more accurate emission inventory for the activities at the installations and provide the State, Tribe or local agency with realistic growth projections for the installations. The facility-wide emission budgets would encourage operators to identify ways of reducing emissions and adopt control measures when possible in order to allow for unforeseen growth.

N. 40 CFR 93.162—Emissions Beyond the Time Period Covered by the Applicable SIP or TIP

The EPA is proposing to add a new section to address how Federal agencies can demonstrate conformity for an action that causes emissions beyond the time period covered by the SIP or TIP. First, EPA is proposing to allow Federal agencies to demonstrate conformity using the last emission budget in the SIP or TIP. If it is not practicable to demonstrate conformity using that technique, then the Federal agency can request the State or Tribe to provide an enforceable commitment to include the emissions from the Federal action in a current or future SIP or TIP emissions budget. In such a case, the State or Tribe would be required to submit a SIP revision within 18 months to include the emissions in the current SIP or TIP or committing to account for the emissions in future SIPs or TIPs. The emissions included in the future SIP should be based on the latest planning assumptions at the time of the SIP revision. Although a State is committing to include the emissions in the emissions budget for the SIP revisions, this commitment does not prevent the State from requiring the use of RACT, RACM or any other control measures within the State's authority to ensure timely attainment of the NAAQS.

O. 40 CFR 93.163—Timing of Offsets and Mitigation Measures

The EPA is proposing to add a new section to address the timing of offset and mitigation measures. First, the section generally requires that the emission reductions for the offset and mitigation measures must occur in the same calendar year as the emission increases caused by the Federal action and that the reductions are equal to the emissions increases. As an alternative, the proposed section would allow, under special conditions and consistent with CAA requirements, the State or Tribe to approve other schedules for offsets or mitigation measures.

Mitigation measures and offsets are used to reduce the impact of emission increases from a project or action. To minimize the impact of the project's emissions, the emissions reductions from offsets or mitigation measures should occur at the same time as the emission increases from the project. In general, EPA has interpreted the existing regulations to mean that the reductions must occur in the same calendar year as the emission increases caused by the action because the total direct and indirect emissions from an action are collated on an annual basis. Therefore, EPA is proposing to include this interpretation in the regulations.

For certain projects, however, it may be beneficial for the State or Tribe to approve mitigation measures or offsets that do not provide for emissions reductions equal to the emission increases for the specific years, but provide net long-term air quality benefits. For example, a project with relatively high short-term emissions, such as a construction project, could be mitigated by converting older equipment to electric or alternate fuels. The State or Tribe may find it advantageous to allow a short period when the emissions are not fully mitigated in return for permanent or the long-term emissions reductions. Therefore, EPA is proposing to allow, under certain conditions, the State and Federal agency to negotiate alternate schedules for the implementation of the offsets and mitigation measures. EPA believes that such emissions reductions should also have substantial long-term attainment and maintenance benefits. EPA is also proposing that emissions reductions used over an alternate schedule would be consistent with statutory requirements that new violations are not created, the frequency or severity of existing violations are not increased, and timely attainment is not delayed.

To ensure these noncontemporaneous emission reductions provide greater environmental benefits in the long term, EPA is proposing to require that the offset or mitigation ratios be greater than one-for-one. Therefore, EPA is proposing a ratio that is no less than the NSR offset ratios for the area. These ratios are readily available and already understood to be based on the severity of the nonattainment problem for the area. In addition, EPA seeks comment on other mechanisms that could be used to require greater than one-for-one reductions for the offsets and mitigation measures that occur in later years or alternatively if greater than one-for-one reductions should be required.

Also, EPA believes that the mitigation or offset compensation period should not last indefinitely and is proposing that the period should not exceed two times the period of the under-mitigated emissions. For example, a Federal agency may be approving a construction project lasting 3 years in a serious nonattainment area and that project will cause 150 tons per year of increased emissions; the State or Tribe can approve mitigation measures or offsets which reduce emissions by less than 150 tons per year provided the total reduction over a 6-year period is equal to or more than 540 tons (150 tons per year times 3 years equals 450 tons times the offset/mitigation ratio of 1.2 to 1 for serious nonattainment areas equals 540 tons). Besides requesting comment on the concept of allowing the States or Tribes to approve a longer time period for offsetting or mitigating the emission increases, EPA is also seeking comment on the mechanism and procedures used to permit/implement the concept. In addition, EPA is seeking comment on the appropriate time period for the Federal agencies to offset or mitigate the increased emissions. The EPA is requesting comments on using longer compensation periods in excess of two times the project period.

Agreeing to allow the use of offset or mitigation measures in later years does not exempt the State or Tribe from meeting any of its SIP or TIP obligations, such as reasonable further progress milestones or attainment deadlines. Emissions reductions which accrue beyond the compensation period

should be properly reflected in the SIP or TIP, e.g. through a SIP revision.

P. 40 CFR 93.164—Inter-Precursor Offsets and Mitigation Measures

EPA is proposing to add a new section to the regulations to allow the use of inter-precursor offset and mitigation measures where they are allowed by the SIP. For example, some States and local air districts have SIP-approved NSR regulations that allow new or modified stationary sources to offset the increase in emissions of one criteria pollutant precursor by reducing the emissions of another precursor of the same criteria pollutant, provided there is an environmental benefit to such an exchange. The existing General Conformity regulations do not specifically allow or prohibit inter-precursor offsets and mitigation measures. Therefore, EPA is proposing to allow such offsets or mitigation measures if they are allowed by a State or Tribe NSR or trading program approved in the SIP; provided they:

1. Are technically justified; and

2. have a demonstrated environmental benefit.

The ratio for the offsets must be consistent with SIP or TIP requirements and EPA guidance.

The EPA recognizes that the evaluation of the inter-precursor offsets may in some cases be difficult and seeks comments on how such offsets or mitigation measures should be evaluated. The EPA expects to use these comments in developing future guidance documents.

Q. 40 CFR 93.165—Early Emission Reduction Credit Program

The EPA is proposing to add a new section to the regulations to establish an early emission reduction credit program for facilities subject to the General Conformity Regulations. The existing regulations require that the offsets and mitigation measures be in place before the emissions increases caused by the Federal action occur. However, emission reduction programs undertaken before the conformity determination is made could be considered as part of the baseline emissions and not available as offsets or mitigation measures. To expedite the project level conformity process, Federal agencies and project sponsors could benefit from the ability to reduce emissions in advance of the time that the reductions are needed for a conformity evaluation. Although the existing regulations do not address the concept, The Port of Seattle and the Puget Sound Clean Air Agency developed a program to implement early emissions reductions. In addition, Congress authorized such a program for the General Conformity program in the FAA reauthorization act signed in December 2003 (Vision 100—A Century of Aviation Reauthorization Act, Pub. L. 108–176). That Act authorized FAA to approve funding of programs to reduce emissions at the airports provided the State would issue emission reduction credits that can be used for General Conformity determinations and NSR offsets. On September 30, 2004, EPA issued guidance on the Airport Emission Reduction Credit (AERC) program to implement the requirements of the December 2003 Act (Guidance on Airport Emission Reduction Credits for Early Measures Through Voluntary Airport Low Emission Programs, U.S. EPA, Office of Air Quality Planning and Standards, September 2004). Other Federal agencies may benefit from the opportunity to reduce emissions prior to when the reductions are needed to offset emission increases covered by the General Conformity program.

To clarify EPA's intent that this program be allowed for other Federal actions, EPA is proposing to add a new section, § 93.165, to the General Conformity Regulations to define the requirements of this program. Under the program, Federal agencies or interested third parties (such as airport authorities) could identify emission control measures and present the proposed reduction to the State, Tribe or local air quality agency. If the measure met the criteria for an offset (quantifiable; consistent with the applicable SIP attainment and reasonable further progress demonstrations; surplus to the reductions required by and credited to other applicable SIP provisions; enforceable at both the State and Federal levels; and permanent within the timeframe specified by the program) as well as all State, Tribe or local requirements, the State, Tribe or local agency can approve the measure as eligible to produce emission reduction credits. If credits are issued, then a Federal agency can use the credits to reduce the total of direct and indirect emissions from a proposed action. At the time the credits are used the State, Tribe or local agency must certify that the reductions still meet the criteria listed above. The credits must be used in the same calendar year in which they are generated.

In proposed paragraph (a), EPA would establish the ability for the State or Tribe and Federal agency to create and use the emission reduction credits.

In proposed paragraph (b), EPA identifies the criteria for creating the credits. The criteria are the same requirements that apply to any offset or mitigation measure used to compensate for the increased emissions caused by the action. First, the Federal agency must be able to quantify the reductions using reliable techniques. In some cases, however, it may not be possible to quantify the reductions until after the measure has been implemented. For example, a facility may adopt a strategy calling for the purchase and use of alternate-fueled vehicles. Although the agency could calculate the difference in the emissions between the alternate-fueled vehicle and the standard vehicle, it may not know the amount the vehicles will be used. In this case, the State or Tribe and Federal agency could agree on an emission factor and determine the use at a later time. The reductions must be quantified before the credit is used to support a conformity determination.

In proposed paragraph (c), EPA would establish the requirements for the use of the credits. If the strategy used to produce the credit is implemented at the same facility and in the same nonattainment or maintenance area as the Federal action the credits can be used in determining if the action would cause emissions above the de minimis levels. If the strategy is not implemented at the same facility but is in the same nonattainment or maintenance areas as the action, then the credits can be used as offset or mitigation measures for the emissions caused by the action, but not to determine if the action emissions fall below de minimis thresholds. In this context, ''same facility'' means a contiguous area that a Federal agency manages or exercises control over. Generally, all actions and operations within a fence line of a facility such as an airport and would be considered to be at the ''same facility''. However, military operations at a civilian airport would not be considered to be at the ''same facility''. Therefore, an airport could install equipment to supply power and conditioned air to airplanes parked at a gate to reduce the use of diesel generators and auxiliary power units at an airport terminal. Those reductions could be considered to be implemented as part of an airport expansion project to improve the terminal and thus would be at the ''same facility.''

Since the general conformity program is based on annual emissions, EPA is proposing to require that the credits be used in the same year as they are generated. Such a restriction would ensure consistency with the other parts of the general conformity program. This does not mean that an emission reduction strategy cannot produce an

annual stream of credits, but does mean that the reduction credits cannot be carried over to another year.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a significant regulatory action because it may interfere with actions taken or planned by other Federal agencies. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

This action does not directly impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, on non-Federal entities. The General Conformity Regulations require Federal agencies to determine that their actions conform to the SIPs or TIPs. However, depending upon how Federal agencies implement the regulations, non-Federal entities seeking funding or approval from those Federal agencies may be required to submit information to that agency.

Although the present proposed revisions to the regulations do not establish any specific new information collection burden, it would establish alternative voluntary approaches that may result in a different burden. For example, the proposed facility-wide emission budget would allow Federal agencies or operators of facilities subject to the General Conformity Requirements such as commercial service airports to work with the State, Tribe or local air quality agency to develop an emission budget for the facility. The State, Tribe or local agencies and Federal agencies or third party facility operators would incur the burden of developing the budget. However, those entities would be relieved of the burden of conducting and reviewing some, if not all, the general conformity determinations for the facility.

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

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

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

For purposes of assessing the impacts of these proposed regulation revisions on small entities, small entity is defined as: (1) A small business that is a small industrial entity as defined in the U.S. Small Business Administration (SBA) size standards. (See 13 CFR 121.); (2) A governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) A small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impact of these proposed revisions to the regulations on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This proposal will not impose any requirements on small entities. The General Conformity Regulations require Federal agencies to conform to the appropriate State, Tribal or Federal implementation plan for attaining clean air. We continue to be interested in the potential impacts of the regulations on small entities and welcome comments on issues related to related to such impacts.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final regulations with Federal mandates that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of $100 million or more in any 1 year. Before promulgating an EPA regulation for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and to adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the regulation. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final regulations an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

The EPA has determined that these revisions to the regulations do not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any 1 year. Thus, these proposed regulation revisions are not subject to the requirements of section 202 and 205 of the UMRA.

The EPA has determined that these proposed regulation revisions contain no regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments because these regulations affect Federal agencies only. Nonetheless, EPA carried out consultations with governmental entities affected by this regulation.

E. Executive Order 13132—Federalism

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

This action does not have Federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Previously, EPA determined the costs to States to implement the General Conformity Regulations to be less than $100,000 per year. Thus, Executive Order 13132 does not apply to these proposed regulation revisions.

Although section 6 of Executive Order 13132 does not apply to these proposed regulation revisions, EPA held meetings with the Federal agencies and organizations that prepare technical support for Federal agencies determinations at which it described the approaches it was considering and provided an opportunity for States, Federal agencies and other stakeholders to comment on the options being considered.

In spirit of Executive Order 13121 and consistent with EPA policy to promote communications between EPA and State and local governments, EPA is soliciting comments on this proposal from State and local officials.

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

Executive Order 13175, entitled Consultation and Coordination with Indian Tribal Governments (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure meaningful and timely input by Tribal officials in the development of regulatory policies that have Tribal implications.

These proposed regulation revisions do not have Tribal implications as specified in Executive Order 13175. They do not have a substantial direct effect on one or more Indian Tribes, since no Tribe has to demonstrate conformity for their actions. Furthermore, except for allowing the Tribes to comment on draft conformity determinations, these proposed regulation revisions do not affect the relationship or distribution of power and responsibilities between the Federal government and Indian Tribes. The CAA and the Tribal Air Rule establish the relationship of the Federal government and Tribes in developing plans to attain the NAAQS, and these revisions to the regulations do nothing to modify that relationship. Because these proposed regulation revisions do not have Tribal implications, Executive Order 13175 does not apply.

Although Executive Order 13175 does not apply to these regulations, EPA did consult with some Tribal officials in developing these proposed regulations revisions and encouraged Tribal input at an early stage. The EPA specifically solicits additional comment on the proposed revisions to the regulations from Tribal officials.

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

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

These proposed revisions to the regulations are not subject to Executive Order 13045 because they are not economically significant as defined in Executive Order 12866 and because EPA does not have reason to believe the environmental health or safety risk addressed by the General Conformity Regulations present a disproportionate risk to children. The General Conformity Regulations ensure that Federal agencies comply with the SIP, TIP or FIP for attaining and maintaining the NAAQS. The NAAQS are promulgated to protect the health and welfare of sensitive populations, including children.

The public is invited to submit or identify peer-reviewed studies and data, of which the Agency may not be aware, that assessed results of early life exposure to criteria air pollutant emissions regulated by this rule.

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

These revisions to the regulations are not subject to Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution, or Use, (66 FR 28355, May 22, 2001) because they are not likely to have a significant adverse effect on the supply, distribution, or use of energy. Further, we have concluded that this rule is not likely to have any adverse energy effects.

I. National Technology Transfer Advancement Act

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

These proposed revisions to the regulations do not involve technical standards. Therefore, EPA is not considering the use of any VCS. EPA welcomes comments on this aspect of the proposed rulemaking and, specifically, invites the public to identify potentially-applicable voluntary consensus standards and to explain why such standards should be used in this regulation.

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

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

EPA has determined that this proposed rule will not have

disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. The proposed revisions to the regulations would, if promulgated, revise procedures for other Federal agencies to follow and does not relax the control measures on emission sources. As such, they do not affect the health or safety of minority or low income populations. The EPA encourages other agencies to carefully consider and address environmental justice in their implementation of their evaluations and conformity determinations.

VII. Statutory Authority

Clean Air Act Section 176(c) (42 U.S.C. 7506)

List of Subjects

40 CFR Part 51

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

40 CFR Part 93

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

Dated: December 20, 2007.

Stephen L. Johnson,

Administrator.

For the reasons stated in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be amended as follows:

PART 51—REQUIREMENTS FOR PREPARATION, ADOPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS

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

Authority: 23 U.S.C. 101; 42 U.S.C. 7401–7671q.

Subpart W—[Amended]

2. Remove and reserve § 51.850 and §§ 51.852 through 51.860.

3. Section 51.851 is revised to read as follows:

§ 51.851 State implementation plan (SIP) or Tribal implementation plan (TIP) revision.

(a) A State or eligible Tribe (a Federally recognized Tribal government determined to be eligible to submit a TIP under 40 CFR 49.6) may submit to the Environmental Protection Agency (EPA) a revision to its applicable implementation plan which contains criteria and procedures for assessing the conformity of Federal actions to the applicable implementation plan, consistent with this section and 40 CFR part 93, subpart B.

(b) Until EPA approves the conformity implementation plan revision permitted by this section, Federal agencies shall use the provisions of 40 CFR part 93, subpart B in addition, to any existing applicable State or Tribal requirements, to demonstrate conformity with the applicable SIP or TIP as required by section 176(c) of the CAA (42 U.S.C. 7506).

(c) Following EPA approval of the State or Tribal conformity provisions (or a portion thereof) in a revision to the applicable SIP, conformity determinations shall be governed by the approved (or approved portion of) State criteria and procedures. The Federal conformity regulations contained in 40 CFR part 93, subpart B would apply only for the portion, if any, of the State's or Tribe's conformity provisions that is not approved by EPA.

(d) The State or Tribal conformity implementation plan criteria and procedures cannot be any less stringent than the requirements in 40 CFR part 93, subpart B.

(e) A State's or Tribe's conformity provisions may contain criteria and procedures more stringent than the requirements described in this subpart and part 93, subpart B, only if the State's or Tribe's conformity provisions apply equally to non-Federal as well as Federal entities.

(f) In its SIP or TIP, the State or Tribe may identify a list of Federal actions or type of emissions that it presumes will conform. The State or Tribe may place whatever limitations on that list that it deems necessary. The State or Tribe must demonstrate that the action will not interfere with attainment or maintenance of the standard, meeting the reasonable further progress milestones or other requirements of the Clean Air Act. For example, the State may identify the emissions from a certain type and size of construction activities that it presumes will conform. Federal agencies can use the list to determine their ''presumed to conform'' emissions.

(g) Any previously applicable SIP or TIP requirements relating to conformity remain enforceable until EPA approves the revision to the SIP or TIP to specifically remove them.

PART 93—DETERMINING CONFORMITY OF FEDERAL ACTIONS TO STATE OR FEDERAL IMPLEMENTATION PLANS

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

Authority: 42 U.S.C. 7401–7671q.

Subpart B—[Amended]

5. Section 93.150 is amended by removing and reserving paragraph (c) and by adding paragraph (e) to read as follows:

§ 93.150 Prohibition.

* * * * *

(e) If an action would result in emissions originating in more than one nonattainment or maintenance area, the conformity must be evaluated for each area separately.

6. Section 93.151 is revised to read as follows:

§ 93.151 State implementation plan (SIP) revision.

The provisions and requirements of this subpart to demonstrate conformity required under section 176(c) of the Clean Air Act (CAA) apply to all Federal actions in designated nonattainment and maintenance areas where EPA has not approved the SIP required under 40 CFR 51.851. When EPA approves a State's conformity provisions (or a portion thereof) in a revision to an applicable implementation plan, a conformity evaluation is governed by the approved (or approved portion of the) State criteria and procedures. The Federal conformity regulations contained in this subpart apply only for the portions, if any, of the State's conformity provisions that are not approved by EPA. In addition, any previously applicable implementation plan conformity requirements remain enforceable until the EPA approves the revision to the applicable SIP to specifically include the revised requirements or remove requirements.

7. Section 93.152 is amended as follows:

a. Add the definition for ''Applicability analysis.''

b. Revise the definition of ''Applicable implementation plan or applicable SIP.''

c. Revise the definition for ''Areawide air quality modeling analysis.''

d. Add the following definitions in alphabetical order: ''Confidential business information,'' ''Conformity determinations,'' ''Conformity

evaluations,'' ''Continuing program responsibility,'' and ''Continuous program to implement.''

e. Revise the definition of ''Direct emissions.''

f. Add a new definition for ''Emission inventory.''

g. Remove the definition for ''Emissions that a Federal agency has a continuing program responsibility for.''

h. Revise the definition of ''EPA.''

i. Revise the definition of ''Indirect Emissions.''

j. Revise the definition of ''Local air quality modeling analysis.''

k. Revise the definitions for ''Maintenance area'' and ''Metropolitan Planning Organization (MPO).''

l. Add in alphabetical order a definition for ''Mitigations measure.''

m. Revise the definition for ''National ambient air quality standards''.

n. In the definitions for ''Precursors of a criteria pollutant'' revise paragraphs (3)(i), (3)(ii) and (3)(iii).

o. Revise the definition for ''Reasonably foreseeable emissions.''

p. Remove the definition for ''Regionally significant action.''

q. Add the following definitions: ''Restricted information.''

r. Add in alphabetical order the definitions for ''Take or start the Federal action'' and ''Tribal implementation plan (TIP).''

The additions and revisions read as follows:

§ 93.152 Definitions.

* * * * *

Applicability analysis is the process of determining if your Federal action must be supported by a conformity determination.

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

Areawide air quality modeling analysis means an assessment on a scale that includes the entire nonattainment or maintenance area using an air quality dispersion model or photochemical grid model to determine the effects of emissions on air quality, for example, an assessment using EPA's community multilayer air quality (CMAQ) model.

* * * * *

Confidential business information (CBI) is information that has been determined by a Federal agency, in accordance with its applicable regulations, to be a trade secret—or commercial or financial information obtained from a person and privileged or confidential; it is exempt from required disclosure under the Freedom of Information Act (5 U.S.C.552(b)(4)).

Conformity determination is the evaluation made after an applicability analysis is completed that a Federal action conforms to the applicable implementation plan and meets the requirements of this subpart.

Conformity evaluation is the entire process from the applicability analysis through the conformity determination demonstrating that the Federal action conforms to the requirements of this subpart.

Continuing program responsibility means a Federal agency has responsibility for emissions caused by:

(1) Actions it takes itself; or

(2) Actions of non-Federal entities that the Federal agency, in exercising its normal programs and authorities, approves, funds, licenses or permits; provided the agency can impose conditions on any portion of the action that could affect the emissions.

Continuous program to implement means that the Federal agency has started the action identified in the plan and does not stop the actions for more than an 18-month period, unless it can demonstrate that such a stoppage was included in the original plan.

* * * * *

Direct emissions means those emissions of a criteria pollutant or its precursors that are caused or initiated by the Federal action and originate in a nonattainment or maintenance area and occur at the same time and place as the action and are reasonably foreseeable.

* * * * *

Emission Inventory is a listing of information on the location, type of source, type and quantity of pollutant emitted as well as other parameters of the emissions.

* * * * *

EPA means the U.S. Environmental Protection Agency.

* * * * *

Indirect emissions means those emissions of a criteria pollutant or its precursors. For the purposes of this definition, even if a federal licensing, rulemaking or other approving action is a required initial step for a subsequent activity that causes emissions, such initial steps do not mean that a federal agency can practically control any resulting emissions:

(1) That are caused or initiated by the Federal action and originate in the same nonattainment or maintenance area but occur at a different time or place as the action;

(2) That are reasonably foreseeable;

(3) That the agency can practically control; and

(4) For which the agency has continuing program responsibility.

* * * * *

Local air quality modeling analysis means an assessment of localized impacts on a scale smaller than the entire nonattainment or maintenance area, including, for example, congested roadways on a Federal facility, which uses an air quality dispersion model, *e.g.*, Industrial Source Complex Model or Emission and Dispersion Model System, to determine the effects of emissions on air quality.

Maintenance area means an area that was designated as nonattainment and has been re-designated in 40 CFR part 81 to attainment, meeting the provisions of section 107(d)(3)(E) of the Act and has a maintenance plan approved under section 175A of the Act.

* * * * *

Metropolitan Planning Organization (MPO) means the policy board of an organization created as a result of the designation process in 23 U.S.C. 134(d).

* * * * *

Mitigation measure means any method of reducing emissions of the pollutant or its precursor taken at the location of the Federal action and used to reduce the impact of the emissions of that pollutant caused by the action.

* * * * *

National ambient air quality standards (NAAQS) are those standards established pursuant to section 109 of the Act and include standards for carbon monoxide (CO), lead (Pb), nitrogen dioxide (NO_2), ozone, particulate matter (PM–10 and $PM_{2.5}$), and sulfur dioxide (SO_2).

* * * * *

Precursors of a criteria pollutant are:

* * * * *

(3) * * *

(i) Sulfur dioxide (SO_2) in all $PM_{2.5}$ nonattainment and maintenance areas,

(ii) Nitrogen oxides in all $PM_{2.5}$ nonattainment and maintenance areas unless both the State and EPA determine that it is not a significant precursor, and

(iii) Volatile organic compounds (VOC) and ammonia (NH_3) only in $PM_{2.5}$ nonattainment or maintenance areas where either the State or EPA determines that they are significant precursors.

Reasonably foreseeable emissions are projected future direct and indirect emissions that are identified at the time

the conformity determination is made; the location of such emissions is known and the emissions are quantifiable as described and documented by the Federal agency based on its own information and after reviewing any information presented to the Federal agency.

* * * * *

Restricted Information is information that is privileged or that is otherwise protected from disclosure pursuant to applicable statutes, Executive Orders, or regulations. Such information includes, but is not limited to: Classified national security information, protected critical infrastructure information, sensitive security information, and proprietary business information.

Take or start the Federal action means the date that the Federal agency signs or approves the permit, license, grant or contract or otherwise begins the Federal action that requires a conformity evaluation under this subpart.

* * * * *

Tribal implementation plan (TIP) means a plan to implement the national ambient air quality standards adopted by a federally recognized Indian Tribal government determined to be eligible under 40 CFR 49.9 and the plan has been approved by EPA.

8. Section 93.153 is amended as follows:

a. By revising paragraph (a).

b. By revising paragaraphs (b) introductory text and (b)(1).

c. By adding paragraph (c)(2)(xxii).

d. By revising paragraphs (d)(1) and (d)(2).

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

f. By adding paragraph (e)(3).

g. By revising paragraph (f).

h. By revising paragraph (g) introductory text.

i. By Adding paragraph (g)(3).

j. By revising paragraphs (h) introductory text, (h)(1), (h)(2), and (h)(4).

k. By revising paragraphs (i), (j), and (k).

§ 93.153 Applicability.

(a) Conformity determinations for Federal actions related to transportation plans, programs and projects developed, funded or approved under title 23 U.S.C. or 49 U.S.C. Chapter 53 must meet the procedures and criteria of 40 CFR part 51, subpart T, in lieu of the procedures set forth in this subpart.

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

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

	Tons/year
Ozone (VOC's or NO_X):	
Serious NAA's	50
Severe NAA's	25
Extreme NAA's	10
Other ozone NAA's outside an ozone transport region	100
Other ozone NAA's inside an ozone transport region:	
VOC	50
NO_X	100
Carbon monoxide: All NAA's	100
SO_2 or NO_2: All NAA's	100
PM–10:	
Moderate NAA's	100
Serious NAA's	70
$PM_{2.5}$:	
Direct emissions	100
SO_2	100
NO_X (unless determined not to be significant precursors)	100
VOC or ammonia (if determined to be significant precursors)	100
Pb: All NAA's	25

* * * * *

(c) * * *

(2) * * *

(xxii) Air traffic control activities and adopting approach, departure and enroute procedures for aircraft operations above 3,000 feet above ground level.

* * * * *

(d) * * *

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

(2) Actions in response to emergencies which are typically commenced on the order of hours or days after the emergency and, if applicable, which meet the requirements of paragraph (e) of this section.

* * * * *

(e) * * *

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

(i) Provides a draft copy of the written determinations required to affected EPA Regional office(s), the affected State(s) and/or air pollution control agencies, and any Federal recognized Indian Tribal government in the nonattainment or maintenance area. Those organizations must be allowed 15 days from the beginning of the extension period to comment on the draft determination, and

(ii) Within 30 days after making the determination, publish a notice of the determination by placing a prominent advertisement in a daily newspaper of general circulation in the area affected by the action.

(3) If additional actions are necessary in response to an emergency or disaster under paragraph (d)(2) of this section beyond the specified time period in paragraph (e)(2) of this section, a Federal agency can make a new written determination as described in (e)(2) of this section for as many 6-month periods as needed, but in no case shall this exemption extend beyond 3 6-month periods except where an agency:

(i) provide information to EPA and the State stating that the conditions that gave rise to the emergency exemption continue to exist and how such conditions effectively prevent the agency from conducting a conformity evaluation.

(ii) [Reserved]

(f) Notwithstanding other requirements of this subpart, actions specified by individual Federal agencies that have met the criteria set forth in either paragraphs (g)(1) (g)(2) or (g)(3) of this section and the procedures set forth in paragraph (h) of this section are presumed to conform, except as provided in paragraph (j) of this section. Actions specified by individual Federal agencies as presumed to conform may not be used in combination with one another when the total direct and indirect emissions from the combination of actions would equal or exceed any of the rates specified in paragraphs (b)(1) or (2) of this section.

(g) The Federal agency must meet the criteria for establishing activities that are presumed to conform by fulfilling the requirements set forth in either paragraphs (g)(1), (g)(2), or (g)(3) of this section:

* * * * *

(3) The Federal agency must clearly demonstrate that the emissions from the type or category of actions and the amount of emissions from the action are included in the applicable SIP and the State or local air quality agencies responsible for the SIP(s) provide written concurrence that the emissions from the actions along with all other expected emissions in the area will not exceed the emission budget in the SIP.

(h) In addition to meeting the criteria for establishing exemptions set forth in paragraphs (g)(1) (g)(2) or (g)(3) of this section, the following procedures must also be complied with to presume that activities will conform:

(1) The Federal agency must identify through publication in the **Federal Register** its list of proposed activities that are presumed to conform and the basis for the presumptions. The notice must clearly identify the type and size of the action that would be presumed to conform and provide criteria for determining if the type and size action qualifies it for the presumption;

(2) The Federal agency must notify the appropriate EPA Regional Office(s), State and local air quality agencies and, where applicable, the agency designated under section 174 of the Act and the MPO and provide at least 30 days for the public to comment on the list of proposed activities presumed to conform. If the presumed to conform action has regional or national application (e.g., the action will cause emission increases in excess of the de minimis levels identified in paragraph(b) of this section in more than one of EPA's Regions), the Federal agency, as an alternative to sending it to EPA Regional Offices, can send the draft conformity determination to U.S. EPA, Office of Air Quality Planning and Standards;

* * * * *

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

(i) Emissions from the following actions are presumed to conform:

(1) Actions at installations with facility-wide emission budgets meeting the requirements in § 93.161 provided that the State has included the emission budget in the EPA approved SIP and the emissions from the action along with all other emissions from the installation will not exceed the facility-wide emission budget.

Alternative 1 for paragraph (i)(2):

(2) Prescribed fires conducted in accordance with a State certified smoke management program (SMP) which meets the requirements of EPA's Air Quality Policy on Wildland and Prescribed Fires.

Alternative 2 for paragraph (i)(2):

(2) Prescribed fires conducted in accordance with a State certified smoke management program (SMP) which meets the requirements of EPA's Air Quality Policy on Wildland and Prescribed Fires or, in the absence of a State certified SMP, where the Federal agency has obtained written assurance from the State prior to the burn that the planned burn employs State approved basic smoke management practices.

(3) Emissions for actions that the State identifies in the EPA approved SIP as presumed to conform.

(j) Even though an action would otherwise be presumed to conform under paragraph (f) or (i) of this section, an action shall not be presumed to conform and the requirements of § 93.150, § 93.151, §§ 93.154 through 93.160 and §§ 93.162 through 93.164 shall apply to the action if EPA or a third party shows that the action would:

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

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

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

(iv) Delay timely attainment of any standard or any required interim emissions reductions or other milestones in any area including, where applicable, emission levels specified in the applicable SIP for purposes of:

(A) A demonstration of reasonable further progress;

(B) A demonstration of attainment; or

(C) A maintenance plan.

(k) The provisions of this subpart shall apply in all nonattainment and maintenance areas except conformity requirements for newly designated nonattainment areas are not applicable until 1 year after the effective date of the final nonattainment designation for each NAAQS and pollutant in accordance with section 176(c)(6) of the Act.

9. Section 93.154 is revised to read as follows:

§ 93.154 Federal agency conformity responsibility.

Any department, agency, or instrumentality of the Federal government taking an action subject to this subpart must make its own conformity determination consistent with the requirements of this subpart. In making its conformity determination, a Federal agency must follow the requirements in §§ 93.155 through 93.160 and §§ 93.162 through 93.165 and must consider comments from any interested parties. Where multiple Federal agencies have jurisdiction for various aspects of a project, a Federal agency may choose to adopt the analysis of another Federal agency or develop its own analysis in order to make its conformity determination.

10. Section 93.155 is revised to read as follows:

§ 93.155 Reporting requirements.

(a) A Federal agency making a conformity determination under §§ 93.154 through 93.160 and §§ 93.162 through 93.164 must provide to the appropriate EPA Regional Office(s), State and local air quality agencies, any federally-recognized Indian Tribal government in the nonattainment or maintenance area, and, where applicable, affected Federal land managers, the agency designated under section 174 of the Act and the MPO a 30-day notice which describes the proposed action and the Federal agency's draft conformity determination on the action. If the action has multi-regional or national impacts (e.g., the action will cause emission increases in excess of the de minimis levels identified in § 93.153(b) in two or more of EPA's Regions), the Federal agency, as an alternative to sending it to EPA Regional Offices, can provide the notice to EPA's Office of Air Quality Planning and Standards.

(b) A Federal agency must notify the appropriate EPA Regional Office(s), State and local air quality agencies, any federally-recognized Indian Tribal government in the nonattainment or maintenance area, and, where applicable, affected Federal land managers, the agency designated under section 174 of the Clean Air Act and the MPO within 30 days after making a final conformity determination under this subpart.

(c) The draft and final conformity determination shall exclude any restricted information or confidential business information. The disclosure of restricted information and confidential business information shall be controlled by the applicable laws, regulations, security manuals, or executive orders concerning the use, access, and release of such materials. Subject to applicable procedures to protect restricted information from public disclosure, any information or materials excluded from the draft or final conformity determination or supporting materials may be made available in a restricted information annex to the determination for review by Federal and State representatives who have received appropriate clearances to review the information.

11. Section 93.156 is revised to read as follows:

§ 93.156 Public participation.

(a) Upon request by any person regarding a specific Federal action, a Federal agency must make available, subject to the limitation in paragraph(e) of this section, for review its draft conformity determination under § 93.154 with supporting materials which describe the analytical methods and conclusions relied upon in making

the applicability analysis and draft conformity determination.

(b) A Federal agency must make public its draft conformity determination under § 93.154 by placing a notice by prominent advertisement in a daily newspaper of general circulation in the area affected by the action and by providing 30 days for written public comment prior to taking any formal action on the draft determination. This comment period may be concurrent with any other public involvement, such as occurs in the National Environmental Policy Act (NEPA) process. If the action has multi-regional or national impacts (e.g., the action will cause emission increases in excess of the de minimis levels identified in § 93.153(b) in two or more of EPA's Regions), the Federal agency, as an alternative to publishing separate notices, can publish a notice in the **Federal Register**.

(c) A Federal agency must document its response to all the comments received on its draft conformity determination under § 93.154 and make the comments and responses available, subject to the limitation in paragraph (e) of this section, upon request by any person regarding a specific Federal action, within 30 days of the final conformity determination.

(d) A Federal agency must make public its final conformity determination under § 93.154 for a Federal action by placing a notice by prominent advertisement in a daily newspaper of general circulation in the area affected by the action within 30 days of the final conformity determination. If the action would have multi-regional or national impacts the Federal agency, as an alternative, can publish the notice in the **Federal Register**.

(e) The draft and final conformity determination shall exclude any restricted information or confidential business information. The disclosure of restricted information and confidential business information shall be controlled by the applicable laws, regulations or executive orders concerning the release of such materials.

12. Section 93.157 is revised to read as follows:

§ 93.157 Reevaluation of conformity.

(a) Once a conformity evaluation is completed by a Federal agency, that determination is not required to be re-evaluated if the agency has: maintained a continuous program to implement the action; the determination has not lapsed as specified in paragraph (a) of this section; or any modification to the action does not result in an increase in emissions above the levels specified in paragraph (d) of this section. If a conformity determination is not required for the action at the time NEPA analysis is completed, the date of the finding of no significant impact (FONSI) for an Environmental Assessment, a record of decision (ROD) for an Environmental Impact Statement, or a categorical exclusion determination can be used as a substitute date for the conformity determination date.

(b) The conformity status of a Federal action automatically lapses 5 years from the date a final conformity determination is reported under § 93.155, unless the Federal action has been completed or a continuous program to implement the Federal action has been commenced.

(c) Ongoing Federal activities at a given site showing continuous progress are not new actions and do not require periodic re-determinations so long as such activities are within the scope of the final conformity determination reported under § 93.155 of the NEPA analysis.

(d) If the Federal agency determines through the applicability analysis that a conformity determination was not necessary because the emissions for the action were below the limits in § 93.153(b) and changes to the action would result in the total emissions from the action being above the limits in § 93.153(b), then the Federal agency must make a conformity determination.

13. Section 93.158 is amended as follows:

a. Revising paragraphs (a)(1), (a)(2), (a)(3) introductory text and (a)(4) introductory text;

b. Revising paragraph (a)(5) introductory text;

c. Revising paragraphs (a)(5)(i) introductory text, and (a)(5)(i)(C), and

d. Adding (a)(5)(i)(D).

e. Revising paragraphs (a)(5)(iii), (a)(5)(iv) introductory text; (a)(5)(iv)(A)(*1*), (a)(5)(iv)(A)(*2*) and paragraph (a)(5)(iv)(B).

§ 93.158 Criteria for determining conformity of general Federal actions.

(a) * * *

(1) For any criteria pollutant or precursor, the total of direct and indirect emissions from the action are specifically identified and accounted for in the applicable SIP's attainment or maintenance demonstration or reasonable further progress milestone or in a facility-wide emission budget included in a SIP accordance with § 93.161 of this rule;

(2) For precursors of ozone, nitrogen dioxide, or PM, the total of direct and indirect emissions from the action are fully offset within the same nonattainment or maintenance area (or nearby area of equal or higher classification provided the emissions from that area contribute to the violations, or have contributed to violations in the past, in the area with the Federal action) through a revision to the applicable SIP or a similarly enforceable measure that effects emissions reductions so that there is no net increase in emissions of that pollutant;

(3) For any directly-emitted criteria pollutant, the total of direct and indirect emissions from the action meets the requirements:

* * * * *

(4) For CO or directly emitted PM—

* * * * *

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

(i) Where EPA has approved a revision to the applicable implementation plan after the area was designated as nonattainment and the State makes a determination as provided in paragraph (a)(5)(i)(A) of this section or where the State makes a commitment as provided in paragraph (a)(5)(i)(B) of this section:

* * * * *

(C) Where a Federal agency made a conformity determination based on a State commitment under paragraph (a)(5)(i)(B) of this section and the State has submitted a SIP to EPA covering the time period during which the emissions will occur or is scheduled to submit such a SIP within 18 months of the conformity determination, the State commitment is automatically deemed a call for a SIP revision by EPA under section 110(k)(5) of the Act, effective on the date of the Federal conformity determination and requiring response within 18 months or any shorter time within which the State commits to revise the applicable SIP;

(D) Where a Federal agency made a conformity determination based on a State commitment under paragraph (a)(5)(i)(B) of this section and the State has not submitted a SIP covering the time period of the emissions will occur or is not scheduled to submit such a SIP within 18 months of the conformity determination, the State must, within 18 months, submit to EPA a revision to the existing SIP committing to include the emissions in the future SIP revision.

* * * * *

(iii) The action (or portion thereof) fully offsets its emissions within the same nonattainment or maintenance

area (or nearby area of equal or higher classification provided the emissions from that area contribute to the violations, or have contributed to violation in the past, in the area with the Federal action) through a revision to the applicable SIP or an equally enforceable measure that effects emissions reductions equal to or greater than the total of direct and indirect emissions from the action so that there is no net increase in emissions of that pollutant;

(iv) Where EPA has not approved a revision to the relevant SIP since the area was designated or reclassified, the total of direct and indirect emissions from the action for the future years (described in § 93.159(d)) do not increase emissions with respect to the baseline emissions:

(A) * * *

(*1*) The most current calendar year with a complete emission inventory available before an area is designated unless EPA sets another year, or;

(*2*) The emission budget in the applicable SIP;

* * * * *

(B) The baseline emissions are the total of direct and indirect emissions calculated for the future years (described in § 93.159(d)) using the historic activity levels (described in paragraph (a)(5)(iv)(A) of this section) and appropriate emission factors for the future years; or

* * * * *

14. Section 93.159 is amended by:

a. Revising paragraphs (b) introductory text and (b)(1)(ii);

b. Revising paragraphs (b)(2) and (c) introductory text; and

c. Removing footnotes 1 and 2,

d. Revising paragraph (d).

The revisions and additions read as follows:

§ 93.159 Procedures for conformity determinations of general Federal actions.

* * * * *

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

(1) * * *

(ii) A grace period of 3 months shall apply during which the motor vehicle emissions model previously specified by EPA as the most current version may be used unless EPA announces a longer grace period in the **Federal Register**. Conformity analyses for which the analysis was begun during the grace period or no more than 3 years before the **Federal Register** notice of availability of the latest emission model may continue to use the previous version of the model specified by EPA.

(2) For non-motor vehicle sources, including stationary and area source emissions, the latest emission factors specified by EPA in the ''Compilation of Air Pollutant Emission Factors'' (AP–42, *http://www.epa.gov/ttn/chiefs/efpac*) must be used for the conformity analysis unless more accurate emission data are available, such as actual stack test data from stationary sources which are part of the conformity analysis.

(c) The air quality modeling analyses required under this subpart must be based on the applicable air quality models, data bases, and other requirements specified in the most recent version of the ''Guideline on Air Quality Models.'' (Appendix W to 40 CFR part 51).

* * * * *

(d) The analyses required under this subpart must be based on the total of direct and indirect emissions from the action and must reflect emission scenarios that are expected to occur under each of the following cases:

(1) The attainment year specified in the SIP, or if the SIP does not specify an attainment year, the latest attainment year possible under the Act, or

(2) The last year for which emissions are projected in the maintenance plan;

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

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

15. Section 93.160 is amended as follows:

a. Revising paragraph (e);

b. Revising paragraph (f); and

c. Revising paragraph (g).

§ 93.160 Mitigation of air quality impacts.

* * * * *

(e) When necessary because of changed circumstances, mitigation measures may be modified so long as the new mitigation measures continue to support the conformity determination. Any proposed change in the mitigation measures is subject to the reporting requirements of § 93.156 and the public participation requirements of § 93.157.

(f) Written commitments to mitigation measures must be obtained prior to a positive conformity determination and that such commitments must be fulfilled.

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

16. Subpart B is further amended by adding §§ 93.161 through 93.165 to read as follows:

§ 93.161 Conformity evaluation for Federal installations with facility-wide emission budgets.

(a) The State or local agency responsible for implementing and enforcing the SIP can in cooperation with Federal agencies or third parties authorized by the agency that operate installations subject to Federal oversight (e.g., a military base or a commercial service airport) develop and adopt a facility-wide emission budget to be used for demonstrating conformity under § 93.158(a)(1). The facility-wide budget must meet the following criteria:

(1) Be for a set time period;

(2) Cover the pollutants or precursors of the pollutants for which the area is designated nonattainment or maintenance;

(3) Include specific quantities allowed to be emitted on an annual or seasonal basis;

(4) The emissions from the facility along with all other emissions in the area will not exceed the emission budget for the area;

(5) Include specific measures to ensure compliance with the budget such as periodic reporting requirements or compliance demonstration when the Federal agency is taking an action that would otherwise require a conformity determination;

(6) Be submitted to EPA as a SIP revision;

(7) The SIP revision must be approved by EPA.

(b) The facility-wide budget developed and adopted in accordance with paragraph (a) of this section can be revised by following the requirements in paragraph (a) of this section.

(c) Total direct and indirect emissions from Federal actions in conjunction with all other emissions subject to general conformity from the facility that do not exceed the facility budget adopted pursuant to paragraph (a) of this section are presumed to conform to the SIP and do not require a conformity analysis.

(d) If the total direct and indirect emissions from the Federal actions in conjunction with the other emissions subject to general conformity from the facility exceed the budget adopted pursuant to paragraph (a) of this section, the action must be evaluated for conformity. A Federal agency can use the compliance with the facility-wide emissions budget as part of the demonstration of conformity, i.e., the agency would have to mitigate or offset the emissions that exceed the emission budget.

(e) If the SIP for the area includes a category for construction emissions, the negotiated budget can exempt construction emissions from further conformity analysis.

§ 93.162 Emissions beyond the time period covered by the SIP.

If a Federal action would result in total direct and indirect emissions which would be emitted beyond the time period covered by the SIP, the Federal agency can:

(a) Demonstrate conformity with the last emission budget in the SIP; or

(b) Request the State to adopt an emissions budget for the action for inclusion in the SIP. The State must submit a SIP revision to EPA within 18 months either including the emissions in the existing SIP or establishing an enforceable commitment to include the emissions in future SIP revisions based on the latest planning assumptions at the time of the SIP revision. No such commitment by a State shall restrict a State's ability require RACT, RACM or any other control measures within the State's authority to ensure timely attainment of the NAAQS.

§ 93.163 Timing of offsets and mitigation measures.

(a) The emissions reductions from an offset or mitigation measure used to demonstrate conformity must occur during the same calendar year as the emission increases from the action except as provided in paragraph (b) of this section.

(b) The State may approve reductions in other years provided:

(1) The reductions are greater than the emission increases by the following ratios:

(i) Extreme nonattainment areas ...	1.5:1
(ii) Severe nonattainment areas	1.3:1
(iii) Serious nonattainment areas	1.2:1
(iv) Moderate nonattainment areas	1.15:1
(v) All other areas	1.1:1

(2) The time period for completing the emissions reductions must not exceed twice the period of the emissions.

(3) The offset or mitigation measure with emissions reductions in another year will not:

(i) Cause or contribute to a new violation of any air quality standard, (ii) Increase the frequency or severity of any existing violation of any air quality standard, or

(iii) Delay the timely attainment of any standard or any interim emissions reductions or other milestones in any area.

(c) The approval by the State of an offset or mitigation measure with emissions reductions in another year, does not relieve the State of any obligation to meet any SIP or Clean Air Act milestone or deadline.

§ 93.164 Inter-precursor mitigation measures and offsets.

Federal agencies must reduce the same type pollutant as being increased by the Federal action except the State may approve offsets or mitigation measures of different precursors of the same criteria pollutant, if such trades are allowed by a State in a SIP approved new source review regulation, is technically justified, and has a demonstrated environmental benefit.

§ 93.165 Early emission reduction credit programs at Federal facilities and installation subject to Federal oversight.

(a) Federal facilities and installation subject to Federal oversight can, with the approval of the State agency responsible for the SIP in that area, create an early emissions reductions credit program. The Federal agency can create the emission reduction credits in accordance with the requirements in paragraph (b) of this section and can used them in accordance with paragraph (c) of this section.

(b) Creation of emission reduction credits. (1) Emissions reductions must be quantifiable through the use of standard emission factors or measurement techniques. If non-standard factors or techniques to quantify the emissions reductions are used, the Federal agency must receive approval from the State agency responsible for the implementation of the SIP and from EPA's Regional Office. The emission reduction credits do not have to be quantified before the reduction strategy is implemented, but must be quantified before the credits are used.

(2) The emission reduction methods must be consistent with the applicable SIP attainment and reasonable further progress demonstrations.

(3) The emissions reductions can not be required by or credited to other applicable SIP provisions.

(4) Both the State and Federal air quality agencies must be able to take legal action to ensure continued implementation of the emission reduction strategy. In addition, private citizens must also be able to initiate action to ensure compliance with the control requirement.

(5) The emissions reductions must be permanent or the timeframe for the reductions must be specified.

(6) The Federal agency must document the emissions reductions and provide a copy of the document to the State air quality agency and the EPA regional office for review. The documentation must include a detailed description of the strategy and a discussion of how it meets the requirements of paragraphs (b)(1) through (5) of this section.

(c) Use of emission reduction credits. The emission reduction credits created in accordance with paragraph (b) of this section can be used, subject to the following limitations, to reduce the emissions increase from a Federal action at the facility for the conformity evaluation.

(1) If the technique used to create the emission reduction is implemented at the same facility as the Federal action and could have occurred in conjunction with the Federal action, then the credits can be used to reduce the total direct and indirect emissions used to determine the applicability of the regulation as required in § 93.153 and as offsets or mitigation measures required by § 93.158.

(2) If the technique used to create the emission reduction is not implemented at the same facility as the Federal action or could not have occurred in conjunction with the Federal action, then the credits cannot be used to reduce the total direct and indirect emissions used to determine the applicability of the regulation as required in § 93.153, but can be used to offset or mitigate the emissions as required by § 93.158.

(3) Emissions reductions credits must be used in the same year in which they are generated.

(4) Once the emission reduction credits are used, they cannot be used as credits for another conformity evaluation. However, unused credits from a strategy used for one conformity evaluation can be used for another conformity evaluation as long as the reduction credits are not double counted. For example, emission reduction credits from a control measure could be used in one year as offset for construction emission increases and in another year to mitigate operational emission increases.

(5) Federal agencies must notify the State air quality agency and EPA

Regional Office when the emission reduction credits are being used.

[FR Doc. E7–25241 Filed 1–7–08; 8:45 am]

BILLING CODE 6560–50–P