

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 93**

[EPA-HQ-OAR-2008-0540; FRL-9127-7]

RIN 2060-AP29

**Transportation Conformity Rule PM<sub>2.5</sub> and PM<sub>10</sub> Amendments**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** In this action, EPA is amending the transportation conformity rule to finalize provisions that were proposed on May 15, 2009. These amendments primarily affect conformity's implementation in PM<sub>2.5</sub> and PM<sub>10</sub> nonattainment and maintenance areas. EPA is updating the transportation conformity regulation in light of an October 17, 2006 final rule that strengthened the 24-hour PM<sub>2.5</sub> national ambient air quality standard (NAAQS) and revoked the annual PM<sub>10</sub> NAAQS. In addition, EPA is clarifying the regulations concerning hot-spot analyses to address a December 2007 remand from the Court of Appeals for the District of Columbia Circuit. This portion of the final rule applies to PM<sub>2.5</sub> and PM<sub>10</sub> nonattainment and maintenance areas as well as carbon monoxide nonattainment and maintenance areas.

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

The U.S. Department of Transportation (DOT) is EPA's federal partner in implementing the transportation conformity regulation. EPA has consulted with DOT, and they concur with this final rule.

**DATES:** This final rule is effective on April 23, 2010.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA-HQ-OAR-2008-0540. All documents in the docket are listed on the <http://www.regulations.gov> Web site. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard copy at the Air and Radiation Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744 and the telephone number for the Air and Radiation Docket is (202) 566-1742.

**FOR FURTHER INFORMATION CONTACT:** Laura Berry, State Measures and Conformity Group, Transportation and Regional Programs Division, Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105, e-mail address: [berry.laura@epa.gov](mailto:berry.laura@epa.gov), telephone number: (734) 214-4858, fax number: (734) 214-

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

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

- I. General Information
- II. Background on the Transportation Conformity Rule
- III. General Overview of Transportation Conformity for the 2006 PM<sub>2.5</sub> NAAQS
- IV. Baseline Year for Certain 2006 PM<sub>2.5</sub> Nonattainment Areas
- V. Regional Conformity Tests in 2006 PM<sub>2.5</sub> Nonattainment Areas That Do Not Have Adequate or Approved SIP Budgets for the 1997 PM<sub>2.5</sub> NAAQS
- VI. Regional Conformity Tests in 2006 PM<sub>2.5</sub> Areas That Have 1997 PM<sub>2.5</sub> SIP Budgets
- VII. Other Conformity Requirements for 2006 PM<sub>2.5</sub> Areas
- VIII. Transportation Conformity in PM<sub>10</sub> Nonattainment and Maintenance Areas and the Revocation of the Annual PM<sub>10</sub> NAAQS
- IX. Response to the December 2007 Hot-Spot Court Decision
- X. Statutory and Executive Order Reviews

**I. General Information**

*A. Does This Action Apply to Me?*

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

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

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

listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

*B. How Can I Get Copies of This Document?*

1. Docket

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

2. Electronic Access

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

An electronic version of the official public docket is available through <http://www.regulations.gov>. You may use <http://www.regulations.gov> to view public comments, access the index listing of the contents of the official

public docket, and access those documents in the public docket that are available electronically. Once in the system, select “search,” then key in the appropriate docket identification number.

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

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

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

## II. Background on the Transportation Conformity Rule

### A. What Is Transportation Conformity?

Transportation conformity is required under CAA section 176(c) (42 U.S.C. 7506(c)) to ensure that transportation plans, transportation improvement programs (TIPs) and federally supported highway and transit project activities are consistent with (“conform to”) the purpose of the state air quality implementation plan (SIP). Conformity to the purpose of the SIP means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment of the relevant national ambient air quality standards (NAAQS) or any interim milestones.<sup>1</sup> Transportation conformity applies to areas that are designated nonattainment, and those areas redesignated to

<sup>1</sup> These requirements are found in Clean Air Act section 176(c)(B)(i), (ii), and (iii): “That such activities will not cause or contribute to any new violation of any standard in any area; increase the frequency or severity of any existing violation of any standard in any area; or delay timely attainment of any standard or any required interim emissions reductions or other milestones in any area.”

attainment after 1990 (“maintenance areas”) for transportation-related criteria pollutants: Carbon monoxide (CO), ozone, nitrogen dioxide (NO<sub>2</sub>) and particulate matter (PM<sub>2.5</sub>, and PM<sub>10</sub>).<sup>2</sup>

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

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

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

<sup>2</sup> 40 CFR 93.102(b)(1) defines PM<sub>2.5</sub> and PM<sub>10</sub> as particles with an aerodynamic diameter less than or equal to a nominal 2.5 and 10 micrometers, respectively.

any of EPA’s transportation conformity rulemakings.<sup>3</sup>

### B. Why Are We Issuing This Final Rule?

Today’s action is necessary because EPA promulgated a final rule on October 17, 2006 that changed the PM<sub>2.5</sub> and PM<sub>10</sub> NAAQS, as described further below. Today’s action provides rules for implementing conformity for these revisions to the PM<sub>2.5</sub> and PM<sub>10</sub> NAAQS. Sections III. through VIII. describe the changes to the transportation conformity rule that are a result of the October 2006 revisions to the PM<sub>2.5</sub> and PM<sub>10</sub> NAAQS.

Today’s final rule is the second transportation conformity rulemaking undertaken primarily for the purpose of addressing a new or revised NAAQS. Due to other statutory requirements, EPA will continue to establish new or revised NAAQS in the future. Therefore, EPA may consider restructuring certain sections of the conformity rule in a future rulemaking so that existing rule requirements would clearly apply to areas designated for future new or revised NAAQS, without having to update the rule each time a new or revised NAAQS is established.

Note that in 2009, EPA issued an interim conformity guidance for areas designated nonattainment for the 2006 PM<sub>2.5</sub> NAAQS<sup>4</sup> (“2006 PM<sub>2.5</sub> areas”).<sup>5</sup> EPA issued this interim guidance to help new nonattainment areas meet conformity requirements by the end of the one-year grace period. While this interim guidance is superseded by today’s final rule, conformity determinations done according to the interim guidance are consistent with the CAA, and with the transportation conformity rule.<sup>6</sup> Therefore, conformity determinations based on the interim guidance and the transportation conformity rule in effect at the time of the conformity determination will remain valid. Conformity determinations completed on or after the effective date of this final rule must meet all the requirements in the final rule. EPA will work with the 2006 PM<sub>2.5</sub>

<sup>3</sup> At this website, click on “Regulations” to find all of EPA’s proposed and final rules as well as the current transportation conformity regulations.

<sup>4</sup> “2006 PM<sub>2.5</sub> NAAQS” refers to the 24-hour PM<sub>2.5</sub> NAAQS promulgated in 2006.

<sup>5</sup> “Interim Transportation Conformity Guidance for 2006 PM<sub>2.5</sub> Nonattainment Areas,” EPA-420-B-09-036, November 2009, available on EPA’s Web site at: <http://www.epa.gov/otaq/stateresources/transconf/policy/420b09036.pdf>.

<sup>6</sup> Today’s final rule changes the baseline year used to demonstrate conformity for the 2006 PM<sub>2.5</sub> NAAQS prior to having an adequate or approved PM<sub>2.5</sub> SIP budget; the interim guidance addressed this change. Refer to Section IV. for further discussion of the baseline year for conformity purposes.

areas to ensure they can meet conformity requirements on time.

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

### III. General Overview of Transportation Conformity for the 2006 PM<sub>2.5</sub> NAAQS

#### A. Background on 2006 PM<sub>2.5</sub> NAAQS Development

EPA issued a final rule on October 17, 2006, effective December 18, 2006, that strengthened the 24-hour PM<sub>2.5</sub> NAAQS and revoked the annual PM<sub>10</sub> NAAQS (71 FR 61144). In that final rule, EPA strengthened the 24-hour PM<sub>2.5</sub> NAAQS from the 1997 level of 65 micrograms per cubic meter (µg/m<sup>3</sup>) (average of 98th percentile values for three consecutive years) to 35 µg/m<sup>3</sup>, while the level of the annual PM<sub>2.5</sub> NAAQS remained unchanged at 15.0 µg/m<sup>3</sup> (average of three consecutive annual average values). EPA selected levels for the final NAAQS after completing an extensive review of thousands of scientific studies on the impact of fine and coarse particles on public health and welfare. For additional information about the October 17, 2006 rulemaking, the final rule and EPA outreach materials can be found at: <http://www.epa.gov/pmdesignations/>.

The October 2006 rule establishing the 2006 PM<sub>2.5</sub> NAAQS did not revoke the 1997 annual or 24-hour PM<sub>2.5</sub> NAAQS. See Section III.D. below for details on how today's final rule interacts with conformity requirements for those areas designated nonattainment for the 1997 PM<sub>2.5</sub> NAAQS.<sup>7</sup>

EPA signed the final rule designating areas for the 2006 PM<sub>2.5</sub> NAAQS on October 8, 2009.<sup>8</sup> This final rule was

<sup>7</sup> "1997 PM<sub>2.5</sub> NAAQS" includes both the annual and the 24-hour 1997 PM<sub>2.5</sub> NAAQS unless noted otherwise.

<sup>8</sup> A **Federal Register** notice designating areas for the 2006 PM<sub>2.5</sub> NAAQS had been signed in late December 2008 by then-Administrator Johnson, where the designations were based on air quality data from 2005–2007. The December 2008 notice was awaiting publication in January 2009 when the newly elected Administration identified the notice as one that should receive additional review before publication. However, this notice was never published in the **Federal Register** and, therefore, designations were not officially promulgated. CAA section 107(d)(2)(A) requires EPA to publish the notice in the **Federal Register** in order to promulgate designations. Since January 2009, monitoring data for 2008 has become available for areas across the U.S. Therefore, the final designations in the final rule signed by Administrator Jackson on October 8, 2009 are based on air quality monitoring data from Federal Reference Method monitors for calendar years 2006–2008.

published in the **Federal Register** on November 13, 2009, and became effective December 14, 2009. The designations for the 2006 PM<sub>2.5</sub> NAAQS are separate from the existing designations for the 1997 PM<sub>2.5</sub> NAAQS.

However, in the final rule designating areas for the 2006 PM<sub>2.5</sub> NAAQS, EPA has also clarified that all 39 areas designated nonattainment for the 1997 PM<sub>2.5</sub> NAAQS were violating the annual PM<sub>2.5</sub> NAAQS, and two of those were also violating the 24-hour PM<sub>2.5</sub> NAAQS.<sup>9</sup> That is, EPA's designations rule clarifies that only two areas were designated nonattainment for the 1997 24-hour PM<sub>2.5</sub> NAAQS, and that all 39 nonattainment areas were designated nonattainment for the 1997 annual PM<sub>2.5</sub> NAAQS.

Transportation conformity applies for the NAAQS for which an area is designated nonattainment.<sup>10</sup> Therefore, in two of the 1997 PM<sub>2.5</sub> areas, conformity applies for both the 1997 annual and 24-hour NAAQS. In the other 37 1997 PM<sub>2.5</sub> areas, conformity applies for the 1997 annual NAAQS, and not the 1997 24-hour PM<sub>2.5</sub> NAAQS.

Refer to EPA's Web site at: <http://www.epa.gov/pmdesignations/2006standards/index.htm> for additional information about the nonattainment designations.

#### B. When Does Conformity Apply for the 2006 PM<sub>2.5</sub> NAAQS?

Transportation conformity for the 2006 PM<sub>2.5</sub> NAAQS does not apply until December 14, 2010, which is one year after the effective date of nonattainment designations for this NAAQS. CAA section 176(c)(6) and 40 CFR 93.102(d) provide a one-year grace period from the effective date of designations before transportation conformity applies in areas newly designated nonattainment for a particular NAAQS.<sup>11</sup>

The following discussion provides more details on the application of the one-year grace period in different types of newly designated nonattainment areas for the 2006 PM<sub>2.5</sub> NAAQS. This information is consistent with how

<sup>9</sup> The two areas designated as nonattainment for both the annual and 24-hour 1997 PM<sub>2.5</sub> NAAQS are the Los Angeles-South Coast Air Basin, CA nonattainment area and the San Joaquin Valley, CA nonattainment area.

<sup>10</sup> Clean Air Act section 176(c)(5) and 40 CFR 93.102(b).

<sup>11</sup> EPA began the process of notifying state and local agencies, via the EPA regional offices, of the timing of conformity under the 2006 PM<sub>2.5</sub> NAAQS in its April 16, 2007 memorandum entitled, "Transportation Conformity and the Revised 24-hour PM<sub>2.5</sub> Standard," from Merrylin Zaw-Mon, Director, Transportation and Regional Programs Division, EPA Office of Transportation and Air Quality, to EPA Regional Air Directors, Regions I–X.

conformity for new NAAQS has been implemented in the past.<sup>12</sup> The conformity grace period will be available to all newly designated nonattainment areas for the 2006 PM<sub>2.5</sub> NAAQS.

Metropolitan areas are urbanized areas that have a population greater than 50,000 and a designated metropolitan planning organization (MPO) responsible for transportation planning per 23 U.S.C. 134. Within one year after the effective date of the initial nonattainment designation for the 2006 PM<sub>2.5</sub> NAAQS, a conformity determination for this NAAQS must be made by the MPO and DOT for the MPO's transportation plan and TIP. MPOs must continue to meet conformity requirements for any other applicable NAAQS, including the 1997 PM<sub>2.5</sub> NAAQS, if the area is designated nonattainment or maintenance for such NAAQS as well.

In nonattainment and maintenance areas with a donut portion,<sup>13</sup> adjacent MPOs must meet conformity requirements for the 2006 PM<sub>2.5</sub> NAAQS. The MPO must also continue to ensure that conformity is met for any other applicable NAAQS, including any 1997 PM<sub>2.5</sub> NAAQS for which the donut area is designated nonattainment.<sup>14</sup> The interagency consultation partners for each newly designated nonattainment area that includes a donut portion should determine how best to consider the donut area transportation system and new donut area projects in the MPO's regional emissions analyses and transportation plan and TIP conformity determinations.

If, at the end of the one-year grace period, the MPO and DOT have not made a transportation plan and TIP conformity determination for the 2006 PM<sub>2.5</sub> NAAQS, the entire area, including any donut area, would be in a conformity "lapse."<sup>15</sup> During a

<sup>12</sup> See EPA's July 1, 2004 final rule for further background on how EPA has implemented this conformity grace period for the 1997 PM<sub>2.5</sub> NAAQS (69 FR 40004).

<sup>13</sup> For the purposes of transportation conformity, a "donut" area is the geographic area outside a metropolitan planning area boundary, but inside a designated nonattainment or maintenance area boundary that includes an MPO (40 CFR 93.101). For more discussion on how conformity determinations should be made for donut areas, see the preamble to the July 1, 2004 conformity rule (69 FR 40013).

<sup>14</sup> Determining conformity for these other NAAQS during the one-year grace period is not necessary unless required by 40 CFR 93.104 (for example, a new or amended transportation plan and TIP are to be adopted).

<sup>15</sup> The lapse grace period provision in CAA section 176(c)(9) does not apply to the deadline for newly designated nonattainment areas to make the initial transportation plan/TIP conformity determination within 12 months of the effective

conformity lapse, only certain projects can receive additional federal funding or approvals to proceed (e.g. exempt projects, project phases that were approved before the lapse).<sup>16</sup> The practical impact of a conformity lapse will vary on an area-by-area basis.

The one-year grace period for conformity also applies to project-level conformity determinations (including hot-spot analyses in certain cases) in newly designated 2006 PM<sub>2.5</sub> nonattainment areas. At the end of the one-year grace period for conformity, requirements for project-level conformity determinations must be met for the 2006 PM<sub>2.5</sub> NAAQS (including hot-spot analyses in certain cases) before any new federal approvals for such projects can occur. See Table 1 in 40 CFR 93.109 for the conformity criteria that apply for project-level conformity determinations.

Isolated rural nonattainment and maintenance areas are areas that do not contain or are not part of any metropolitan planning area as designated by 23 U.S.C. 134 and 49 U.S.C. 5303 (40 CFR 93.101). As in other newly designated nonattainment areas, the one-year conformity grace period for the 2006 PM<sub>2.5</sub> NAAQS will begin on the effective date of an isolated rural area's initial nonattainment designation. However, because these areas do not have federally required metropolitan transportation plans and TIPs, they are not subject to the frequency requirements for conformity determinations on transportation plans and TIPs (40 CFR 93.104(b), (c), and (e)). Instead, conformity determinations in isolated rural areas are required only when a non-exempt FHWA/FTA project(s) needs approval.

Therefore, although the one-year conformity grace period is available to isolated rural areas, most likely no conformity consequences would occur upon the expiration date of the one-year grace period because these areas most likely would not have any projects that require federal funding or approval at that time. Once the conformity grace

period has expired, a conformity determination would only be required in such areas when a non-exempt FHWA/FTA project needs approval. Conformity requirements for isolated rural areas can be found at 40 CFR 93.109(n).<sup>17</sup>

*Response to comments about the grace period.* Some commenters believed that the one-year grace period would not allow enough time for some areas to meet the conformity requirements. These same commenters questioned whether a year would be enough time to adequately prepare attainment SIPs, learn EPA's new emissions factor model (called the Motor Vehicle Emissions Simulator, or MOVES model) when final, and complete their conformity determinations. To address these concerns, these commenters suggested lengthening the conformity grace period for newly designated nonattainment areas from one to two years.

EPA understands that some areas, such as areas that have never done conformity before and multi-jurisdictional nonattainment areas (e.g., areas with multiple states and/or multiple MPOs) may have additional challenges in conducting their initial conformity determinations. However, the CAA as amended on October 27, 2000 specifically provides newly designated nonattainment areas with only a one-year grace period, after which conformity applies as a matter of law under the statute. Therefore, we believe that the statutory language precludes EPA from extending the conformity grace period beyond one year for new nonattainment areas.

In accordance with the CAA, states were initially required to submit their recommendations for nonattainment areas based on monitored data by December 18, 2007, well before designations became effective.<sup>18</sup> Additionally, EPA began the process of notifying state and local agencies, via the EPA regional offices, of the timing of conformity under the 2006 PM<sub>2.5</sub> NAAQS in the April 16, 2007 memorandum cited earlier.<sup>19</sup> As

mentioned, EPA provided interim guidance for the 2006 PM<sub>2.5</sub> areas to assist in meeting conformity requirements by the end of the one-year grace period. Finally, EPA will be working with 2006 PM<sub>2.5</sub> areas to provide technical assistance in an expeditious manner, such as helping each area determine which test applies for the first 2006 PM<sub>2.5</sub> conformity determination.

We also want to clarify that while areas will have to complete a conformity determination for their transportation plans and TIPs within one year, they are not required to complete their attainment demonstration SIPs for the 2006 PM<sub>2.5</sub> NAAQS in that same time period as the commenter suggested. Instead, they will have three years from the effective date of designations to submit their attainment demonstrations, per CAA section 172(b).

Also, implementers will have additional time before MOVES is required for conformity determinations, as a different grace period will apply for MOVES once it is released. The conformity rule at 40 CFR 93.111 provides a grace period before a new emissions model is required for conformity. This grace period can be anywhere from three months to two years depending on the degree of change from one model to another (40 CFR 93.111(b)(2)); EPA is intending to provide the maximum length two-year grace period for the transition to MOVES. Therefore, MOVES will not be required for the first transportation plan and TIP conformity determination done for the 2006 PM<sub>2.5</sub> NAAQS. EPA will provide specific guidance regarding the MOVES grace period and when MOVES will be required to be used for SIPs and conformity. This guidance will be available on EPA's Web site at: <http://www.epa.gov/otaq/stateresources/transconf/policy.htm#models>.

EPA and DOT understand the concern that the commenter notes with respect to learning the new MOVES model, and therefore have devoted significant staff time and resources to training state and local air quality and transportation planners in using MOVES. During 2009, 20 MOVES training sessions were held at locations across the U.S. Once MOVES is final, EPA intends to offer web-based training, and EPA and DOT are planning to hold additional in-person training sessions as well. See EPA's Web site: <http://www.epa.gov/>

Transportation and Regional Programs Division, EPA Office of Transportation and Air Quality, to EPA Regional Air Directors, Regions I–X, found on EPA's Web site at: <http://www.epa.gov/otaq/stateresources/transconf/generalinfo/rev24hr-pm25.pdf>.

date of the nonattainment designation. For additional details on the conformity lapse grace period, see the preamble to the January 24, 2008 conformity rule (73 FR 4423–4425).

<sup>16</sup> For additional information on projects that can proceed during a conformity lapse, refer to the final rule of July 1, 2004 (69 FR 40005–40006), which addressed the March 2, 1999 U.S. Court of Appeals decision that affected related provisions of the conformity rule (*Environmental Defense Fund v. EPA*, 167 F.3d 641 (D.C. Cir. 1999)). See also the following guidance memoranda that address this court decision: DOT's January 2, 2002 guidance, published in the **Federal Register** on February 7, 2002 (67 FR 5882); DOT's May 20, 2003 and FTA's April 9, 2003 supplemental guidance documents; and, EPA's May 14, 1999 guidance memorandum.

<sup>17</sup> Prior to today's rulemaking, the requirements for isolated rural areas were found at § 93.109(l). This section has been renamed as § 93.109(n), as a result of other revisions and additions in this regulatory section. This is merely an administrative change and the conformity requirements for isolated rural areas remain unchanged.

<sup>18</sup> Information on 2006 PM<sub>2.5</sub> nonattainment designations, including copies of EPA's designation letters, can be accessed from EPA's Web site at <http://www.epa.gov/pmdesignations/2006standards/state.htm>.

<sup>19</sup> Memorandum entitled, "Transportation Conformity and the Revised 24-hour PM<sub>2.5</sub> Standard," from Merrylin Zaw-Mon, then-Director,

*otaq/models/moves/trainingsessions.htm* for information about upcoming training sessions. Also note that other MOVES related guidance, including user guides and other technical information is available on EPA's Web site at: <http://www.epa.gov/otaq/models/moves/index.htm> and <http://www.epa.gov/otaq/stateresources/transconf/policy.htm>

### C. Definitions for PM<sub>2.5</sub> NAAQS

EPA is adding two new definitions to § 93.101 of the conformity rule to distinguish between the 1997 PM<sub>2.5</sub> NAAQS and the 2006 PM<sub>2.5</sub> NAAQS. These definitions will help implement certain conformity requirements in areas that have been designated nonattainment for 1997 PM<sub>2.5</sub> NAAQS and/or 2006 PM<sub>2.5</sub> NAAQS. Some areas designated nonattainment for the 2006 PM<sub>2.5</sub> NAAQS also are designated nonattainment for the 1997 PM<sub>2.5</sub> NAAQS. In addition, some areas are designated for only the 2006 PM<sub>2.5</sub> NAAQS.

These definitions are similar to the rule's definitions in 40 CFR 93.101 for the 1-hour ozone NAAQS and 8-hour ozone NAAQS, and are generally consistent with how EPA is defining both kinds of PM<sub>2.5</sub> areas for air quality planning purposes. EPA also notes that any provision of the conformity rule that references only "PM<sub>2.5</sub>" and does not specify which PM<sub>2.5</sub> NAAQS applies to any area designated nonattainment for a PM<sub>2.5</sub> NAAQS. EPA received no comments regarding these definitions.

### D. How Does This Final Rule Interact With Conformity Requirements for the 1997 PM<sub>2.5</sub> NAAQS?

Sections IV. through VI. of today's final rule describe conformity requirements for areas designated nonattainment for the 2006 PM<sub>2.5</sub> NAAQS. No changes have been made to the existing transportation conformity requirements for areas designated nonattainment for the 1997 PM<sub>2.5</sub> NAAQS.

Nonattainment designations for the 1997 and 2006 PM<sub>2.5</sub> NAAQS are different designations with separate SIP requirements, different attainment dates, etc. As a result, CAA section 176(c)(5) requires conformity requirements to be met in both 1997 and 2006 PM<sub>2.5</sub> nonattainment and maintenance areas, as applicable.

Some areas designated nonattainment for the 2006 PM<sub>2.5</sub> NAAQS have never been subject to PM<sub>2.5</sub> conformity requirements. Under today's final rule and CAA section 176(c)(5), these areas must meet conformity requirements

only for the 2006 PM<sub>2.5</sub> NAAQS, and not for the 1997 PM<sub>2.5</sub> NAAQS, because these areas are not designated nonattainment for the 1997 PM<sub>2.5</sub> NAAQS.

Other areas designated nonattainment for the 2006 PM<sub>2.5</sub> NAAQS have been designated also, in whole or in part, for the 1997 PM<sub>2.5</sub> NAAQS. (See Section III.A. for the clarification that EPA has made in designations for the 1997 PM<sub>2.5</sub> NAAQS areas.) These areas must continue to meet their existing conformity requirements for the 1997 PM<sub>2.5</sub> NAAQS as well as those that apply for the 2006 PM<sub>2.5</sub> NAAQS.

One commenter was concerned that, given identical boundaries, an area could potentially be required to prepare conformity determinations for three different PM NAAQS (*i.e.*, the 24-hr PM<sub>10</sub> NAAQS, 1997 PM<sub>2.5</sub> NAAQS, and 2006 PM<sub>2.5</sub> NAAQS), and believed that this could mean three separate analyses would be required. This commenter recommended that an area should only have to model to the most restrictive NAAQS.

As described in the May 2009 proposal, nonattainment designations for these NAAQS are different designations with separate SIP requirements, different attainment dates, etc. As a result, CAA section 176(c)(5) requires conformity to be met for all of the NAAQS for which an area has been designated. However, MPOs subject to more than one PM NAAQS will be able to use existing transportation models and data for regional emissions analyses, especially where nonattainment area boundaries are the same. Some analysis years for the regional emissions analyses will be the same, such as the last year of the transportation plan. In addition, MPOs in areas designated for more than one PM NAAQS will be able to meet consultation and other conformity requirements through the existing processes.

Furthermore, if an area is designated nonattainment for both the 1997 and 2006 PM<sub>2.5</sub> NAAQS and it has no adequate or approved PM<sub>2.5</sub> budgets, it could use the same interim emissions test for both NAAQS (*see* Section V.; note that the baseline year for these two NAAQS are different, *see* Section IV.) If such an area has budgets only for the 1997 PM<sub>2.5</sub> NAAQS, conformity determinations for the 2006 PM<sub>2.5</sub> NAAQS will be based on the same conformity test—*i.e.*, the budget test—that is being used for the 1997 PM<sub>2.5</sub> NAAQS (note that the attainment year for each of these NAAQS, which is a required analysis year for the budget test, will differ). As described in Section

VI., MPOs must use any adequate or approved SIP budgets for the 1997 PM<sub>2.5</sub> NAAQS for conformity determinations that are made prior to SIP budgets for the 2006 PM<sub>2.5</sub> NAAQS being found adequate or approved.

Today's final rule does not impact project-level conformity requirements for the 1997 PM<sub>2.5</sub> NAAQS. For example, this rule does not substantively change the PM<sub>2.5</sub> hot-spot analysis requirements, and EPA and FHWA's existing qualitative guidance for such analyses continues to be available.<sup>20</sup> For the purposes of PM<sub>2.5</sub> conformity, a hot-spot analysis must address the PM<sub>2.5</sub> NAAQS for which the area has been designated nonattainment.<sup>21</sup> See Section VII. for further information regarding project-level conformity requirements for the 2006 PM<sub>2.5</sub> NAAQS.

EPA will work with PM<sub>2.5</sub> nonattainment areas as needed to ensure that state and local agencies can meet conformity requirements for both the applicable 1997 and 2006 PM<sub>2.5</sub> NAAQS in a timely and efficient manner.

### E. Precursors That Apply for 2006 PM<sub>2.5</sub> Conformity

The existing transportation conformity rule at 40 CFR 93.102(b) describes the pollutants and precursors that must be examined in a regional emissions analysis in PM<sub>2.5</sub> areas, and these provisions apply to 2006 PM<sub>2.5</sub> areas as well as 1997 PM<sub>2.5</sub> areas. Direct PM<sub>2.5</sub> must be analyzed per 40 CFR 93.102(b)(1). Before SIP budgets are adequate or approved, NO<sub>x</sub> must also be analyzed, unless both EPA and the state air quality agency find that transportation-related emissions of NO<sub>x</sub> are not a significant contributor to the PM<sub>2.5</sub> nonattainment problem and notify the MPO and DOT (40 CFR 93.102(b)(iv)).<sup>22</sup> Before SIP budgets are adequate or approved, VOCs, sulfur dioxide, and ammonia do not have to be analyzed unless either EPA or the state air quality agency finds that such a precursor is a significant contributor, and notifies the MPO and DOT (40 CFR 93.102(b)(v)). Similarly, before SIP budgets are adequate or approved, road dust does not have to be included in the regional emission analysis of directly

<sup>20</sup> "Transportation Conformity Guidance for Qualitative Hot-spot Analyses in PM<sub>2.5</sub> and PM<sub>10</sub> Nonattainment and Maintenance Areas," EPA420-B-06-902, March 2006.

<sup>21</sup> EPA notes that today's final rule does not address project requirements for the National Environmental Policy Act or other environmental programs.

<sup>22</sup> Note that instead of establishing a budget for direct PM<sub>2.5</sub> or NO<sub>x</sub>, a SIP could demonstrate that the pollutant or precursor is insignificant based on 40 CFR 93.109(k).

emitted PM<sub>2.5</sub> unless EPA or the state air agency find that re-entrained road dust emissions are a significant contributor, and notifies the MPO and DOT (40 CFR 93.102(b)(3)).

Once budgets from a submitted PM<sub>2.5</sub> SIP have been found adequate or approved, a conformity determination for the 2006 PM<sub>2.5</sub> NAAQS must include any precursors for which budgets are established (40 CFR 93.102(b)(iv) and (v)). If road dust is included in the direct PM<sub>2.5</sub> budget, it must also be included in a regional emissions analysis (40 CFR 93.102(b)(3)).

Please use the interagency consultation process if there are questions regarding whether a regional emissions analysis for the 2006 PM<sub>2.5</sub> NAAQS must include specific precursors or road dust.

#### IV. Baseline Year for Certain 2006 PM<sub>2.5</sub> Nonattainment Areas

##### A. Background

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

Before an adequate or approved SIP budget is available, conformity of the transportation plan, TIP, or project not from a conforming transportation plan and TIP is demonstrated using the interim emissions test(s), as described in 40 CFR 93.119. The interim emissions tests include different forms of the "build/no-build" test and "baseline year" test. In general, for the baseline year test, emissions from the planned transportation system are compared to emissions that occurred in the baseline year. Today's rule updates section 93.119 of the conformity rule for the 2006 PM<sub>2.5</sub> NAAQS. The baseline year for nonattainment areas under the 1997 PM<sub>2.5</sub> NAAQS is 2002 (40 CFR 93.119(e)(2)). Sections V. and VI. of today's final rule go into further detail about how the baseline year will be applied in 2006 PM<sub>2.5</sub> areas.

##### B. Baseline Year for 2006 PM<sub>2.5</sub> Areas

###### 1. Description of Final Rule

In today's final rule, EPA is defining the baseline year as the most recent year for which EPA's Air Emissions Reporting Requirements (AERR) (40 CFR Part 51) requires submission of on-road mobile source emissions inventories,<sup>23</sup> as of the effective date of EPA's nonattainment designations for any PM<sub>2.5</sub> NAAQS other than the 1997 PM<sub>2.5</sub> NAAQS. EPA had proposed this definition under "Option 2" in the proposed rule. AERR requires on-road mobile source emission inventories to be submitted every three years, for example, 2002, 2005, 2008, 2011, etc. See § 93.119(e)(2)(B) for the regulatory text.

Today's final rule results in a baseline year of 2008 for the 2006 PM<sub>2.5</sub> areas. The year 2008 is the most recent year as of the effective date of the 2006 PM<sub>2.5</sub> designations, December 14, 2009, for which AERR requires submission of on-road mobile source emissions inventories. In other words, the designations were effective on December 14, 2009, and the most recent year for which an on-road mobile source inventory was required as of that date was 2008. Therefore, 2008 is the baseline year for 2006 PM<sub>2.5</sub> areas.

This final rule would also govern the baseline year for conformity purposes for any areas designated for a PM<sub>2.5</sub> NAAQS that EPA promulgates in the future. EPA will clarify the relevant baseline year under today's regulation for each such future NAAQS for conformity implementers in guidance and maintain a list of baseline years that result from today's final rule on EPA's Web site.<sup>24</sup>

Today's action does not change the 2002 baseline year for areas designated nonattainment for the 1997 PM<sub>2.5</sub> NAAQS and the conformity rule now clarifies that 2002 applies as the baseline year only to areas designated nonattainment for the 1997 PM<sub>2.5</sub> NAAQS. The baseline year for 1997 PM<sub>2.5</sub> NAAQS areas is found in § 93.119(e)(2)(A).

The existing interagency consultation process (40 CFR 93.105(c)(1)(i)) must be used to determine the latest assumptions and models for generating baseline year motor vehicle emissions to complete any baseline year test. The baseline year emissions level that is used in conformity must be based on the latest planning assumptions available, the latest emissions model, and

<sup>23</sup> 40 CFR 51.30(b).

<sup>24</sup> See <http://www.epa.gov/otaq/stateresources/transconf/index.htm>.

appropriate methods for estimating travel and speeds as required by 40 CFR 93.110, 93.111, and 93.122 of the current conformity rule. The baseline year test can be completed with a submitted or draft baseline year motor vehicle emissions SIP inventory, if the SIP reflects the latest information and models. If such a SIP baseline is not available, an MPO, in consultation with state and local air agencies, could also develop baseline year emissions as part of the conformity analysis.

###### 2. Rationale and Response to Comments

*General overview.* EPA believes that today's definition for the baseline year results in an environmentally protective and legal baseline year for conformity under the 2006 PM<sub>2.5</sub> NAAQS and any future PM<sub>2.5</sub> NAAQS revisions, and best accomplishes several important goals.

First, as EPA discussed in the preamble to the proposed rule, EPA believes that a more recent year than 2002 (the baseline year for 1997 PM<sub>2.5</sub> areas) is appropriate for meeting CAA conformity requirements for 2006 PM<sub>2.5</sub> nonattainment areas. EPA also believes that using a more recent year is more environmentally protective than 2002, and more relevant for the 2006 PM<sub>2.5</sub> NAAQS. Several commenters agreed with these points. Because the AERR requires submission of inventories every three years, today's final rule results in a baseline year that is recent for any PM<sub>2.5</sub> NAAQS established after 1997. The baseline year will always be either the same year as the year in which designations are effective, or one or two years prior to the effective date of designations. For example, in the case of the 2006 PM<sub>2.5</sub> NAAQS, the baseline year, 2008, is the year before the year in which designations are effective, 2009.

EPA had also proposed 2005 as a baseline year as it is also more recent than 2002. One commenter preferred a 2005 baseline year because the introduction of Tier 2 and improved fuel and engine technologies since then would allow transportation plans and TIPs to meet conformity more easily. However, because of the implementation of EPA's Tier 2 Vehicle and Gasoline Program as well as other federal programs, motor vehicle emissions in the year 2005 were higher than emissions in the year 2008. Thus today's rule, which results in a baseline year of 2008, provides more protection for the environment than would a baseline year of 2005, in the time before an area has adequate or approved motor vehicle emissions budgets from a SIP that addresses PM<sub>2.5</sub>.

Second, today's baseline year definition coordinates the conformity

baseline year with other air quality planning requirements, which allows state and local governments to use their resources more efficiently. Coordinating the conformity baseline year with the year used for SIP planning and an emission inventory year was EPA's rationale for using 2002 as the baseline year for conformity tests in existing PM<sub>2.5</sub> nonattainment areas for the 1997 NAAQS. Today's regulatory text results in a conformity baseline year that is consistent with emission inventory requirements, and most likely will be consistent with the baseline year used for SIP planning as well. Several commenters voiced support for coordinating the conformity baseline year with these other air quality planning requirements.

Third, today's final rule provides transportation planners with knowledge of the baseline year for any future PM<sub>2.5</sub> NAAQS upon the effective date of designations for that NAAQS, without having to wait either for EPA to amend the transportation conformity rule or select a SIP planning baseline year. As a result, MPOs and other transportation planners would understand conformity requirements for future PM<sub>2.5</sub> NAAQS revisions more quickly, which may, in turn, also allow more time to prepare and complete necessary conformity determinations. Several commenters agreed that not having to wait for a rule revision would be a benefit of defining the baseline year as in today's rule, rather than choosing a specific year. Some commenters preferred defining the baseline year in terms of the year used as the baseline year for SIP planning. Today's final rule addresses these concerns since it will most likely result in a conformity baseline year that is consistent with the SIP baseline year, and in the future will give transportation planners the advantage of knowing the baseline year at the beginning of the grace period for newly designated areas.

Last, given that the CAA requires EPA to review the NAAQS for possible revision once every five years, today's baseline year provision potentially reduces the need for future rule revisions for any future PM<sub>2.5</sub> NAAQS.

While today's final rule establishes a baseline year for any PM<sub>2.5</sub> NAAQS other than the 1997 PM<sub>2.5</sub> NAAQS, the same rationale would apply for establishing the same type of baseline year definition for any future new or revised NAAQS of a transportation-related criteria pollutant. Therefore, EPA may amend the rule in the future to apply the baseline year language found in today's § 93.119(e)(2)(B) more generally. However, EPA did not

propose such an amendment, and intends to solicit and consider public comment before it would adopt any such provision.

*Specific comments.* EPA is responding today to several comments regarding the baseline year. A couple of commenters indicated that they thought proposed Option 2 would create a "rolling" baseline year, that is, one that would be updated every three years. One commenter did not support such a rolling baseline; another did support it as long as motor vehicle emissions in an inventory year were less than the prior reporting year. However, today's final rule does not establish a rolling baseline year for any PM<sub>2.5</sub> NAAQS. It establishes a single baseline year for each PM<sub>2.5</sub> NAAQS that does not change over time. For example, for the 2006 PM<sub>2.5</sub> NAAQS, the definition results in a baseline year of 2008. The year 2008 will remain the baseline year for 2006 PM<sub>2.5</sub> areas until it's no longer needed, i.e., until adequate or approved budgets are available in a given area.

One commenter who supported the option finalized in today's rule expressed concern that final emissions data would not be available for 2008 for some time. However, if a final AERR inventory for 2008 is not available in a particular area, there are other options for generating the motor vehicle emissions in the baseline year, discussed above under "IV.B.1. Description of Final Rule."

Another commenter expressed concern that MOVES would not be available in time for the year 2008 for the first conformity determination for the 2006 PM<sub>2.5</sub> NAAQS. At this time, the current emissions model, MOBILE6.2, applies for conformity in all areas except California, where EMFAC2007 applies. Therefore, if the MOVES model is not available to generate a 2008 baseline estimate for use in conformity, the MOBILE6.2 model must be used. Once MOVES is available, areas can create a new baseline emissions estimate for use in conformity using MOVES along with other interim analysis years. EPA will provide a policy guidance document for using MOVES in conformity determinations that will include more details about when MOVES must be used. When available, this guidance will be found on EPA's Web site at: <http://www.epa.gov/otaq/stateresources/transconf/policy.htm#models>. For more information on MOVES, please see EPA's Web site at: <http://www.epa.gov/otaq/models/moves/index.htm>.

One commenter thought that the baseline year should be determined through interagency consultation. This

was not a proposed option. However, EPA believes that details for the baseline year test must be determined through rulemaking, as EPA has done for other NAAQS since 1993. Today's rule better accomplishes the purposes of meeting the CAA's requirements, coordinating with SIP and inventory planning, and providing certainty to transportation planners. Furthermore, today's rule ensures consistency across the nation, whereas allowing each area to determine its own baseline year through interagency consultation could result in different baseline years in different areas.

#### **V. Regional Conformity Tests in 2006 PM<sub>2.5</sub> Nonattainment Areas That Do Not Have Adequate or Approved SIP Budgets for the 1997 PM<sub>2.5</sub> NAAQS**

This section of the preamble discusses regional conformity tests for nonattainment areas for the 2006 PM<sub>2.5</sub> NAAQS that do not have adequate or approved PM<sub>2.5</sub> SIP budgets for the 1997 NAAQS. This part of the final rule applies to 2006 PM<sub>2.5</sub> nonattainment areas that were not covered by the 1997 PM<sub>2.5</sub> NAAQS, as well as nonattainment areas for both PM<sub>2.5</sub> NAAQS that do not have an adequate or approved 1997 PM<sub>2.5</sub> SIP budget. EPA has addressed conformity tests for these areas under section 93.109(j) of the conformity rule. See Section VI. of today's final rule for conformity tests in 2006 PM<sub>2.5</sub> areas that have adequate or approved SIP budgets for the 1997 PM<sub>2.5</sub> NAAQS.

Note that the rule finalizes new requirements for conformity only under the 2006 PM<sub>2.5</sub> NAAQS. Today's final rule does not address or change the requirements for demonstrating conformity for the 1997 PM<sub>2.5</sub> NAAQS.

##### *A. Conformity After 2006 PM<sub>2.5</sub> SIP Budgets Are Adequate or Approved*

###### 1. Description of Final Rule

Once a SIP for the 2006 PM<sub>2.5</sub> NAAQS is submitted with a budget(s) that EPA has found adequate or approved, the budget test must be used in accordance with 40 CFR 93.118 to complete all applicable regional emissions analyses for the 2006 PM<sub>2.5</sub> NAAQS. This requirement is found at § 93.109(j)(2). Conformity is demonstrated if the transportation system emissions reflecting the proposed transportation plan, TIP, or project not from a conforming transportation plan and TIP are less than or equal to the motor vehicle emissions budget level defined by the SIP as being consistent with CAA requirements.

The first SIP for the 2006 PM<sub>2.5</sub> NAAQS could be a control strategy SIP



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

Whatever the case, the interim emissions test(s) would no longer be used for direct PM<sub>2.5</sub> or a relevant precursor once an adequate or approved SIP budget for the 2006 PM<sub>2.5</sub> NAAQS is established and effective for the pollutant or precursor. States are required to develop their future 2006 PM<sub>2.5</sub> SIPs in consultation with MPOs, state and local transportation agencies, and local air quality agencies in an effort to facilitate future conformity determinations. EPA Regions will be available to assist states in the development of early progress SIPs for the 2006 PM<sub>2.5</sub> NAAQS, if desired.

## 2. Rationale and Response to Comments

EPA believes that this provision meets statutory requirements for conformity determinations that occur after SIP budgets are available for the 2006 PM<sub>2.5</sub> NAAQS. Section 176(c) of the CAA states that transportation activities must “conform to an implementation plan...” (SIP) and states further that conformity to an implementation plan means conformity to the SIP’s purpose. Once EPA finds a budget for the 2006 PM<sub>2.5</sub> NAAQS adequate or approves the SIP that includes it, the budget test provides the best means to determine whether transportation plans and TIPs meet the statutory obligations in CAA sections 176(c)(1)(A) and (B) for that NAAQS. That is, the budget test best shows that transportation plans and TIPs conform to the SIP’s purpose of eliminating or reducing the severity and number of violations of the NAAQS and achieving expeditious attainment of the NAAQS

(176(c)(1)(A)); and best confirms the requirement that transportation plans and TIPs not cause or contribute to any new violation, worsen an existing violation, or delay timely attainment or any interim milestones (176(c)(1)(B)). The budget test also best demonstrates that transportation plans and TIPs comply with the statutory obligation to be consistent with the emissions estimates in SIPs, according to CAA section 176(c)(2)(A). By being consistent with the on-road mobile source emissions levels in the SIP, transportation planners can ensure that their activities remain consistent with state and local air quality goals to protect public health. EPA received no comments on this aspect of today’s rule.

## B. Conformity Before 2006 PM<sub>2.5</sub> SIP Budgets Are Adequate or Approved

### 1. Description of Final Rule

The 2006 PM<sub>2.5</sub> nonattainment areas that do not have existing adequate or approved PM<sub>2.5</sub> budgets for the 1997 PM<sub>2.5</sub> NAAQS must meet one of the following interim emissions tests for conformity determinations conducted before adequate or approved 2006 24-hour PM<sub>2.5</sub> SIP budgets are established:

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

This aspect of today’s final rule is similar to the transportation conformity rule at 40 CFR 93.119(e) for nonattainment areas for the 1997 PM<sub>2.5</sub> NAAQS. Today’s final rule allows 2006 PM<sub>2.5</sub> nonattainment areas without SIP budgets to choose between the two interim emissions tests, rather than require that one specific test or both tests be completed. Conformity is demonstrated if, for each analysis year, the transportation emissions reflecting the proposed transportation plan or TIP (build) are less than or equal to either the emissions from the existing transportation system (no-build), or the level of motor vehicle emissions in the baseline year, as described in 40 CFR 93.119. For the discussion of the baseline year for the 2006 PM<sub>2.5</sub> NAAQS, please refer to Section IV. of today’s notice.

### 2. Rationale and Response to Comments

EPA believes that this provision of today’s rule meets statutory requirements for conformity determinations that occur before SIP budgets are available for the 2006 PM<sub>2.5</sub> NAAQS. EPA believes it is appropriate to provide flexibility and allow 2006 PM<sub>2.5</sub> areas to meet only one interim emissions test before adequate or

approved PM<sub>2.5</sub> SIP budgets are established.

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

Based on the CAA, EPA has previously determined that only in ozone and CO areas of higher classifications<sup>25</sup> are transportation plans and TIPs required to also satisfy section 176(c)(3)(A)(iii), *i.e.*, that the transportation plan and TIP contribute to emissions reductions, during the time period before adequate or approved SIP budgets are available (58 FR 3782–3783; 62 FR 43784–43785; 69 FR 40018, 40019–40031). As a result, the current rule requires these ozone and CO areas to meet both interim emissions tests, rather than only one test.

However, prior to today’s rule, the conformity rule already allowed areas designated for the other pollutants, as well as the lower classifications of ozone and CO, to conform based on only one interim emissions test, rather than having to complete two tests and thereby contribute further reductions towards attainment. Today’s final rule requiring the 2006 PM<sub>2.5</sub> areas also to meet only one of the interim emissions tests meets the CAA’s requirements in section 176(c)(1)(B) (described above in Section II.A., footnote 1). For more information and the full rationale for allowing some areas to conform based on only one interim emissions test, see the November 24, 1993 final rule (58 FR 62197) that addressed interim requirements for PM<sub>10</sub> and NO<sub>2</sub> areas, the July 1, 2004 final rule (69 FR 40029) that established interim requirements for 1997 PM<sub>2.5</sub> areas, and the May 15, 2009 proposed rule.

EPA believes that the no-greater-than-baseline year interim emissions test is an appropriate test for meeting section 176(c)(1)(B) (refer to footnote 1 in Section II.A.) requirements in 2006 PM<sub>2.5</sub> nonattainment areas. By definition, the no-greater-than-baseline year test ensures that emissions from on-road mobile sources are no greater than they were during the baseline year that will most likely be used for 2006

<sup>25</sup> These areas include ozone areas classified as moderate and above, CO areas classified as moderate with design value greater than 12.7 ppm, and CO areas classified as serious.



PM<sub>2.5</sub> NAAQS SIP planning purposes. If future on-road emissions do not increase above their base year levels, applicable statutory requirements are met.

The build/no-build test also allows a 2006 PM<sub>2.5</sub> area to meet statutory requirements. As described above, the build/no-build test requires a regional emissions analysis to demonstrate that the emissions from the proposed transportation system in future years would be less than the emissions from the built transportation system in future years. Since for each analysis year, a new transportation plan, TIP, or project (the build scenario) could not result in regional emissions that are higher than those that would occur in the absence of the proposed transportation activities (the no-build scenario) for the system, CAA section 176(c)(1)(B) requirements are met. For these reasons, EPA believes that the build/no-build test continues to be an appropriate interim test prior to SIP budgets being available.

Most commenters supported allowing 2006 PM<sub>2.5</sub> areas to meet only one of the interim emissions tests because it would give areas the flexibility to use the test they deem most appropriate, given the available data and the unique circumstances of individual areas. However, one commenter objected, arguing that the rule doesn't promote the CAA or the SIP process because it doesn't require reduction of PM<sub>2.5</sub> emissions. The commenter also stated that the case EPA cited in its proposal, *Environmental Defense v. EPA* 467 F.3d 1329 (DC Cir. 2006), is not pertinent because it did not consider climate change factors in any way.

EPA disagrees. First, it has already been clearly established in case law that the conformity provisions of the CAA do not require that transportation projects achieve additional emission reductions in PM<sub>2.5</sub> areas before SIP budgets are available. As discussed above, allowing 2006 PM<sub>2.5</sub> areas the choice of interim emissions tests does meet the CAA's requirements. Today's rule is parallel to the current rule's requirements for 1997 PM<sub>2.5</sub> nonattainment areas (69 FR 40028–40031), which were upheld by an October 2006 court decision.

*Environmental Defense v. EPA*, 467 F.3d 1329 (D.C. Cir. 2006).<sup>26</sup> Contrary to the

<sup>26</sup> Petitioners challenged several aspects of the conformity regulations. In its decision, the U.S. Court of Appeals for the District of Columbia Circuit upheld EPA's regulations at 40 CFR 93.119(b)(2), (d), and (e) "because the Act does not require that activities involving transportation actually reduce pollutants, but merely not frustrate an implementation plan's purpose to reduce overall emissions." The court also upheld EPA's regulations

commenter's view, this court case is not rendered irrelevant because it doesn't consider climate change factors; conformity applies only to nonattainment and maintenance areas for transportation-related criteria pollutants and their precursors.

The same commenter thought that the 2006 court case does not preclude EPA from reasonably determining that more stringent interim rules are required to "conform to a SIP's purpose of reducing overall emissions." However, EPA believes that the best interpretation of the Act is that reflected in today's rule, which allows 2006 PM<sub>2.5</sub> areas the choice between the interim emissions tests. This interpretation is also consistent with past rulemakings for interim emissions test requirements for other pollutants, as described above.

Finally, one commenter asked EPA to clarify whether an area that is currently using one of the interim emissions tests for the 1997 PM<sub>2.5</sub> NAAQS could use the results of that test for the 2006 PM<sub>2.5</sub> NAAQS. When areas are determining conformity for the 1997 and 2006 PM<sub>2.5</sub> NAAQS at the same time, they could apply some of the information developed in the 1997 PM<sub>2.5</sub> regional emissions analysis in creating 2006 PM<sub>2.5</sub> regional emissions analysis.

First, note that regardless of whether the area is using the baseline year test or build/no-build test, the same analysis years can be used for 1997 PM<sub>2.5</sub> conformity and 2006 PM<sub>2.5</sub> conformity when the analyses are done at the same time (refer to 40 CFR 93.119(g) for analysis year requirements).

In most 1997 PM<sub>2.5</sub> areas, conformity applies only for the annual NAAQS.<sup>27</sup> While the results of an interim emissions test for the 1997 annual PM<sub>2.5</sub> NAAQS cannot be directly applied for the 2006 24-hour PM<sub>2.5</sub> NAAQS, the option described below could save implementers some effort when conformity is being determined for both of these NAAQS at the same time. This option applies only when using MOBILE6.2 for regional emissions analyses.<sup>28</sup>

at 40 CFR 93.118(b), (d), and (e)(6). The court vacated a narrow provision at 40 CFR 93.109(e)(2)(v) which had allowed 8-hour ozone areas to avoid using their existing 1-hour budgets under certain circumstances. This provision was removed from the transportation conformity regulation in the January 24, 2008 final rule (*see* 73 FR 4434).

<sup>27</sup> There are two areas where conformity for both the 1997 annual and 24-hour NAAQS applies. See Section III.A. for more information.

<sup>28</sup> Areas in California should use the interagency consultation process to determine appropriate methods. In all other 2006 PM<sub>2.5</sub> areas, EPA expects that MOBILE6.2 will be used for the first 2006 PM<sub>2.5</sub> conformity determinations.

Areas should develop the annual emissions for the 1997 PM<sub>2.5</sub> NAAQS by estimating emissions in two seasons, summer and winter; four seasons; or the 12 months of the year.<sup>29</sup>

To apply information from the analysis done for the 1997 PM<sub>2.5</sub> NAAQS to the 2006 PM<sub>2.5</sub> analysis, for each analysis year, areas should use the emission factors developed in the 1997 PM<sub>2.5</sub> NAAQS regional emissions analysis for PM<sub>2.5</sub> and NO<sub>x</sub> in a season or month where violations of the 2006 PM<sub>2.5</sub> NAAQS occurred, and multiply these emission factors by the seasonally-adjusted average daily VMT for the area of the analysis year.<sup>30</sup> If violations occurred in more than one season or month, the interagency consultation process should be used to choose the season or month that would best ensure that the CAA is met, for example by choosing the season with the most frequent or most severe violations, or the season with the highest vehicle miles traveled, or both.<sup>31</sup> The choice of season or seasons should be based on air quality data from the three years used to make designations (*i.e.*, 2006–2008), unless more recent air quality data indicates that a different season should be analyzed, as decided through consultation.

Whatever season is chosen to estimate the build scenario emissions, the same season should be used for comparison whether using the baseline year test or build/no-build test. For example, emissions for a build scenario calculated using winter MOBILE6.2 inputs should be compared to emissions in the winter of the baseline year, or emissions in winter from the no-build scenario.

<sup>29</sup> This description reflects how analyses are to be done for the 1997 PM<sub>2.5</sub> NAAQS, which is covered in "Guidance for Creating Annual On-Road Mobile Source Emission Inventories for PM<sub>2.5</sub> Nonattainment Areas for Use in SIPs and Conformity," EPA420-B-05-008, August 2005, found on EPA's Web site at: <http://www.epa.gov/otaq/stateresources/transconf/policy/420b05008.pdf>. In particular, Question 7 on pp. 5–8 of that guidance addresses how analyses are to be done for the 1997 PM<sub>2.5</sub> NAAQS.

<sup>30</sup> If a 24-hour emissions estimate is available in the appropriate season or month because this step has been completed for 1997 PM<sub>2.5</sub> NAAQS conformity and conformity is being determined for the 1997 PM<sub>2.5</sub> NAAQS and the 2006 PM<sub>2.5</sub> NAAQS at the same time, it does not need to be redone but can be applied in the regional emissions analysis for 2006 PM<sub>2.5</sub> conformity.

<sup>31</sup> Note that this guidance regarding the choice of season applies only when using MOBILE6.2 and not MOVES because MOBILE6.2 PM<sub>2.5</sub> emission factors are not sensitive to changes in temperature. EPA will provide guidance on this issue when MOVES is released. See EPA's Web site at: <http://www.epa.gov/otaq/models/moves/index.htm> and <http://www.epa.gov/otaq/stateresources/transconf/policy.htm> for future MOVES guidance.

Note that after the effective date of today's final rule, the baseline year for the 2006 PM<sub>2.5</sub> NAAQS will be 2008 while the baseline year for the 1997 PM<sub>2.5</sub> NAAQS remains 2002. See Section IV. for additional discussion of the baseline year.

As stated above, once an area has adequate or approved budgets for any PM<sub>2.5</sub> NAAQS, it must use the budget test instead of an interim emissions test.

### C. Implementation of Regional Tests

The existing conformity rule's general requirements for PM<sub>2.5</sub> regional emissions analyses apply to 2006 PM<sub>2.5</sub> areas that do not have adequate or approved SIP budgets for the 1997 PM<sub>2.5</sub> NAAQS. EPA is including this discussion of the existing regulation's requirements for clarity, to help readers understand how the existing regulation applies to areas designated nonattainment for the 2006 PM<sub>2.5</sub> NAAQS. The discussion below is intended to illustrate how today's final rule is to be implemented in practice for 2006 PM<sub>2.5</sub> areas without adequate or approved 1997 PM<sub>2.5</sub> SIP budgets.

#### 1. Decisions Made Through the Interagency Consultation Process

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

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

#### 2. How a Regional Emissions Analysis Can Be Developed When Using An Interim Emissions Test

Under the "Rationale and Response to Comments" above, EPA described how an area using an interim emissions test for 1997 PM<sub>2.5</sub> conformity could apply it to 2006 PM<sub>2.5</sub> conformity. This section provides general guidance for creating a 2006 PM<sub>2.5</sub> regional emissions analysis.

Because the 2006 PM<sub>2.5</sub> NAAQS designations were only for the 2006 24-hour PM<sub>2.5</sub> NAAQS, the regional emissions analysis will be based on emissions for a 24-hour time period.

For either the baseline year test or the build/no-build test, for each analysis year, emissions must be estimated for the build scenario according to 40 CFR 93.119(i) with a 24-hour emissions inventory. (The build scenario is referred to as the "Action" scenario at 40 CFR 93.119(i).)

This emissions inventory would include direct PM<sub>2.5</sub>, NO<sub>x</sub>, and any other relevant precursor emissions<sup>32</sup> that result from the build scenario using MOBILE6.2 for a 24-hour period. For each analysis year chosen, areas should choose MOBILE6.2 inputs for the season of the year where violations of the 2006 PM<sub>2.5</sub> NAAQS occurred.<sup>33</sup> If violations occurred in more than one season, implementers should use the interagency consultation process to choose the season (or seasons) that would best ensure that the CAA is met, for example by choosing the season with the most frequent or most severe violations, or the season with the highest vehicle miles traveled, or both.<sup>34</sup> The choice of season or seasons should be based on air quality data from the three years used to make designations (*i.e.*, 2006–2008), unless more recent air quality data indicates that a different season should be analyzed, as decided through consultation.

For each analysis year, these emission factors from MOBILE6.2 for direct PM<sub>2.5</sub>, NO<sub>x</sub>, and any other relevant precursor for the season chosen should be

<sup>32</sup> Refer to 40 CFR 93.102(b) for which precursors apply. To date, before they have adequate or approved budgets from a PM<sub>2.5</sub> SIP, PM<sub>2.5</sub> areas have determined conformity for only direct PM<sub>2.5</sub> and NO<sub>x</sub>.

<sup>33</sup> In California where EMFAC is used, areas should use the interagency consultation process to determine appropriate methods.

<sup>34</sup> Note that this guidance regarding the choice of season applies only when using MOBILE6.2 and not MOVES because MOBILE6.2 PM<sub>2.5</sub> emission factors are not sensitive to changes in temperature. EPA will provide guidance on this issue when MOVES is released. See EPA's Web site at: <http://www.epa.gov/otaq/models/moves/index.htm> and <http://www.epa.gov/otaq/stateresources/transconf/policy.htm> for future MOVES guidance.

multiplied by the seasonally-adjusted average daily VMT in that analysis year to create an estimate of transportation emissions in a 24-hour period. For additional guidance on creating daily emissions inventories, refer to EPA's existing guidance documents.<sup>35</sup>

Note that whatever season is chosen to estimate the build scenario emissions, the same season should be used for comparison whether using the baseline year test or build/no-build test. For example, emissions for a build scenario calculated using winter MOBILE6.2 inputs should be compared to emissions in the winter of the baseline year (*see* Section IV. for a discussion of the baseline year in 2006 PM<sub>2.5</sub> areas), or emissions in winter from the no-build scenario.

Refer to 40 CFR 93.119 for additional information about conducting the build/no-build and baseline year tests.

#### 3. Conformity Test Requirements for All Areas

Regional emissions analyses under today's final rule are to be implemented through existing conformity requirements such as 40 CFR 93.118, 93.119, and 93.122. For example, the existing conformity rule requires that certain years within the transportation plan (or alternate timeframe) be examined. Under 40 CFR 93.118(d), the following years would be analyzed for the budget test with 2006 PM<sub>2.5</sub> SIP budgets:

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

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

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

<sup>35</sup> Specifically, see EPA's "Technical Guidance on the Use of MOBILE6.2 for Emission Inventory Preparation," EPA420-R-04-013, August 2004, found on EPA's Web site at: <http://www.epa.gov/otaq/models/mobile6/420r04013.pdf> and "Procedures for Emission Inventory Preparation—Vol IV: Mobile Sources," found at: <http://ntl.bts.gov/DOCS/AQP.html>.

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

#### 4. Cases Involving Multi-Jurisdictional Areas

In July 2004, EPA issued a guidance document for implementing conformity requirements in multi-jurisdictional areas.<sup>36</sup> Multi-jurisdictional areas are nonattainment and maintenance areas with multiple MPOs, one or more MPOs and a donut area, or multi-state areas. EPA believes that this guidance should also apply to 2006 PM<sub>2.5</sub> areas with multiple jurisdictions.

There are two parts of this existing guidance that are most relevant for implementing conformity for multi-jurisdictional 2006 PM<sub>2.5</sub> areas that do not have adequate or approved 1997 PM<sub>2.5</sub> SIP budgets. Part 2 of this guidance describes how conformity would be implemented in all 2006 PM<sub>2.5</sub> areas before adequate or approved SIP budgets are available for an applicable NAAQS. Part 3 of this guidance is relevant for meeting conformity requirements once adequate or approved 2006 PM<sub>2.5</sub> SIP budgets are available.

For example, Part 3 of this guidance describes how a state or MPO in a multi-state nonattainment area can operate independently from other states/MPOs for conformity purposes once adequate or approved SIP budgets for a state are established. This same conformity guidance also applies for the 2006 PM<sub>2.5</sub> NAAQS in these types of areas. Part 3 applies to the cases where subarea budgets are established for a nonattainment area within one state with multiple MPOs. For further information, please refer to EPA's 2004 multi-jurisdictional conformity guidance.

#### VI. Regional Conformity Tests in 2006 PM<sub>2.5</sub> Areas That Have Adequate or Approved 1997 PM<sub>2.5</sub> SIP Budgets

This section describes the conformity tests required for completing regional emissions analyses in areas designated for the 2006 PM<sub>2.5</sub> NAAQS that have adequate or approved SIP budgets for the 1997 PM<sub>2.5</sub> NAAQS that cover either part or all of the 2006 PM<sub>2.5</sub> area. The

conformity tests for these areas are found under a new section 93.109(k). See Section V. of this preamble for conformity tests in 2006 PM<sub>2.5</sub> areas that do not have an adequate or approved 1997 PM<sub>2.5</sub> SIP budget.

#### A. Conformity After 2006 PM<sub>2.5</sub> SIP Budgets Are Adequate or Approved

##### 1. Description of Final Rule

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

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

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

when developing 2006 PM<sub>2.5</sub> SIPs to facilitate future conformity determinations. Once EPA's nonattainment designations are finalized, EPA Regions would be available to assist states in developing early progress SIPs for the 2006 PM<sub>2.5</sub> NAAQS, if desired.

##### 2. Rationale and Response to Comments

EPA's rationale for the use of the budget test once adequate or approved SIP budgets addressing the 2006 PM<sub>2.5</sub> NAAQS are available, and the summary of comments received on this provision, is found in Section V.A.2. of this preamble. It is not repeated here.

#### B. Conformity Before 2006 PM<sub>2.5</sub> SIP Budgets Are Adequate or Approved

##### 1. Description of the Final Rule

This portion of the final rule is for completing conformity under the 2006 PM<sub>2.5</sub> NAAQS before 2006 PM<sub>2.5</sub> SIP budgets are established. For areas designated nonattainment for the 2006 PM<sub>2.5</sub> NAAQS where all, or a portion, of the area is covered by adequate or approved 1997 PM<sub>2.5</sub> SIP budgets, the 1997 PM<sub>2.5</sub> SIP budgets serve as the surrogate for budgets for the 2006 PM<sub>2.5</sub> NAAQS until the point when 2006 PM<sub>2.5</sub> SIP budgets are adequate or approved. The interagency consultation process should be used if there are questions about what adequate or approved budgets are established in an area's 1997 PM<sub>2.5</sub> SIP. In addition, in the case where the 1997 budget does not cover the entire 2006 PM<sub>2.5</sub> area, one of the interim emissions tests must also be used, as described below. Section IV. of today's rule covers the baseline year to be used for the baseline year interim emissions test and Section V. covers interim emissions tests in 2006 PM<sub>2.5</sub> areas before adequate or approved SIP budgets for the 2006 PM<sub>2.5</sub> NAAQS are available.

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

The final rule creates a new provision in § 93.109(k) that covers the four possible scenarios that could result when areas are designated nonattainment for the 2006 PM<sub>2.5</sub> NAAQS:

- *Scenario 1:* the 2006 PM<sub>2.5</sub> area nonattainment boundary is the same as the 1997 PM<sub>2.5</sub> area boundary.

<sup>36</sup> "Companion Guidance for the July 1, 2004, Final Transportation Conformity Rule: Conformity Implementation in Multi-Jurisdictional Nonattainment and Maintenance Areas for Existing and New Air Quality Standard," EPA420-B-04-012, July 2004, found on EPA's Web site at <http://www.epa.gov/otaq/stateresources/transconf/policy/420b04012.pdf>.

- *Scenario 2:* the 2006 PM<sub>2.5</sub> area is smaller than (and completely within) the 1997 PM<sub>2.5</sub> area boundary.

- *Scenario 3:* the 2006 PM<sub>2.5</sub> area is larger than (and contains) the 1997 PM<sub>2.5</sub> area boundary.

- *Scenario 4:* the 2006 PM<sub>2.5</sub> area boundary overlaps with a portion of the 1997 PM<sub>2.5</sub> area boundary.

Most of the 2006 PM<sub>2.5</sub> areas that are also designated for the 1997 PM<sub>2.5</sub> NAAQS are Scenario 1 areas; there are areas that belong to Scenarios 2 and 3 as well. EPA is including rules for all four scenarios for the sake of completeness.<sup>37</sup> The following paragraphs describe today's rule provisions for each possible scenario for 2006 PM<sub>2.5</sub> nonattainment areas.

*Scenario 1: 2006 PM<sub>2.5</sub> areas where the nonattainment boundary is exactly the same as the 1997 PM<sub>2.5</sub> boundary.* In this case, the 2006 and 1997 PM<sub>2.5</sub> nonattainment boundaries cover exactly the same geographic area. Such areas must meet the budget test for the 2006 PM<sub>2.5</sub> NAAQS using existing adequate or approved SIP budgets for the 1997 PM<sub>2.5</sub> NAAQS.

*Scenario 2: 2006 PM<sub>2.5</sub> areas where the boundary is smaller than and within the 1997 PM<sub>2.5</sub> boundary.* In this case, the 2006 PM<sub>2.5</sub> nonattainment area is smaller than and completely encompassed by the 1997 PM<sub>2.5</sub> nonattainment boundary. Such areas must meet one of the following versions of the budget test:

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

- The budget test using the existing adequate or approved 1997 PM<sub>2.5</sub> SIP budgets for the entire 1997 PM<sub>2.5</sub> nonattainment area. In this case, any additional reductions beyond those addressed by control measures in the 1997 PM<sub>2.5</sub> SIP would be required to

come from the 2006 PM<sub>2.5</sub> nonattainment area as described below.

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

A conformity determination using the entire 1997 PM<sub>2.5</sub> budget would have to include a comparison between the on-road regional emissions produced in the entire 1997 PM<sub>2.5</sub> area and the existing 1997 PM<sub>2.5</sub> SIP budget(s). However, if additional reductions are required to meet conformity beyond those produced by control measures in the 1997 PM<sub>2.5</sub> SIP budgets, those reductions must be obtained from within the 2006 PM<sub>2.5</sub> nonattainment area only, since the conformity determination is being made for the 2006 PM<sub>2.5</sub> NAAQS.

*Scenario 3: 2006 PM<sub>2.5</sub> areas where the boundary is larger than the 1997 PM<sub>2.5</sub> boundary.* In this case, an entire 1997 PM<sub>2.5</sub> nonattainment or maintenance area would be within a larger 2006 PM<sub>2.5</sub> nonattainment area and the 1997 PM<sub>2.5</sub> budgets would not cover the entire 2006 PM<sub>2.5</sub> nonattainment area. Such areas are required to meet one of the following:

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

- The budget test using the existing adequate or approved 1997 PM<sub>2.5</sub> SIP budgets for the entire 2006 PM<sub>2.5</sub> nonattainment area.<sup>38</sup>

The budget test must be completed according to the requirements in 40 CFR

93.118, and the interim emissions test must follow the requirements of 40 CFR 93.119.

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

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

The 2006 PM<sub>2.5</sub> areas covered under this scenario must use the 1997 PM<sub>2.5</sub> budget(s) to meet the budget test for the portion of the 1997 PM<sub>2.5</sub> area and budgets that overlap with the 2006 PM<sub>2.5</sub> area boundary, and one of the interim emissions tests for either the remaining portion of the 2006 PM<sub>2.5</sub> nonattainment area, the entire 2006 PM<sub>2.5</sub> area, or the entire portion of the 2006 PM<sub>2.5</sub> area within an individual state, if 1997 PM<sub>2.5</sub> budgets are established in each state in a multi-state area. Under this final rule, the budget test must be completed according to the requirements in 40 CFR 93.118, and the interim emissions test must follow the requirements of 40 CFR 93.119.

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

<sup>37</sup> Today's final rule is based on EPA's experience in establishing conformity requirements for areas designated for the 1997 8-hour ozone NAAQS that had SIP budgets for the 1-hour ozone NAAQS, found in 40 CFR 93.109(e)(2). The four boundary scenarios are the same as the four boundary scenarios EPA described for the 1997 8-hour ozone areas that had existing 1-hour ozone budgets. EPA's 2004 guidance entitled, "Companion Guidance for the July 1, 2004 Final Transportation Conformity Rule, Conformity Implementation in Multi-Jurisdictional Nonattainment and Maintenance Areas for Existing and New Air Quality Standards," (EPA420-B-04-012), contains diagrams of the four scenarios for 8-hour ozone areas. Readers may be interested in reviewing these diagrams as they read the following description of the regulation. This document can be found on EPA's transportation conformity website at: <http://www.epa.gov/otaq/stateresources/transconf/policy/420b04012.pdf>.

<sup>38</sup> While the existing regulation for 8-hour ozone areas does not explicitly contain this option, it was addressed in the preamble to the final rule addressing 8-hour ozone areas (July 1, 2004, 69 FR 40027).

## 2. Rationale and Response to Comments

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

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

The use of the 1997 PM<sub>2.5</sub> budgets as a surrogate for the 2006 PM<sub>2.5</sub> NAAQS also would ensure that CAA requirements are met. Section 176(c) of the CAA requires that transportation activities may not cause or contribute to new violations, worsen existing violations, or delay timely attainment or any interim milestones. In these areas, the budgets for the 1997 annual PM<sub>2.5</sub> NAAQS have been the measure of PM<sub>2.5</sub> conformity thus far, and have been consistent with these areas' PM<sub>2.5</sub> air quality progress to date. Therefore, using budgets that address the 1997 annual PM<sub>2.5</sub> NAAQS where no other PM<sub>2.5</sub> budgets are available ensures that the requirements of CAA 176(c) are met. Once 2006 PM<sub>2.5</sub> budgets are found adequate or approved, the budget test for that NAAQS provides the best means to determine whether transportation plans, TIPs, or projects meet CAA requirements.

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

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

In addition, using the 1997 PM<sub>2.5</sub> budgets for 2006 PM<sub>2.5</sub> conformity purposes may also streamline the conformity process for areas designated nonattainment for both the 1997 and 2006 PM<sub>2.5</sub> NAAQS. These areas would already be using 1997 PM<sub>2.5</sub> budgets for conformity of that NAAQS. In areas where the 1997 and 2006 PM<sub>2.5</sub> nonattainment boundaries are the same (Scenario 1), today's final rule requires these areas to meet only one type of test—the budget test—to demonstrate conformity for both the 1997 and 2006 PM<sub>2.5</sub> NAAQS, although the attainment year, which is a required analysis year, will be different for these two NAAQS.

For multi-state 2006 PM<sub>2.5</sub> nonattainment areas, today's final rule preserves states' ability to determine conformity independently from one another, if a state has already established budgets for its own state (and/or MPO(s)) for the 1997 PM<sub>2.5</sub> NAAQS. Further explanation and examples are given below in Section VI.C.

While today's final rule concerns the 2006 PM<sub>2.5</sub> NAAQS, this same rationale regarding conformity tests would apply for future new or revised NAAQS of any transportation-related criteria pollutant. Therefore, EPA may amend the rule in the future to apply the conformity test language found in today's § 93.109(j) and (k) more generally. EPA is not doing so in today's final rule as such a provision was not proposed, and EPA intends to solicit and consider public comments on applying this language to future new or revised NAAQS before adopting any such provision.

*Scenario 1 and 2 areas.* Today's final rule for conformity in 2006 PM<sub>2.5</sub> areas before budgets that address that NAAQS are available is largely consistent with

the process that EPA finalized for 8-hour ozone areas designated under the 1997 ozone NAAQS where 1-hour ozone budgets exist (69 FR 40021–40028). Requirements for Scenario 1 and 2 areas are identical to the final rule for these 8-hour ozone areas. Scenario 2 2006 PM<sub>2.5</sub> areas also have the choice of adjusting the existing 1997 PM<sub>2.5</sub> budgets for the new geographical area. As we indicated in the November 5, 2003 proposed rule for the 8-hour ozone areas (68 FR 62702), using the relevant portion of existing budgets for purposes of conducting conformity determinations for a different NAAQS of the same pollutant is appropriate since the budgets for the 1997 PM<sub>2.5</sub> NAAQS would only be used as a surrogate for the 2006 PM<sub>2.5</sub> NAAQS. These 1997 PM<sub>2.5</sub> budgets still have to be met in the 1997 PM<sub>2.5</sub> areas.

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

However, some Scenario 3 areas may be able to demonstrate conformity without an interim emissions test. Scenario 3 PM<sub>2.5</sub> areas have an option that similar 8-hour ozone areas also have: The entire larger, newly designated area could meet budgets established for the smaller, existing area. In the July 1, 2004 final rule, EPA clarified that 8-hour ozone areas have this option. In that final rule, EPA noted that while this option was not explicitly addressed by the regulatory text, it is consistent with the requirements and is available to interested 8-hour ozone areas (69 FR 40027).

Finally, EPA believes that statutory requirements are met under the proposal to use either interim emissions test when no adequate or approved PM<sub>2.5</sub> SIP budgets are available. See further rationale regarding this flexibility in today's final rule in Section V.

EPA did not receive any specific comments on this portion of the rulemaking, but one commenter supported the use of EPA's 2004 multi-jurisdictional guidance for 2006 PM<sub>2.5</sub> areas. This guidance, discussed further

below in C.2. of this section, reflects the requirements finalized today.

### C. General Implementation of Regional Tests

Today's final rule applies the existing conformity rule's general requirements for PM<sub>2.5</sub> regional emissions analyses to all 2006 PM<sub>2.5</sub> areas. As described in Section V.C., EPA is including this discussion of the existing regulation's requirements for clarity, to help readers understand how the existing regulation would apply to areas designated nonattainment for the 2006 PM<sub>2.5</sub> NAAQS.

The discussion below is intended to illustrate how today's rule will be implemented in practice for 2006 PM<sub>2.5</sub> areas with adequate or approved 1997 PM<sub>2.5</sub> SIP budgets.

#### 1. Conformity Test Requirements for Most Areas

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

The consultation process must be used to determine which analysis years should be selected for regional emissions analyses for the budget test. The conformity rule at 40 CFR 93.118(d)(2) requires the following analysis years for this test:

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

Areas covered by § 93.109(k) of today's final rule will also be determining conformity for the 1997 PM<sub>2.5</sub> NAAQS, using adequate or approved budgets established for that NAAQS, although there will be some differences in analysis years required for the 2006 and 1997 PM<sub>2.5</sub> NAAQS (*e.g.*, the attainment year, which is a required analysis year, will be different for these two NAAQS).

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

#### 2. Cases Involving Multi-Jurisdictional Areas

As described earlier, EPA issued a guidance document in 2004 for implementing conformity requirements in multi-jurisdictional areas. There are two parts of this existing guidance that are relevant for implementing conformity for these areas. Part 3 of the existing guidance describes how conformity would be implemented in all 2006 PM<sub>2.5</sub> areas once adequate or approved SIP budgets for the 2006 PM<sub>2.5</sub> NAAQS are established. Part 4 of this guidance is relevant for meeting conformity requirements when only 1997 PM<sub>2.5</sub> budgets are available.<sup>39</sup>

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

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

#### VII. Other Conformity Requirements for 2006 PM<sub>2.5</sub> Areas

The conformity regulations already provide the remaining requirements that are necessary for conformity under the 2006 PM<sub>2.5</sub> NAAQS. Any existing conformity requirements that are listed for "PM<sub>2.5</sub>" areas that have not been revised by today's final rule apply to 2006 PM<sub>2.5</sub> nonattainment or maintenance areas as well. These provisions have already been promulgated, based on past rulemakings and rationale, and are unchanged by today's rule. For example, a hot-spot analysis is required for certain projects in any PM<sub>2.5</sub> nonattainment and maintenance areas before such projects can be found to conform. These requirements are found in §§ 93.116(a) and § 93.123(b) of the conformity rule, although please note that EPA for other reasons has clarified amendments to section 93.116(a) in today's final rule; see Section IX. The hot-spot analysis requirements that were promulgated for "PM<sub>2.5</sub>" areas in the conformity rule did

<sup>39</sup>This section of the guidance covers how 8-hour ozone areas that have 1-hour ozone budgets would proceed with developing their regional emissions analyses and making conformity determinations, which is analogous to any 2006 PM<sub>2.5</sub> areas that have 1997 budgets in the interim.

not need to be amended to apply to 2006 PM<sub>2.5</sub> areas, because they already apply for this NAAQS.

A hot-spot analysis in an area designated for both the 1997 and 2006 PM<sub>2.5</sub> NAAQS would have to demonstrate that the project meets the conformity rule's hot-spot requirements for all of the PM<sub>2.5</sub> NAAQS for which the area is designated nonattainment:

- If an area is designated nonattainment for only the 2006 PM<sub>2.5</sub> NAAQS, the analysis would have to consider only this NAAQS;
- If an area is designated nonattainment for the 1997 annual NAAQS and the 2006 24-hour NAAQS, the analysis would have to consider both NAAQS;
- If an area is designated nonattainment for both the 1997 annual and 1997 24-hour NAAQS, as well as the 2006 24-hour NAAQS, the analysis would have to consider all of these NAAQS.

Please refer to the March 10, 2006 final rule for additional information regarding hot-spot analyses (47 FR 12468) and EPA and FHWA's current guidance for implementing this requirement (Transportation Conformity Guidance for Qualitative Hot-spot Analyses in PM<sub>2.5</sub> and PM<sub>10</sub> Nonattainment and Maintenance Areas, March 2006, EPA420-B-06-902). EPA will also be releasing PM quantitative hot-spot modeling guidance in the near future. Please check EPA's Web site at: <http://www.epa.gov/otaq/stateresources/transconf/policy.htm>.

Section 93.117 of the conformity rule, which requires project-level conformity determinations to comply with any PM<sub>2.5</sub> control measures in an approved SIP, also applies for conformity under the 2006 PM<sub>2.5</sub> NAAQS. Again, EPA promulgated this requirement in general for nonattainment and maintenance areas under the PM<sub>2.5</sub> NAAQS. See EPA's July 2004 final rule for further information on this requirement (69 FR 40036-40037).

EPA will work with PM<sub>2.5</sub> nonattainment areas as needed to ensure that state and local agencies can meet existing and new conformity requirements for the 2006 PM<sub>2.5</sub> NAAQS in a timely and efficient manner.

#### VIII. Transportation Conformity in PM<sub>10</sub> Nonattainment and Maintenance Areas and the Revocation of the Annual PM<sub>10</sub> NAAQS

##### A. Background

On October 17, 2006, EPA issued a final rule establishing changes to the PM<sub>2.5</sub> and PM<sub>10</sub> NAAQS (71 FR 61144). The October 2006 final rule retained the

24-hour PM<sub>10</sub> NAAQS of 150 µg/m<sup>3</sup>, and revoked the annual PM<sub>10</sub> NAAQS of 50 µg/m<sup>3</sup>. EPA made a commitment in the October 2006 final rule to provide information regarding how transportation conformity will be implemented under the revised PM<sub>10</sub> NAAQS (71 FR 61215). To satisfy this commitment, EPA described which conformity tests would apply in PM<sub>10</sub> nonattainment and maintenance areas (“PM<sub>10</sub> areas”) in a guidance document.<sup>40</sup> Today’s final rule updates the conformity rule in response to this commitment.

CAA section 176(c)(5) requires conformity only in areas that are designated nonattainment or maintenance for a given pollutant and NAAQS. Therefore, transportation conformity has continued to apply to all PM<sub>10</sub> nonattainment and maintenance areas because transportation conformity applies based on an area’s status as a nonattainment or maintenance area, and PM<sub>10</sub> designations were not affected by the October 2006 final rule. As stated in the October 2006 final rule, “both transportation and general conformity will continue to apply to all PM<sub>10</sub> nonattainment and maintenance areas since no designations are changing” (71 FR 61215).

As of the effective date of the October 2006 rule, conformity determinations in PM<sub>10</sub> areas have been required only for the 24-hour PM<sub>10</sub> NAAQS. The October 2006 final rule stated, “However, because EPA is revoking the annual PM<sub>10</sub> NAAQS in this final rule, after the effective date of this rule conformity determinations in PM<sub>10</sub> areas will only be required for the 24-hour PM<sub>10</sub> NAAQS; conformity to the annual PM<sub>10</sub> NAAQS will no longer be required” (71 FR 61215). Please refer to the October 17, 2006 final rule for additional information (71 FR 61144).

#### B. Description of the Final Rule

EPA has added two new definitions to 40 CFR 93.101 of the conformity rule to distinguish between the 24-hour PM<sub>10</sub> NAAQS and the annual PM<sub>10</sub> NAAQS. EPA has also updated 40 CFR 93.109(g) so that:

- PM<sub>10</sub> areas that have adequate or approved SIP budgets for both the 24-hour and annual PM<sub>10</sub> NAAQS are required to use only the budgets established for the 24-hour PM<sub>10</sub> NAAQS. Conformity to the annual PM<sub>10</sub>

budgets in such a case is no longer required.

- PM<sub>10</sub> areas that have adequate or approved SIP budgets for only the annual PM<sub>10</sub> NAAQS are required to use them for PM<sub>10</sub> conformity determinations until PM<sub>10</sub> SIP budgets for the 24-hour PM<sub>10</sub> NAAQS are found adequate or approved. For areas that use annual PM<sub>10</sub> budgets, a regional emissions analysis must be done based on an analysis of annual, rather than 24-hour, emissions.

No other conformity requirements for PM<sub>10</sub> nonattainment and maintenance areas have been changed by the final rule. For example, the requirement for project-level conformity determinations in PM<sub>10</sub> areas continues to apply, including hot-spot analyses in some cases (see §§ 93.116(a) and 93.123(b)). Although project-level conformity requirements and any required hot-spot analyses apply only with respect to the 24-hour PM<sub>10</sub> NAAQS, this requires no revisions to the conformity rule to implement.

Where an area has adequate or approved PM<sub>10</sub> budgets for both the annual and 24-hour PM<sub>10</sub> NAAQS, it is not necessary to remove the annual PM<sub>10</sub> NAAQS budgets from the SIP. Such annual budgets do not apply for conformity purposes if an area has budgets for the 24-hour PM<sub>10</sub> NAAQS. However, states can choose to revise such SIPs to remove any annual PM<sub>10</sub> budgets, since this NAAQS has been revoked and remaining 24-hour PM<sub>10</sub> budgets ensure that anti-backsliding SIP requirements are met.

#### C. Rationale and Response to Comments

Today’s update to the rule for PM<sub>10</sub> conformity tests results from the revocation of the annual PM<sub>10</sub> NAAQS. In areas where annual PM<sub>10</sub> budgets are the only PM<sub>10</sub> budgets that are adequate or approved, EPA believes it is necessary to use such budgets to demonstrate conformity for the 24-hour PM<sub>10</sub> NAAQS to meet CAA requirements. As discussed above in Section VI.B.2., a 2006 decision by the Court of Appeals for the DC Circuit clarified this point. In this decision, the court stated, “A current SIP, even one tied to outdated NAAQS, remains in force until replaced by another but later-approved SIP. The CAA provides that the current SIPs are legally sufficient until they are replaced by new SIPs.” (*Environmental Defense v. EPA*, 467 F.3d 1329, 1335 (DC Cir. 2006)). Refer to Section VI.B.2. for further information about the decision. EPA believes that today’s final rule is consistent with this decision.

Consequently, EPA believes that annual PM<sub>10</sub> budgets must be used to demonstrate conformity for the 24-hour PM<sub>10</sub> NAAQS when adequate or approved 24-hour PM<sub>10</sub> budgets are not yet established. In areas with PM<sub>10</sub> budgets that address only the annual PM<sub>10</sub> NAAQS, these budgets have been the measure of PM<sub>10</sub> conformity thus far, and have been consistent with these areas’ PM<sub>10</sub> air quality progress to date. Therefore, using annual PM<sub>10</sub> budgets where no other PM<sub>10</sub> SIP budgets are available ensures that air quality progress to date is maintained, air quality will not be worsened and attainment and any interim milestones for the 24-hour PM<sub>10</sub> NAAQS will not be delayed because of emissions increases. Once 24-hour PM<sub>10</sub> budgets are found adequate or approved, the budget test using only the budgets for the 24-hour PM<sub>10</sub> NAAQS provides the best means to determine whether transportation plans, TIPs, or projects meet CAA conformity requirements.

Most PM<sub>10</sub> areas already have adequate or approved budgets for only the 24-hour PM<sub>10</sub> NAAQS. However, there are a limited number of PM<sub>10</sub> areas that have SIP budgets only for the annual PM<sub>10</sub> NAAQS. EPA believes that the statute as interpreted by the court requires such areas to continue to use these adequate or approved annual PM<sub>10</sub> SIP budgets, rather than use one of the interim emissions tests in 40 CFR 93.119(d) which could be less environmentally protective tests than SIP budgets.

While EPA addressed how the revocation affected PM<sub>10</sub> transportation conformity requirements in its September 2008 guidance, updating the regulation clarifies the requirements and simplifies implementation. This final rule also saves resources in some areas with adequate or approved SIP budgets for both the 24-hour and annual PM<sub>10</sub> NAAQS because these areas are no longer required to use budgets for the annual PM<sub>10</sub> NAAQS. As mentioned above, today’s minor revision to the conformity rule is consistent with what is already required in the field for PM<sub>10</sub> nonattainment and maintenance areas.

EPA received one comment supporting this rule change and no comments opposing it.

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

### A. Background

EPA promulgated a final rule on March 10, 2006 (71 FR 12468) that revised the previous PM<sub>10</sub> conformity hot-spot analysis requirements and applied these revised requirements to

<sup>40</sup> Transportation Conformity in PM<sub>10</sub> Nonattainment and Maintenance Areas and the Revocation of the Annual PM<sub>10</sub> Standard, September 25, 2008, found on EPA’s Web site at: <http://www.epa.gov/otaq/stateresources/transconf/policy.htm>.



PM<sub>2.5</sub>.<sup>41</sup> A hot-spot analysis is defined in 40 CFR 93.101 as an estimation of likely future localized pollutant concentrations and a comparison of those concentrations to relevant NAAQS. A hot-spot analysis assesses the air quality impacts of an individual transportation project on a scale smaller than a regional emissions analysis for an entire nonattainment or maintenance area.

Prior to today, section 93.116(a) of the conformity rule read: “\* \* \* The FHWA/FTA project must not cause or contribute to any new localized CO, PM<sub>10</sub>, and/or PM<sub>2.5</sub> violations or increase the frequency or severity of any existing CO, PM<sub>10</sub>, and/or PM<sub>2.5</sub> violations \* \* \*.” These requirements continue to apply in today’s rule, and are satisfied for applicable projects<sup>42</sup> “if it is demonstrated that during the time frame of the transportation plan no new local violations will be created and the severity or number of existing violations will not be increased as a result of the project.” Sections 93.105(c)(1)(i) and 93.123 contain the consultation and methodology requirements for conducting hot-spot analyses.

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

Environmental petitioners challenged the March 2006 final rule, and raised several issues related to it. First, petitioners alleged that the final rule did not ensure that transportation projects complied with CAA section 176(c)(1)(A) and (c)(1)(B)(iii). Second, petitioners alleged that EPA had previously approved its MOBILE6.2 on-road mobile source emissions model for use in quantitative PM<sub>2.5</sub> and PM<sub>10</sub> hot-spot analyses, and withdrew such approval in the March 2006 final rule without providing adequate notice and opportunity for public comment.<sup>43</sup>

<sup>41</sup> The March 10, 2006 rule constituted final action on EPA’s original proposal from November 5, 2003 (68 FR 62690, 62712) and a supplemental proposal from December 13, 2004 (69 FR 72140, 72144–45, and 72149–50).

<sup>42</sup> Section 93.123(b) contains the types of projects for which a hot-spot analysis applies in PM<sub>2.5</sub> and PM<sub>10</sub> areas. For additional discussion, please refer to “V. Projects of Air Quality Concern and General Requirements for PM<sub>2.5</sub> and PM<sub>10</sub> Hot-Spot Analyses” in the preamble of the March 10, 2006 final rule at 71 FR 12490–12498.

<sup>43</sup> EPA and petitioners settled a third issue that was not raised to the court. The settlement was finalized on June 22, 2007 (72 FR 34460), and

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

However, the court remanded one issue to EPA for further explanation of the Agency’s interpretation of CAA section 176(c)(1)(B)(iii). The court instructed EPA on remand to interpret how this provision of the Act is met within the local area affected by an individual project, or explain why this statutory provision does not apply within such an area. Today’s final rule responds to this part of the court’s decision.

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

EPA has made two changes to section 93.116(a) of the conformity rule to address the court’s remand. First, EPA is explicitly stating in this provision that federally funded or approved highway and transit projects in PM<sub>2.5</sub> and PM<sub>10</sub> nonattainment and maintenance areas must meet the requirements of CAA section 176(c)(1)(B)(iii) within the local area affected by the project. That is, § 93.116(a) now expressly says that project must not delay timely attainment or any interim milestones. EPA has also explicitly stated in § 93.116 the requirement that projects must be included in a regional emissions analysis under 40 CFR 93.118 or 93.119. Consistent with the court’s decision, as explained below, EPA is not requiring an individual project to

described a stakeholder process that EPA will use to develop its future PM<sub>2.5</sub> and PM<sub>10</sub> quantitative hot-spot modeling guidance.

reduce emissions in the local project area.

These revisions are intended to clarify and make more explicit EPA’s longstanding interpretation of the CAA as it applies to hot-spot analyses, and do not reflect any substantive changes to existing requirements for project-level conformity determinations. Under today’s final rule, project-level conformity determinations, including any hot-spot analyses, will continue to be performed in the same manner as current practice. Projects will continue to be required to be a part of a regional emissions analysis that supports a conforming transportation plan and TIP. Hot-spot analyses will need to demonstrate that during the time frame of the transportation plan no new local violations would be created and the severity or number of existing violations would not be increased as a result of a new project. By making these demonstrations, it can be assured that the project would not delay timely attainment or any required interim reductions or milestones, as described further below. In addition, project sponsors must continue to document the hot-spot analysis as part of the project-level conformity determination, and the public continues to be able to comment on any aspects of the conformity determination through existing public involvement requirements.

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

#### *C. Rationale and Response to Comments*

##### *1. General*

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

In *Environmental Defense*, the court held that EPA did not adequately explain how it interpreted the language of CAA section 176(c)(1)(B)(iii) in conjunction with related language in sections 176(c)(1)(B)(i) and (ii). The court stated that, if “any area” in the first two provisions refers to a “local area,” then EPA must either interpret the term “any area” in section 176(c)(1)(B)(iii) to also mean “local area,” or explain why a different interpretation is reasonable. 509 F.3d at 560–61. EPA believes that “any area” as used in the first two provisions does include local areas, and that the same interpretation should apply to the third provision as well; therefore all of section 176(c)(1)(B) requirements must be met in the local project area.

EPA believes that its conformity hot-spot regulations, as well as other conformity requirements, already require that individual projects comply with section 176(c)(1)(B)(iii) in the local project area. EPA has always intended the term “any area” in all three statutory provisions of section 176(c)(1)(B) to include the local area affected by the emissions produced by a new project. For example, as EPA stated in the March 2006 final hot-spot rule (71 FR 12483), “a regional emissions analysis for an area’s entire planned transportation system is not sufficient to ensure that individual projects meet the requirements of section 176(c)(1)(B) where projects could have a localized air quality impact.”

To implement section 176(c)(1)(B) requirements in PM<sub>2.5</sub>, PM<sub>10</sub>, and CO nonattainment and maintenance areas (40 CFR 93.109(b)), EPA’s conformity rule has required and continues to require project-level conformity determinations to address the regional and local emissions impacts from new projects. Section 93.115(a) of the conformity rule requires that an individual project must be consistent with the emissions projections and control measures in the SIP, either by inclusion in a conforming transportation plan and TIP or through a separate demonstration (and regional emissions analysis developed under 40 CFR 93.118 or 93.119). In addition, section 93.116(a) requires that some project-level conformity determinations include a hot-spot analysis that demonstrates emissions from a single project do not negatively impact air quality within the area substantially affected by the project.<sup>44</sup> EPA concludes that through

meeting all of these requirements, it can be assured that a project does not cause or contribute to a new violation, worsen a violation, or delay timely attainment or any interim milestones.

However, in light of the court’s request for further explanation, today’s rule specifically clarifies that the term “any area” in CAA section 176(c)(1)(B) applies to any portion of a nonattainment or maintenance area, including the local area affected by a transportation project. Today’s final rule thus ensures that transportation planners address the requirement that there be no delay in timely attainment or any interim milestones in the local project area.

EPA notes that CAA section 176(c)(1)(B)(iii) does not require that transportation activities provide additional emissions reductions in a local project area in order to meet the requirement not to delay timely attainment or any interim milestones. EPA explained this interpretation in the preamble to its March 2006 hot-spot regulations (71 FR 12482), and the court upheld this interpretation in *Environmental Defense v. EPA* (509 F.3d 553, 560 (D.C. Cir. 2007)). See also *Environmental Defense v. EPA*, 467 F.3d 1329, 1337 (DC Cir. 2006) (“EPA argues, and we agree, that conformity to a SIP can be demonstrated by using the build/no-build test, even if individual transportation plans do not actively reduce emissions”). CAA section 176(c)(1)(B)(iii) does not require a new project to mitigate new or worsened air quality violations that it does not cause. This statutory provision also does not require a new project to contribute new interim reductions beyond those that are already required in the SIP. Rather, the hot-spot determination must instead conclude that the new project, in conjunction with all other emissions increases and decreases in the local project area, is consistent with the emissions budgets in the SIP and does not produce any new or worsen any existing violations.

The only case where Congress specifically required individual projects to provide emission reductions in hot-spot analyses is for projects in certain CO nonattainment areas. CAA section 176(c)(3)(B)(ii) requires individual projects in CO nonattainment areas to “eliminate or reduce the severity and number of violations of the carbon monoxide NAAQS in areas substantially

affected by the project.”<sup>45</sup> Since Congress did not establish such a requirement for any project in PM<sub>2.5</sub> and PM<sub>10</sub> areas under section 176(c)(3)(B)(ii), and for the reasons described in today’s final rule, EPA does not interpret such a requirement to apply to projects in PM<sub>2.5</sub> or PM<sub>10</sub> areas under section 176(c)(1)(B)(iii).

Some commenters supported EPA’s interpretation, while others disagreed. The other commenters believed that, despite the court’s decision, a project should not be allowed to proceed unless it reduces emissions sufficient to offset emissions from other sources that negatively impact meeting the NAAQS. Commenters thought today’s rule would allow a project to conform even when there are NAAQS violations after the attainment date and that EPA’s rule eliminates the opportunity to identify and remedy violations.

The commenters’ argument—that section 176(c)(1)(B)(iii) requires transportation projects to reduce emissions in the area affected by the project—has been raised in earlier transportation conformity rulemakings and repeatedly rejected by the D.C. Circuit Court of Appeals. In *Environmental Defense Fund v. EPA*, the court explained that “[a]lthough the Act states that SIPs must reduce violations, and therefore emissions, it is notably silent on whether *transportation plans themselves*, which are but one part of the SIP, must reduce emissions.” 467 F.3d 1329, 1338 (D.C. Cir. 2006) (emphasis in original). The court went on to uphold as reasonable EPA’s interpretation that individual transportation plans need not reduce emissions to comply with the statutory requirement to conform to the SIP. *Id.* In the 2006 EDF decision, the court also referred to its earlier decision in *Environmental Defense Fund v. EPA*, 82 F.3d 451 (D.C. Cir. 1996), in which it rejected a challenge to EPA’s 1993 conformity regulations for similar reasons. In the 2006 EDF decision, the court noted that it had previously decided a similar issue in the 1996 EDF opinion, in which it “agreed with EPA ‘that plans and improvement programs may contribute to emissions reductions by avoiding or reducing increases in emissions over the years,’ because although the statute ‘require[d] reductions in [several pollutants],’ it ‘[d]id not require that the emissions come entirely from mobile sources’[.]” *EDF v. EPA*, 467 F.3d at 1338. Thus, the 2006 EDF decision was the second time the D.C. Circuit rejected the same

<sup>44</sup> Hot-spot analyses must be based on the latest data and models under 40 CFR 93.109(b), 93.111, and 93.123, and therefore any growth in other emissions sources or the impact of new or existing

emissions controls (including those in any required SIP) would always be considered in a hot-spot analysis prior to approving a project.

<sup>45</sup> This requirement is in section 93.116(b) of the conformity rule.

argument commenters raise here. The fact that the 1996 and 2006 D.C. Circuit decisions addressed transportation plans and TIPs, rather than individual projects, is not relevant because the court's analysis of what section 176(c)(1) requires applies equally to transportation plans, TIPs, and individual projects, since section 176(c) imposes the same requirements for all three, and contains no additional or different requirements for individual projects.

In its 2007 decision in *Environmental Defense v. EPA*, the court for a third time upheld EPA's interpretation that a transportation project that does not increase violations of the NAAQS conforms to the SIP's purpose of eliminating or reducing the severity and number of NAAQS violations and achieving expeditious attainment of the NAAQS, even if the project does not itself achieve emissions reductions. 509 F.3d 553, 560 (DC Cir. 2007). In that decision, the court did remand to EPA for further explanation of the issue of whether section 176(c)(1)(B)(iii) applies to hot-spot analyses, and if it does, how its conditions are to be met. Today's final rule responds to that remand. As explained below, EPA interprets section 176(c)(1)(B)(iii) as applying to hot-spot analyses, and the requirements of the regulations as amended in today's action will ensure that transportation projects do not interfere with timely attainment of the NAAQS or any interim milestones.

Section 176(c)(1) prohibits federal agencies from supporting, providing financial assistance for, licensing, permitting, or approving any activity that does not conform to an approved SIP. This provision defines "conformity to a SIP" to mean (1) conformity to the SIP's purpose of eliminating or reducing the severity and number of NAAQS violations and achieving expeditious attainment of the NAAQS, (2) that the activity will not cause or contribute to any new violation of the NAAQS in any area, (3) that the activity will not increase the frequency or severity of any existing NAAQS violation in any area, and (4) that the activity will not delay timely attainment of any NAAQS or interim milestones. Commenters focus on the fourth requirement above—that an activity will not delay timely attainment of any NAAQS or any interim milestones—to support their argument that EPA's May 2009 proposal is inconsistent with the CAA because it would allow a new or expanded transportation project to conform to the SIP if the project does not achieve attainment of the NAAQS. EPA

disagrees with the commenters' assertion.

EPA first notes that two of the four elements in the statutory definition of "conformity to an implementation plan" contain some redundancy. Section 176(c)(1)(A) states that "conformity to an implementation plan" means conformity to the SIP's purpose of eliminating or reducing the severity and number of NAAQS violations and achieving expeditious attainment of the NAAQS. Section 176(c)(1)(B)(iii) states that conformity to the SIP means that the transportation activity will not delay timely attainment of the NAAQS or any interim milestones. Both of these criteria seek to ensure attainment of the SIP in a timely manner—by requiring that projects not delay timely attainment of any interim milestones in any area and thereby ensuring expeditious attainment of the NAAQS. If a project conforms to the SIP's purpose of achieving expeditious attainment of the NAAQS, it cannot be delaying timely attainment of the NAAQS, since "expeditious attainment" would require attainment at least as early as would "timely attainment." "Expeditious" means "characterized by speed and efficiency," whereas "timely" is defined as "before a time limit expires" or "done or happening at the appropriate or proper time."<sup>46</sup> Thus, EPA is not reading section 176(c)(1)(B)(iii) out of the statute, as commenters assert, but is instead reading it in conjunction with a closely related provision which also addresses projects' relationship to attainment of the NAAQS.

Further, the regulatory requirements for hot-spot analyses meet the requirement that a project not delay timely attainment of the NAAQS or any interim milestones. See 40 CFR 93.123(c). The hot-spot analysis must evaluate air quality concentrations resulting from emissions from the project and the future background pollutant concentrations. Such concentrations must be examined at receptor locations in the localized area substantially affected by the project. Future background concentrations at the project location are based on either available monitoring data near the project location, or when such information is not available, the latest information must be used as determined through the interagency consultation process (40 CFR 93.105(c)(1)(i)). Based on a review of the available data, the hot-spot analysis must include future expected air quality concentrations at the project location. The concentrations

must then be compared to the NAAQS and the project will conform to the SIP only if it can be shown that the project does not cause or contribute to any new localized violations, increase the frequency or severity of any existing violations, or delay timely attainment of any NAAQS or any interim milestones. See 40 CFR 93.116(a). The fact that the regulations provide that these criteria are met if, during the time frame of the transportation plan, (1) no new local violations will be created, (2) the severity or number of existing violations will not be increased as a result of the project, and (3) the project has been included in a regional emissions analysis that meets applicable §§ 93.118 and/or 93.119 requirements does not mean that the project may delay timely attainment of the NAAQS and still be found to conform.

Specifically, commenters assert that the requirement that a project must be included in a regional emissions analysis does not suffice to ensure that it will not delay timely attainment of the NAAQS, because the regional emissions analysis is based on the approved SIP, and EPA's SIP guidance does not require states to model the incremental impact of highway emissions in the ambient air near highways or to develop control strategies to remedy near-highway NAAQS violations. Commenters assert that only if EPA were to modify its SIP guidance accordingly would it be reasonable to interpret section 176(c)(1)(B)(iii) as EPA has done in the proposed rule. Commenters also state that section 176(c)(1)(B)(iii) requires some remedial action to be taken if a NAAQS violation is projected after the attainment deadline, even if the project itself does not adversely affect emissions. EPA disagrees. First, EPA notes that any comments requesting that EPA revise its regulations and/or policies regarding establishment of the PM<sub>2.5</sub> NAAQS, designation of PM<sub>2.5</sub> nonattainment areas and development of PM<sub>2.5</sub> SIPs are beyond the scope of this rulemaking. Further, the requirement that a project is included in a regional emissions analysis, in conjunction with the other requirements of § 93.116(a) and the requirements of § 93.123, is sufficient to ensure that transportation projects do not delay timely attainment of the NAAQS as explained below. And finally, as described above, the DC Circuit has already held that a project need not achieve additional emissions reductions needed to attain the NAAQS in order to conform to the SIP.

The approved SIP for a nonattainment area contains the control measures and emissions projections that demonstrate

<sup>46</sup> Definitions from Webster's On-line Dictionary, see <http://www.websters-online-dictionary.org/>.

attainment of the NAAQS by the required attainment date, including the motor vehicle emissions budget that defines the upper limit of transportation sector emissions above which attainment could be delayed. Therefore, a project will not delay attainment beyond the required date if its transportation emissions (along with all other transportation emissions) are included in a conformity analysis that meets the SIP budgets in the attainment year and all other future years. Commenters point to EPA's statement in the preamble to the 2006 PM<sub>2.5</sub> hot-spot rule that PM<sub>2.5</sub> SIP modeling is unlikely to be performed at the level of detail necessary to identify PM<sub>2.5</sub> hot-spots to support their assertion that EPA cannot rely on the regional emissions analysis as part of the hot-spot analysis. However, that statement in the 2006 preamble is taken out of context by commenters. The original statement was part of EPA's explanation for not finalizing a proposed option for which projects need a PM<sub>10</sub> or PM<sub>2.5</sub> hot-spot analysis (rather than how the analysis is actually completed). In the 2006 rule, EPA did not finalize the proposed option to require hot-spot analyses only in the cases where the SIP identifies projects of local air quality concern.<sup>47</sup> The 2006 statement was not, as suggested by commenters, a judgment on the value of the regional emissions analysis that supports a conformity determination. EPA continues to believe that regional conformity analyses are critical to meeting all of section 176(c)(1) requirements for project-level conformity determinations, in conjunction with hot-spot analyses of emissions resulting from the project in the local affected area along with other future expected emissions in that area. Rather, it only indicates EPA's view that SIP modeling is unlikely to identify all locations that warrant a hot-spot analysis.

Moreover, in addition to demonstrating that the project is consistent with the regional emissions analysis (which supports the budget), there can be no new local violations and the severity or number of existing violations cannot increase as a result of the project. In practice, EPA's regulations will ensure that any project that creates a new violation or worsens an existing violation of the NAAQS in the local area affected by the project (either by increasing the number of

violations or the severity of an existing violation) will not be found to conform. A project will be found to conform only if it is demonstrated that the project will not adversely impact air quality concentrations in the affected local area, and has been included in a regional emissions analysis that meets the rule's conformity test requirements. Therefore, for the reasons explained above, EPA is finalizing the proposed regulations, which will ensure that project-level conformity determinations will comply with all the statutory criteria in section 176(c)(1)(A) and (B).

EPA has responded to other comments related to the hot-spot provisions at the end of this section, below.

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

The provisions of today's final rule clarify that a project will meet CAA section 176(c)(1)(B)(iii) requirements not to delay timely attainment as long as no new or worsened violations are predicted to occur, which is already required under the existing hot-spot requirements. While overall emissions can increase in a local area above those expected without a new project's implementation, a project will not delay timely attainment if air quality concentrations continue to meet federal air quality NAAQS or any violations of the NAAQS are not worsened.

Furthermore, in the case where the analysis shows that air quality concentrations are above the NAAQS, a project would not delay timely attainment if air quality is improved or unchanged from what would have occurred without the new project's implementation. In other words, even where air quality concentrations are above the NAAQS, a project does not delay timely attainment if it improves air quality associated with a violation that existed prior to completion of the project, or does not increase such violation. In this case, the project also would still meet section 176(c)(1)(B)(i) and (B)(ii), in that it does not cause or worsen an existing violation.

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

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

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

Today's final rule also ensures that a project would meet CAA section 176(c)(1)(B)(iii) requirements for no delay in the timely attainment of any required interim reductions or other milestones. EPA interprets "any required interim emission reductions or other milestones" to refer to CAA requirements associated with reductions and milestones addressed by reasonable further progress SIPs, rather than other reductions required for other purposes. However, EPA believes there is added value in referencing in section 93.116(a) the conformity requirement that a project be consistent with the budgets and control measures in any applicable SIP, not just reasonable further progress SIPs. Therefore, the provisions of today's final rule clarify that this requirement is satisfied in the local project area if a project is consistent with the motor vehicle emissions budget(s) and control measures in the applicable SIP or interim emission test(s) (in the absence of a SIP budget). Although such a demonstration is already required under the current rule, EPA's reference to the requirements in 40 CFR 93.118 and 93.119 clarify that a project's emissions—when combined

<sup>47</sup> Under 40 CFR 93.123(b)(1), EPA has identified projects of local air quality concern that require a localized hot-spot analysis. These projects include all new or expanded highway projects that have a significant number of or a significant increase in diesel vehicles).

with all other emissions from all other existing and other proposed transportation projects—must be consistent with any applicable required interim reductions and milestones.

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

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

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

expedited from what would have occurred without the project's implementation.

#### 4. Other Comments

EPA is including responses to other relevant comments on this portion of today's rule below.

*Comment:* One commenter thought that based on the statutory language in CAA 176(c)(1)(A) and (B), promulgating rules that require PM<sub>2.5</sub> emission reductions would be permissible and reasonable. Another commenter believed that EPA had not responded to the court's remand, since it was not expanding on existing conformity rule requirements for hot-spot analyses.

*Response:* As explained above, EPA disagrees that section 176(c)(1) requires projects to reduce emissions. As such, EPA believes its interpretation of these provisions is the most reasonable one. Hot-spot analyses in PM<sub>2.5</sub> (and PM<sub>10</sub>) nonattainment and maintenance areas are required for transportation projects of local air quality concern. Such projects are those highway and transit projects that involve significant diesel traffic, significant increases in diesel traffic, or significant numbers of diesel vehicles congregating in one location. These types of projects are unlikely to improve air quality in and of themselves.

The structure of section 176(c) supports EPA's interpretation as the most reasonable interpretation of the statutory language. The conformity provisions of the CAA in 176(c)(1)(A) and (B) do not require that transportation activities reduce emissions, only that they be consistent with the purpose of the SIP. Only in the specific provision of 176(c)(3)(A)(iii) does the statute require transportation projects to "contribute to annual emissions reductions," and this requirement applies to projects only in certain CO areas before such areas have a SIP, not generally to all projects. Had Congress intended for projects subject to sections 176(c)(1)(A) and (B) to "contribute to annual emissions reductions," it would have included explicit language stating so, as it did in section 176(c)(3). See further details in our general rationale earlier in this section.

*Comment:* One commenter requested that EPA add language to the conformity rule that prescribes procedures for requesting assistance from the air quality agency in developing offsetting emissions reductions, to reduce air quality concentrations at appropriate receptor locations to levels that attain the NAAQS on or after the attainment deadline.

*Response:* EPA does not believe additional language is necessary because existing requirements adequately address the state air agency's involvement in developing offsetting measures. First, the existing regulation at 40 CFR 93.123(c)(4) states: "CO, PM<sub>10</sub>, or PM<sub>2.5</sub> mitigation or control measures shall be assumed in the hot-spot analysis only where there are written commitments from the project sponsor and/or operator to implement such measures, as required by § 93.125(a)."<sup>48</sup> The air quality agency as well as EPA has the opportunity to review any such written commitments during interagency consultation on the conformity determination per 40 CFR 93.105(c). Second, if offsetting measures are added to the SIP, then the state air quality agency would have to agree on these measures. In addition, the development of offsetting emissions reductions would be subject to the public process required for a SIP revision. Third, in the case where a new transportation control measure (TCM) is to be added to the SIP without a full SIP revision, the CAA requires the TCM to be developed through a collaborative process that includes the state air quality agency; in addition, the state air quality agency as well as EPA must concur before such a TCM is added to the SIP. See EPA's guidance, entitled, "Guidance for Implementing the Clean Air Act Section 176(c)(8) Transportation Control Measure Substitution and Addition Provision," found on EPA's Web site at: <http://www.epa.gov/otaq/stateresources/transconf/policy/420b09002.pdf>.

*Comment:* One commenter thought the regulations at 40 CFR 93.116(a) and 93.123 are unclear regarding the specifics of performing a PM hot-spot analysis, including whether the conformity rule requires a comparison of emissions from the build case with the emissions from the no-build case in the same future year, or whether it allows a comparison of the build case with emissions in the current year as the baseline. The commenter was concerned that if the analysis is based on a comparison of the build case for a future

<sup>48</sup> In addition, the conformity rule at 40 CFR 93.101 defines "written commitment" as follows: "Written commitment for the purposes of this subpart means a written commitment that includes a description of the action to be taken; a schedule for the completion of the action; a demonstration that funding necessary to implement the action has been authorized by the appropriating or authorizing body; and an acknowledgement that the commitment is an enforceable obligation under the applicable implementation plan." Since these obligations are "an enforceable obligation under the applicable implementation plan," state air agencies will have a role in ensuring that any necessary measures are properly implemented and enforced.

year with current emissions, a project could conform even if it adds more vehicle trips to the project location, because the build analysis would include the effect of new engine control technologies and fleet turnover. The commenter believes that the analysis should examine the impacts of the project itself. Therefore, the commenter urged that the rule be clarified to require an estimate of future peak year emissions using a build/no-build analysis, which the commenter asserted would provide a lawful basis for assessing the impact of emissions from a proposed project.

*Response:* This comment is beyond the scope of this rulemaking. For purposes of EPA's hot-spot regulations, EPA is only addressing in today's rule the specific issue that was remanded by the Court in December 2007, *i.e.*, whether CAA section 176(c)(1)(B)(iii) applies in the local area affected by a project. As stated in the May 2009 proposal, EPA did not propose or seek public comment on any other aspect of EPA's preexisting rules for performing hot-spot analyses under 40 CFR 93.123 or any other parts of the conformity rule.

In addition, EPA has already addressed how hot-spot analyses are to be conducted to avoid the situation described by the commenter. In the original conformity rule, EPA stated its intentions for applying the hot-spot requirement—"that the hot-spot analysis compare concentrations with and without the project based on modeling of conditions in the analysis year." (58 FR 62212). The July 2004 final rule clarified the horizon years for hot-spot analyses. In this rule, EPA stated that "[t]o ensure that the requirement for hot-spot analysis is being satisfied, areas should examine the year(s) within the transportation plan or regional emissions analysis, as appropriate, during which peak emissions from the project are expected and a new violation or worsening of an existing violation would most likely occur due to the cumulative impacts of the project and background regional emissions in the project area." See 69 FR 40056-58 for more details on this rulemaking.

Furthermore, EPA agrees that it would be inappropriate to ignore the future air quality impacts from building a proposed project. As stated above, EPA's rule requires that in the future year(s) where emissions are expected to be the highest, the concentrations of the pollutant that result from the project's emissions in combination with background emissions from other sources are compared to the NAAQS. However, this analysis is performed by

examining future air quality impacts from a project, rather than comparing emissions from the project in the future to emissions in a baseline year. EPA strongly disagrees that the current rule can be interpreted in this way. An analysis under the rule does provide a lawful basis for assessing the impact of emissions from a proposed project, because it compares resulting air quality concentrations to the NAAQS, which by law are established by EPA through rulemaking.

As stated above, in the case where the analysis shows that the air quality concentrations are greater than the NAAQS, the project may still be able to conform. If building the project leads to improved air quality concentrations over not building the project, then the project could still be found to conform, even if the concentrations are above the NAAQS. In this case, a build/no-build analysis would show that the project is helping to reduce concentrations, and improve air quality by reducing a future violation. In this case, the project neither creates a new violation nor worsens an existing violation, nor does it delay timely attainment.

Last, it is entirely appropriate that a hot-spot analysis include the effects of new technologies and fleet turnover that is expected to occur in a future analysis year. The conformity rule has always allowed the future effects of federal vehicle emissions standards, fleet turnover, fuel programs, and other control measures to be reflected in hot-spot analyses when they are assured to occur, because including such effects provides a reasonable estimate of future emissions that is more accurate than not including such effects.

*Comment:* One commenter opined that off-road emissions that result from a transportation project being built should be included in the hot-spot analysis as part of the background emissions, because the conformity regulations at 40 CFR 93.123(c) require them to be included: "[e]stimated pollutant concentrations must be based in the total emissions burden which may result from the implementation of the project." The commenter asserted that a highway project that facilitates additional diesel vehicles such as ocean-going vessels, locomotives, harborcraft, and cargo-handling equipment cannot ignore these significant sources of emissions that affect the air quality at the location of the project.

*Response:* This comment is outside the scope of today's rulemaking for the reasons discussed above. However, EPA notes that it agrees with this comment. As the commenter points out, the

regulations at 40 CFR 93.123(c)(1) state: "Estimated pollutant concentrations must be based on the total emissions burden which may result from the implementation of the project, summed together with future background concentrations." EPA agrees that if a highway project will facilitate additional diesel ships or locomotives, these additional non-road emissions must be included as part of the background concentrations in the hot-spot analysis. The current conformity rule also requires hot-spot analyses to consider any emissions that are already expected to occur from other sources in the local project area, in addition to any emissions created by the project being built.

*Comment:* One commenter suggested that hot-spot analyses should apply to existing projects, not just new projects, and that the language of CAA section 176(c) would support "an ongoing duty" to ensure compliance with the hot-spot rule. To the extent that the federal government "engage[s] in" or "supports" a facility, the commenter believed that a hot-spot analysis is required. For example, when the government provides funds for maintenance and repair of freight facilities, the commenter believed there should be an ongoing requirement to perform a hot-spot analysis.

*Response:* This comment is outside the scope of today's action. EPA did not propose or seek comment on any revision to the hot-spot regulations addressing when hot-spot analyses are required. Since the original 1993 transportation conformity rule, EPA's hot-spot requirements have applied only to those projects that require project-level conformity determinations under 40 CFR 93.102(a) and 93.104(d), which are those new non-exempt highway and transit projects that receive FHWA or FTA funding or approval. After that point, conformity of a project does not need to be redetermined unless one of three things occur: (1) The project's design concept and scope significantly changes; (2) three years elapse since the most recent major step to advance the project; or (3) a supplemental environmental document has been initiated for air quality purposes (40 CFR 93.104(d)). EPA has previously concluded that a new project-level conformity determination is warranted in these cases. Barring one of these cases, it is reasonable to conclude that conformity continues to be demonstrated, based on both the initial project-level conformity determination as well as the periodic regional conformity determination needed for the transportation plan and TIP, which

includes the project. Today's final rule addresses none of these requirements.

*Comment:* One commenter stated that the proposed rule is inconsistent with EPA's definition for "hot-spot analysis" and the CAA because the proposed rule fails to require a comparison of localized PM<sub>2.5</sub> concentrations to the NAAQS. The commenter opines that EPA's regulatory definition is consistent with the statutory text but the proposed rule is not in that it fails to expressly require that, where emissions from a highway project subject to hot-spot review would cause or contribute to NAAQS violations after the attainment deadline, approval of the project must be prohibited unless some remedial action is taken to avoid the NAAQS violation after the attainment deadline.

The same commenter also stated that EPA's proposal is not consistent with the CAA because it would allow a project to conform even if emissions are maintained at levels that will continue to cause NAAQS violations after the statutory deadline.

*Response:* EPA disagrees with this commenter and the description of the May 2009 proposal. Today's final rule does require a comparison of localized pollutant concentrations to the NAAQS. By requiring a demonstration that no new local violations are created and no existing violations are worsened, the regulation does require a comparison to the NAAQS. In addition, today's final rule would not result in the outcome in the example provided by commenters. As stated earlier, a project could not be found to conform if its emissions caused or contributed to a future NAAQS violation.

In the commenter's second example, the project could be found to conform, since the project's emissions would not have caused or worsened a NAAQS violation. If a hot-spot analysis shows that air quality concentration levels would be the same with and without a project, then such a project would not be 'maintaining' any NAAQS violation, as suggested by the commenter. Instead, such a hot-spot analysis would show that a project is not the cause or contributor to the local area's air quality problem, and consequently, the project would not be delaying timely attainment. See other parts of today's final rule preamble for rationale on similar comments.

*Comment:* One commenter requested that EPA add a definition to the conformity rule for the term "delay timely attainment." The commenter requested that the term be defined as follows: If emissions from a project are expected to cause or contribute to concentrations that are greater than the

NAAQS at appropriate receptor locations after the attainment deadline, the project would fail to meet CAA 176(c)(1)(B)(iii).

*Response:* EPA does not believe it is necessary to promulgate a separate regulatory definition of the term "delay timely attainment" in section 93.101 of the conformity rule. Section 93.116(a) of today's final rule and section 93.123(c) of the existing conformity rule include this regulatory text, and the discussion in this preamble and earlier preambles to transportation conformity regulations adequately explain the meaning of "delay timely attainment" in the context of section 176(c)(1)(B)(iii), including how the hot-spot analysis must comply with that provision.

*Comment:* One commenter requested that EPA define "local area" for hot-spot analysis purposes, because neither the proposed nor existing conformity rule clearly defines it. The commenter opined that depending upon the definition, the results of the analysis might be different. As an example, the commenter indicated that a project such as a bus terminal might result in increased emissions in the immediate area (although not enough to violate other portions of section 176(c)(1)(B)), but may be part of a larger group of projects that would reduce emissions overall in a larger area.

*Response:* EPA agrees that PM hot-spot analyses under the conformity rule must examine the air quality impacts of the PM<sub>10</sub> and PM<sub>2.5</sub> NAAQS, including the area immediately surrounding the project. In developing the March 2006 final PM hot-spot rule, EPA completed a thorough review of more than 70 studies representing a cross-section of available studies looking at particle concentrations near roadways and transit projects (71 FR 12472–12474). Many of these studies were completed in the types of local communities cited by the commenter.

However, EPA is not defining "local area" in this final rule because the existing conformity rule, along with previous conformity preambles, provide the necessary information for hot-spot analyses. First, the rule's "hot-spot analysis" provisions are applied at a local level to an individual "highway project" or "transit project," and the rule defines all three of these terms in detail (see 40 CFR 93.101). As a result, the hot-spot requirements for individual projects in conformity rule sections 93.116 and 93.123 are applied within the local project area. Another example is the rule's definition of "cause or contribute to a new violation," which includes the phrase about this requirement being met "in an area

substantially affected by the project." EPA believes that all of the conformity rule's hot-spot provisions provide adequate information regarding what is a "local area," and a separate "local area" definition is not necessary or required by the December 2007 court remand.

EPA does not believe that "local area" can be more specifically defined and still be appropriate for all projects, because projects where a hot-spot analysis is needed can differ in type, location, scale, scope, and neighboring populations. EPA believes that the existing regulation allows the appropriate local area to be determined in a hot-spot analysis.

EPA also notes that in the commenter's example, a bus terminal increases emissions in the immediate area but does not violate other portions of section 176(c)(1)(B), i.e., this project increases emissions but would not create a new violation or worsen an existing NAAQS violation. Therefore, this project could be found to conform under the PM hot-spot conformity rules.

*Comment:* One commenter requested that EPA define "appropriate receptor location" in section 93.123(c)(1) of the conformity rule to be "locations near the project where the public has daily access and where exposure risks will be greatest with regard to the frequency or severity." The commenter stated that the rule should clarify that receptor or monitor locations should not be located outside the zone of observed highway impacts because at those distances no difference would be detected regardless of how many additional vehicles are added. The commenter cited examples of past PM hot-spot analyses where emissions impacts were examined at monitors or locations that were a mile and a half or more from the highway or from the residential and school facilities adjacent to the proposed project. The commenter stated that in both cases, evidence was submitted showing that highway emissions decrease to the level of regional background within the first 300 meters.

In addition, this and another commenter provided EPA with recent studies and data illustrating the air quality impacts of highways in the near-highway environment, and with data tallying the millions of people who live within this range as well as the number of schools located within it.

*Response:* EPA appreciates the data that commenters provided, and agrees with commenters that hot-spot analyses are important to ensure that public health is protected. As noted in the previous response, EPA finalized the PM<sub>10</sub> and PM<sub>2.5</sub> hot-spot requirements based on the type of information



submitted by commenters (71 FR 12472–12474). However, the location of modeling receptors, which is addressed in 40 CFR 93.123(c), is outside the scope of today's final rule.

EPA also notes that the U.S. District Court in Maryland has upheld the appropriateness of one of the PM qualitative hot-spot analyses cited by the commenter (*Audubon Naturalist Society of the Central Atlantic States, Inc., et al v. USDOT, et al.*, 524 F.Supp.2d 642 (Md. 2007), appeal dismissed without decision *Environmental Defense, et al. v. USDOT, et al.*, No. 08–1107 (4th Cir., dismissed Nov. 17, 2008)).

EPA intends to describe appropriate receptor locations in its forthcoming quantitative PM hot-spot guidance, which is required under 40 CFR 93.123(b)(4). Interested parties will have an opportunity to comment on this document before it is finalized.<sup>49</sup>

*Comment:* One commenter recommended that EPA require projects to reduce the severity and number of local 2006 PM<sub>2.5</sub> NAAQS violations as a way to reduce black carbon. This commenter noted that in EPA's recent proposed endangerment finding for greenhouse gases, EPA explained that it did not include black carbon because EPA is addressing black carbon through its review of the primary and secondary PM NAAQS. This commenter cited a large body of new science explaining black carbon's climate forcing effect and impacts on sensitive ecosystems, and believed that this rule should include some specific requirements for black carbon.

*Response:* Transportation conformity applies only to transportation-related criteria pollutants for which a NAAQS is established and their precursor pollutants as described in 40 CFR 93.102(b) of the regulation. There is no NAAQS specifically for black carbon, therefore EPA lacks authority to require conformity analysis specifically for black carbon. To the extent that black carbon is a component of PM<sub>2.5</sub> (as defined by 40 CFR 93.102(b)(1) and EPA's rulemakings for the development of any PM<sub>2.5</sub> NAAQS), it is included as part of any conformity analysis for PM<sub>2.5</sub>.

<sup>49</sup>EPA will provide opportunity for public comment on the PM quantitative hot-spot guidance according to the terms of a settlement agreement with Environmental Defense, Natural Resources Defense Council, and Sierra Club. Refer to the June 22, 2007 "Notice of proposed settlement agreement; request for public comment" at 72 FR 34460.

## X. Statutory and Executive Order Reviews

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

This action is not a "significant regulatory action" under the terms of Executive Order (EO) 12866, (58 FR 51735; October 4, 1993) and is therefore not subject to review under the EO.

### B. Paperwork Reduction Act

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

### C. Regulatory Flexibility Act

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

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

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This regulation directly affects federal

agencies and metropolitan planning organizations that, by definition, are designated under federal transportation laws only for metropolitan areas with a population of at least 50,000. These organizations do not constitute small entities within the meaning of the Regulatory Flexibility Act.

### D. Unfunded Mandates Reform Act

This rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. The purpose of this final rule is to amend the conformity rule to clarify how certain highway and transit projects meet statutory conformity requirements for particulate matter in response to a December 2007 court ruling, and to update the regulation to accommodate revisions to the PM<sub>10</sub> and PM<sub>2.5</sub> NAAQS. This final rule merely implements already established law that imposes conformity requirements and does not itself impose requirements that may result in expenditures of \$100 million or more in any year. Thus, today's final rule is not subject to the requirements of sections 202 and 205 of the UMRA.

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

### E. Executive Order 13132: Federalism

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

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). The CAA requires transportation conformity to apply in any area that is designated nonattainment or maintenance by EPA. This rule amends the conformity rule to clarify how certain highway and transit projects meet statutory conformity requirements for particulate matter in response to a December 2007 court ruling, and updates the conformity rule to accommodate revisions to the PM<sub>10</sub> and PM<sub>2.5</sub> NAAQS. Because today's amendments to the conformity rule do not significantly or uniquely affect the communities of Indian tribal governments, Executive Order 13175 does not apply to this action.

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

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

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

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

*I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104-113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or

otherwise impractical. Voluntary consensus standards are technical standards (e.g., material specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

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

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

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

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. This final rule simply amends the conformity rule to clarify how certain highway and transit projects meet statutory requirements for particulate matter in response to a December 2007 court ruling, and updates the conformity rule to accommodate revisions to the PM<sub>10</sub> and PM<sub>2.5</sub> NAAQS.

*K. Determination Under Section 307(d)*

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

*L. Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides

that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action Transportation Conformity Rule PM<sub>2.5</sub> and PM<sub>10</sub> Amendments

Page 134 of 145 is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective April 23, 2010.

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

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

Dated: March 10, 2010.

**Lisa P. Jackson**,  
Administrator.

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

**PART 93—[AMENDED]**

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

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

■ 2. Section 93.101 is amended as follows:

■ a. By removing the definitions for "1-hour ozone NAAQS" and "8-hour ozone NAAQS"; and

■ b. By revising the definition of "National ambient air quality standards (NAAQS)".

**§ 93.101 Definitions.**

\* \* \* \* \*

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

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

(2) *8-hour ozone NAAQS* means the 8-hour ozone national ambient air quality standard codified at 40 CFR 50.10.

(3) *24-hour PM<sub>10</sub> NAAQS* means the 24-hour PM<sub>10</sub> national ambient air quality standard codified at 40 CFR 50.6.

(4) *1997 PM<sub>2.5</sub> NAAQS* means the PM<sub>2.5</sub> national ambient air quality standards codified at 40 CFR 50.7.

(5) *2006 PM<sub>2.5</sub> NAAQS* means the 24-hour PM<sub>2.5</sub> national ambient air quality standard codified at 40 CFR 50.13.

(6) *Annual PM<sub>10</sub> NAAQS* means the annual PM<sub>10</sub> national ambient air quality standard that EPA revoked on December 18, 2006.

\* \* \* \* \*

#### § 93.105 [Amended]

- 3. Section 93.105 is amended in paragraph (c)(1)(vi) by removing the citation “§ 93.109(l)(2)(iii)” and adding in its place “§ 93.109(n)(2)(iii)”.
- 4. Section 93.109 is amended as follows:
  - a. In paragraph (b):
    - i. By removing the citation “(c) through (i)” and adding in its place the citation “(c) through (k)”;
    - ii. By removing the reference “(j)” and adding in its place “(l)”;
    - iii. By removing the reference “(k)” from the fourth sentence and adding in its place “(m)”;
    - iv. By removing the reference “(l)” from the fifth sentence and adding in its place “(n)”;
  - b. By revising paragraph (g)(2) introductory text;
  - c. By redesignating paragraph (g)(3) as (g)(4);
  - d. By adding new paragraph (g)(3);
  - e. By revising the heading of paragraph (i);
  - f. By adding the words “such 1997” before the words “PM<sub>2.5</sub> nonattainment or maintenance areas” in paragraph (i)(1);
  - g. By adding the words “such 1997” before the words “PM<sub>2.5</sub> nonattainment and maintenance areas” in paragraph (i) introductory text and paragraph (i)(2) introductory text;
  - h. By adding the words “such 1997” before the words “PM<sub>2.5</sub> nonattainment areas” in paragraph (i)(3);
  - i. By redesignating paragraphs (j), (k), and (l) as (l), (m), and (n), respectively;
  - j. In newly designated paragraph (n)(2) introductory text by removing the citation “(c) through (k)” and adding in its place the citation “(c) through (m)”;
  - k. In newly designated paragraph (n)(2)(iii):
    - i. By removing the citation “(l)(2)(ii)” and adding in its place the citation “(n)(2)(ii)”;
    - ii. By removing the citation “(l)(2)(ii)(C)” and adding in its place the citation “(n)(2)(ii)(C)”;
  - l. By adding new paragraphs (j) and (k).

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

\* \* \* \* \*

(g) \* \* \*

(2) In PM<sub>10</sub> nonattainment and maintenance areas where a budget is

submitted for the 24-hour PM<sub>10</sub> NAAQS, the budget test must be satisfied as required by § 93.118 for conformity determinations made on or after:

\* \* \* \* \*

(3) Prior to paragraph (g)(2) of this section applying, the budget test must be satisfied as required by § 93.118 using the approved or adequate motor vehicle emissions budget established for the revoked annual PM<sub>10</sub> NAAQS, if such a budget exists.

\* \* \* \* \*

(i) *1997 PM<sub>2.5</sub> NAAQS nonattainment and maintenance areas.* \* \* \*

(j) *2006 PM<sub>2.5</sub> NAAQS nonattainment and maintenance areas without 1997 PM<sub>2.5</sub> NAAQS motor vehicle emissions budgets for any portion of the 2006 PM<sub>2.5</sub> NAAQS area.* In addition to the criteria listed in Table 1 in paragraph (b) of this section that are required to be satisfied at all times, in such 2006 PM<sub>2.5</sub> nonattainment and maintenance areas conformity determinations must include a demonstration that the budget and/or interim emissions tests are satisfied as described in the following:

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

(2) In such PM<sub>2.5</sub> nonattainment and maintenance areas the budget test must be satisfied as required by § 93.118 for conformity determinations made on or after:

(i) The effective date of EPA’s finding that a motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan for the 2006 PM<sub>2.5</sub> NAAQS is adequate for transportation conformity purposes;

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

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

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

(k) *2006 PM<sub>2.5</sub> NAAQS nonattainment and maintenance areas with motor vehicle emissions budgets for the 1997 PM<sub>2.5</sub> NAAQS that cover all or a portion of the 2006 PM<sub>2.5</sub> nonattainment area.*

In addition to the criteria listed in Table 1 in paragraph (b) of this section that are required to be satisfied at all times, in such 2006 PM<sub>2.5</sub> nonattainment and maintenance areas conformity determinations must include a demonstration that the budget and/or interim emissions tests are satisfied as described in the following:

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

(2) In such PM<sub>2.5</sub> nonattainment and maintenance areas the budget test must be satisfied as required by § 93.118 for conformity determinations made on or after:

(i) The effective date of EPA’s finding that a motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan for the 2006 PM<sub>2.5</sub> NAAQS is adequate for transportation conformity purposes;

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

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

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

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

(ii) If the 2006 PM<sub>2.5</sub> nonattainment area covers a smaller geographic area within the 1997 PM<sub>2.5</sub> nonattainment or maintenance area(s), the budget test as required by § 93.118 for either:

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

(B) The 1997 PM<sub>2.5</sub> nonattainment area using the approved or adequate motor vehicle emissions budgets in the 1997 PM<sub>2.5</sub> applicable implementation plan or implementation plan submission. If additional emissions reductions are necessary to meet the budget test for the 2006 PM<sub>2.5</sub> NAAQS in such cases, these emissions

reductions must come from within the 2006 PM<sub>2.5</sub> nonattainment area;

(iii) If the 2006 PM<sub>2.5</sub> nonattainment area covers a larger geographic area and encompasses the entire 1997 PM<sub>2.5</sub> nonattainment or maintenance area(s):

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

(B) The budget test as required by § 93.118 for the entire 2006 PM<sub>2.5</sub> nonattainment area using the approved or adequate motor vehicle emissions budgets in the applicable 1997 PM<sub>2.5</sub> implementation plan or implementation plan submission.

(iv) If the 2006 PM<sub>2.5</sub> nonattainment area partially covers a 1997 PM<sub>2.5</sub> nonattainment or maintenance area(s):

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

(B) The interim emissions tests as required by § 93.119, when applicable, for either: The portion of the 2006 PM<sub>2.5</sub>

nonattainment area not covered by the approved or adequate budgets in the 1997 PM<sub>2.5</sub> implementation plan, the entire 2006 PM<sub>2.5</sub> nonattainment area, or the entire portion of the 2006 PM<sub>2.5</sub> nonattainment area within an individual state, in the case where separate 1997 PM<sub>2.5</sub> SIP budgets are established for each state in a multi-state 1997 PM<sub>2.5</sub> nonattainment or maintenance area.

\* \* \* \* \*

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

**§ 93.116 Criteria and procedures: Localized CO, PM<sub>10</sub>, and PM<sub>2.5</sub> violations (hot-spots).**

(a) This paragraph applies at all times. The FHWA/FTA project must not cause or contribute to any new localized CO, PM<sub>10</sub>, and/or PM<sub>2.5</sub> violations, increase the frequency or severity of any existing CO, PM<sub>10</sub>, and/or PM<sub>2.5</sub> violations, or delay timely attainment of any NAAQS or any required interim emission reductions or other milestones in CO, PM<sub>10</sub>, and PM<sub>2.5</sub> nonattainment and maintenance areas. This criterion is satisfied without a hot-spot analysis in PM<sub>10</sub> and PM<sub>2.5</sub> nonattainment and maintenance areas for FHWA/FTA projects that are not identified in § 93.123(b)(1). This criterion is satisfied for all other FHWA/FTA projects in CO, PM<sub>10</sub> and PM<sub>2.5</sub> nonattainment and maintenance areas if it is demonstrated that during the time frame of the transportation plan no new local violations will be created and the severity or number of existing violations will not be increased as a result of the project, and the project has been included in a regional emissions analysis that meets applicable §§ 93.118 and/or 93.119 requirements. The demonstration must be performed according to the consultation

requirements of § 93.105(c)(1)(i) and the methodology requirements of § 93.123.

\* \* \* \* \*

**§ 93.118 [Amended]**

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

■ 7. Section 93.119 is amended as follows:

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

■ b. By revising paragraph (e)(2).

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

\* \* \* \* \*

(e) \* \* \*

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

(i) 2002 emissions, in areas designated nonattainment for the 1997 PM<sub>2.5</sub> NAAQS; or

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

\* \* \* \* \*

**§ 93.121 [Amended]**

■ 8. Section 93.121 is amended:

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

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

[FR Doc. 2010-5703 Filed 3-23-10; 8:45 am]

BILLING CODE 6560-50-P