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MEETING NOTICE AND AGENDA

SAN DIEGO CONFORMITY WORKING GROUP

The San Diego Conformity Working Group may take action on any item appearing on this agenda.

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Wednesday, March 4, 2009

10:30 a.m. to 12 noon

SANDAG, Conference Room 8C
 401 B Street, Suite 800
 San Diego, CA 92101-4231

Staff Contact: Rachel Kennedy
 (619) 699-1929
 rke@sandag.org

AGENDA HIGHLIGHTS

- TRANSPORTATION CONTROL MEASURE SUBSTITUTION AND ADDITION GUIDANCE
- GUIDANCE FOR DEVELOPING TRANSPORTATION CONFORMITY STATE IMPLEMENTATION PLANS
- EIGHT-HOUR OZONE STANDARD RECLASSIFICATION PROPOSED RULE

Please contact Rachel Kennedy prior to the meeting if you wish to participate by conference call.

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SAN DIEGO CONFORMITY WORKING GROUP

Wednesday, March 4, 2009

ITEM #		RECOMMENDATION
1.	INTRODUCTIONS	
+2.	SUMMARY OF DECEMBER 3, 2008, MEETING	APPROVE
	The summary for the December 3, 2008, Conformity Working Group (CWG) meeting is attached. The CWG is asked to review the meeting summary.	
3.	PUBLIC COMMENTS/COMMUNICATIONS	
	Members of the public will have the opportunity to address the Working Group during this time.	
4.	EMFAC 2010 DEVELOPMENT	DISCUSSION
	California Air Resources Board staff will provide the CWG with an update on the development of the next generation of Emission FACtors (EMFAC) software.	
+5.	GUIDANCE FOR IMPLEMENTING THE CLEAN AIR ACT SECTION 176(C)(8): TRANSPORTATION CONTROL MEASURE SUBSTITUTION AND ADDITION PROVISION	DISCUSSION
	On February 12, 2009, the United States Environmental Protection Agency (EPA) released new guidance regarding the transportation control measure substitution and addition provision contained in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). EPA staff will provide the CWG with an overview of this guidance.	
+6.	GUIDANCE FOR DEVELOPING TRANSPORTATION CONFORMITY STATE IMPLEMENTATION PLANS	DISCUSSION
	On February 11, 2009, the EPA released new guidance on the statutory and regulatory guidance requirements for states to develop conformity State Implementation Plans. EPA staff will provide the CWG with an overview of this guidance.	
+7.	PROPOSED RULE TO IMPLEMENT THE 1997 8-HOUR OZONE STANDARD: REVISION ON SUBPART 1 AREA RECLASSIFICATION AND ANTI-BACKSLIDING PROVISIONS	DISCUSSION
	On January 16, 2009, the EPA published a Proposed Rule to Implement the 1997 8-Hour Ozone National Ambient Air Quality Standard: Revision on Subpart 1 Area Reclassification and Anti-Backsliding Provisions Under Former 1-Hour Ozone Standard; Proposed Deletion of Obsolete 1-Hour Ozone Standard Provision was published in the Federal Register. The comment period closes on April 1, 2009. Staff from the EPA and San Diego Air Pollution Control District will discuss the rule and its significance to the San Diego region.	
8.	OTHER BUSINESS	INFORMATION

+ next to an item indicates an attachment

The next meeting of the San Diego Region Conformity Working Group is scheduled for Wednesday, April 1, 2009, from 10:30 a.m. to 12 noon, at SANDAG.

San Diego Association of Governments
CONFORMITY WORKING GROUP

March 4, 2009

AGENDA ITEM NO.: **2**

Action Requested: APPROVE

SUMMARY OF DECEMBER 3, 2008, MEETING

File Number 3000400

Item #1: Introductions

Self-introductions were made. See attached attendance list.

Item #2: Summary of November 5, 2008, Meeting

Carl Selnick, San Diego Air Pollution Control District (APCD), commented that the second paragraph on page four of the meeting summary should be verified by John Kelly from the U.S. Environmental Protection Agency (EPA). He stated that the last sentence should read "Mr. Kelly stated that the monitoring requirement in the regulation is source-specific and population-based (cities with more than 500,000 people are required to monitor)." He commented that the fourth paragraph on page four should read, "Mr. Kelly stated that the hot spots are associated mainly with the construction phase of projects due to residual lead in soil." He said that this correction also should be verified with Mr. Kelly.

Mr. Selnick corrected the spelling of his name on pages five and six.

Ms. Kennedy said that she would follow up with Mr. Kelly on the proposed corrections and make the relevant changes to the meeting summary.

Andrea Hoff, SANDAG, said that she was the initial author of the minutes and is new to the Conformity Working Group (CWG) and appreciated all of the clarifications made.

Item #3: Public Comments/Communications

There were none.

Item #4: 2008 Regional Transportation Improvement Program (RTIP) Conformity Determination and 2030 Regional Transportation Plan (RTP) Conformity Redetermination

Ms. Kennedy, SANDAG, stated that on November 17, 2008, the Federal Highway Administration (FHWA) and Federal Transit Administration (FTA) made a finding of conformity for the 2008 RTIP and a conformity redetermination for the 2030 RTP: Pathways for the Future. She stated that the letter had been posted to the CWG Web page.

Item #5: 8-Hour Ozone Standard Re-Classification Update

Ms. Kennedy stated that agenda item five would be moved to the end of the meeting to allow more time for Mr. Kelly to arrive. This item eventually was tabled until the next meeting.

Item #6: EMFAC 2010 Development

Ms. Kennedy asked that Denis Wade, Air Resources Board (ARB), provide an update to the CWG on the development process for Emission FACTors (EMFAC) 2010. She noted that SANDAG has had some initial conversations with ARB regarding EMFAC 2010 and has provided some initial travel activity data.

Mr. Wade stated that SANDAG provided data to ARB at the end of October 2008. The data is being processed for inclusion into the next iteration of the model. The timeline for the model development is soft right now, but it is anticipated that the model will be made public in late 2009 or early 2010 with submittal to EPA in the mid to late 2010 time frame. Mr. Wade stated that the 2007 latest planning assumptions will expire at the end of the year 2010 and it is likely that EMFAC 2010 will be produced by that time. The initial data solicited by ARB will be included in a version of EMFAC 2010 which will be used internally by ARB to develop State Implementation Plans (SIP). Later, in the third quarter of 2009, ARB will solicit revised activity data from the Metropolitan Planning Organization (MPO). Mr. Wade stated that the truck activity data may take longer to process, but there will be updates as time permits and data is available. He invited the group to ask any questions.

Ms. Kennedy, stated that Elisa Arias, SANDAG, had spoken to Mr. Wade about the development of EMFAC 2010 and how it will coincide with the development of the SANDAG 2050 RTP, which is anticipated to be adopted in 2011. Currently EMFAC 2007 has a horizon year of 2040. SANDAG will be completing its growth forecast to the year 2050. Mr. Wade had indicated that he would speak to Mr. Benjamin, ARB, regarding the horizon year for EMFAC 2010, which had been indicated to be 2040. Ms. Kennedy asked if there had been any further discussion about the out-year of the EMFAC 2010 model.

Mr. Wade stated that he spoke with Mr. Benjamin and it was agreed that the model should be pushed out beyond 2040. At this time Mr. Wade does not know what year the model horizon year will be; it may be able to be extended to 2050.

Mike Brady, Caltrans, asked if the model could be pushed out further in order to be consistent with MOVES and he suggested it should be pushed out at least to 2050.

Mr. Wade said he would need to clarify if the model could be extended past 2050 to be consistent with MOVES. In order to determine how far out the model could be extended confidence in the out-year activity data and the control measures would need to be determined. If there is confidence in these two areas, then the model horizon should be able to be extended.

Stew Sonnenberg, FHWA, stated that the model should be pushed out as far as it can be and it does need to go out to 2050 because of where locals are in their planning process. Mr. Wade said he would pass the request on to Mr. Benjamin.

Ms. Kennedy asked if the model did not go out to 2050 and the SANDAG RTP did how the process would work for conformity determinations. Mr. Wade said that he had not encountered this issue and for that reason did not have an answer. Mr. Sonnenberg said that the EPA would need to buy-off on whatever strategy is employed.

Mr. Selnick said that the timing of the model's release is critical because he will be preparing a new 8-hour ozone attainment demonstration to be submitted in the year 2010 as a formerly basic area. It is possible that the preparation of the attainment demonstration will need to be done prior to

the model being completed; but, the submittal of the attainment demonstration will be done after the model is released and approved.

Mr. Wade asked when Mr. Selnick was anticipating the submittal. Mr. Selnick responded that this is dependent on the EPA. He said that he had understood that the proposal for the requirements for that SIP is supposed to be released within days or weeks. He said that the EPA could take up to one year to respond to public comments on the proposal. Sometime between summer 2009 and fall/winter 2009, the EPA will finalize those requirements and the SIP is due 12 months after the requirements are final.

Mr. Wade said that he recently held a meeting with planning staff to identify SIPs preparation schedules, and to become aware of potential scheduling conflicts.

Mr. Selnick was under the impression that he could use EMFAC 2010 in the new SIP, but after seeing the agenda realized that the release may not come in time. Mr. Wade said he would keep the timing of the release in mind and keep the group up to date as the schedule changes.

Mr. Selnick said that he appreciated hearing that Mr. Wade would come back to the MPOs/Council of Governments (COG) later to obtain updated activity forecasts, because the existing forecasts may need to be modified to account for the recent economic recession.

Ms. Kennedy said that modeling staff at SANDAG already is working on the Series 12 forecast, which will be used for the 2050 RTP. Despite economic downturns in the past, the forecasts have been relatively accurate with an approximate 3.4 percent point variation. She said she is also in favor of ARB providing an opportunity to provide data in the future. She asked when the next opportunity for a revised data submittal will be. Mr. Wade said he was expecting the data request to come in mid- to late 2009.

Mr. Selnick asked if and how he could reflect Series 12 in the SIP. Mr. Wade asked if ARB or APCD is doing the modeling for the APCD SIP. Mr. Selnick said that he would need to hear from his budgeting department in order to determine the answer. His initial request was that APCD complete the modeling.

The group agreed that there is some concern using Series 11 data, once Series 12 is available. If the Series 12 data is significantly different, this may have implications for the attainment demonstration. The group acknowledged there are a number of timelines that need to be coordinated.

Item #7: San Diego Region Conformity State Implementation Plan Development

Ms. Kennedy stated that the federal Transportation Conformity Rule requires locally developed procedures defining the process for interagency consultation on air quality and transportation planning documents. The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) contains streamlined requirements for State Conformity SIPs. She stated that SANDAG and APCD staffs have completed a preliminary draft San Diego Region Conformity SIP. She explained that the EPA is expected to come up with revised Conformity SIP Guidance, which should be out by the end of the year or early 2009. Ms. Kennedy said that the draft would not be acted on until the new guidance is out to ensure consistency between San Diego's Conformity SIP and the new guidelines. She assured that the CWG would have ample time to review and comment on the document in the meantime. She invited the group to make any comments on the draft at this time.

Ms. Kennedy said that Mr. Kelly provided SANDAG with a completed Conformity SIP for Clark County, Nevada, which recently was approved and published in the Federal Register. SANDAG used this as a model for the draft document and incorporated the original Conformity Procedures with the new requirements. Mr. Kelly also provided a checklist which was used to ensure that all requirements were being followed.

Ms. Kennedy stated that the draft Conformity SIP follows the new rules in that it addresses the three main elements called for in SAFETEA-LU. She explained that the document also contains a new introduction and a description of SANDAG. She invited comments on Section 1.

Mr. Brady stated that he had not read the document in detail, but noted that it seemed to be on the right track. He said that Mr. Kelly would need to approve the document first and foremost. Ms. Kennedy said she had not received comments from Mr. Kelly to date.

Mr. Brady noted that Sections 4.7 and 4.8 were not written in the same tense as the other items on the list. Ms. Kennedy responded that the grammar would be fixed.

Mr. Brady asked if the document addresses the need for a rulemaking on the part of the District. Mr. Wade said that the document must be in the form of a district rule that is adopted by APCD. Each district needs the Conformity SIP and a rule, despite the fact that an Memorandum of Understanding (MOU) may be in place, which does not function the same as the formal rule. Mr. Brady concurred with Mr. Wade that both a rule and a SIP are necessary.

Mr. Selnick suggested that the document could serve as both the rule and a SIP, but he would need to review the draft more carefully in order to determine how it might serve both purposes. He requested that information be obtained from the EPA that specifically states what is needed in a rule and what the new guidance calls for.

Mr. Brady stated that he would like to know from EPA if all of the language included in the draft conformity SIP is necessary. Any unnecessary elements should be eliminated. Mr. Brady asked if San Diego had submitted a SIP in 1993. Mr. Selnick said that APCD did submit a SIP, but it was never acted on; the Metropolitan Transportation Commission (MTC) is the only California region with an enacted SIP. Mr. Brady suggested that one advantage of not having a submittal acted on at this time is that the State of California would not need to withdraw it in order to enact the new SIP.

Mr. Wade stated that one of John Kelly's tasks was to search for old submittals, because the new rule calls for the states to withdraw the old submittal and adopt the new one.

Mr. Selnick noted that "SIP logs" are available online at both the ARB and Region 9 Web sites. Mr. Wade stated that ARB has a rule log, but not a formal log of SIP submittals without the rule. He asked if APCD had submitted a rule in the early 1990s. Mr. Selnick said that his district had made a SIP submittal for transportation conformity without a rule. He said that he believed that San Diego originally had an Memorandum of Agreement (MOA), then morphed those into procedures and these became the adopted SIP submittal. Mr. Selnick said that this will have to be withdrawn. He expressed surprise that the Clark County SIP would not include a rule if it was required; he suggested that the group would have to wait for Mr. Kelly and Karina O'Connor, EPA, to discuss process.

Ms. Kennedy said that the rule and guidelines are follow-ups for the EPA, in addition to new transportation control measures (TCM) guidelines. She said that guidance for SIPs and TCMs are anticipated to come out around the same time.

Ms. Kennedy said that the table of roles and responsibilities on page 20 should reflect each CWG member's comments since the last meeting. She said that she received a few edits by FHWA, EPA, and their comments were incorporated into the document.

Carla Walecka, Transportation Corridor Agency (TCA), had inquired as to how the role of the public would be incorporated and stated that the answer to her question was found in the document. Ms. Kennedy also noted that the TCA had been added to the list of agencies.

Mr. Wade said that number 3 in the role table under ARB should be changed, because they do not adopt and approve emission factors. He suggested that the responsibility should read that ARB develops, submits input on, and passes on to EPA for adoption.

Item #9: Other Business

Ms. Kennedy announced that the next meeting of the CWG is scheduled for Wednesday, February 4, 2008, from 10:30 a.m. to 12 noon at SANDAG. She thanked the group for participating and noted that this meeting is Sandy Johnson's last meeting before her retirement. Ms. Kennedy and the group recognized Sandy Johnson as a valuable member of the CWG and thanked her for her service.

Ms. Johnson said she had enjoyed her work with the CWG.

San Diego Region Conformity Working Group

Meeting Attendance

December 3, 2008

Name	Agency
Monica Lewis (phone)	ARB
Dennis Wade(phone)	ARB
Carl Selnick	APCD
Mike Brady (phone)	Caltrans
Sandy Johnson	Caltrans
Jose Marquez	Caltrans
Stew Sonnenberg (phone)	FHWA
Andrea Hoff	SANDAG
Rachel Kennedy	SANDAG
Carla Walecka (phone)	TCA
Janielle Yousser	Public (SDSU)

Guidance for Implementing the Clean Air Act Section 176(c)(8) Transportation Control Measure Substitution and Addition Provision





Guidance for Implementing the Clean Air Act Section 176(c)(8) Transportation Control Measure Substitution and Addition Provision

Transportation and Regional Programs Division
Office of Transportation and Air Quality
U.S. Environmental Protection Agency

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Section 1: Introduction

1.1 What is the purpose of this guidance?

The purpose of this document is to provide nonattainment and maintenance areas with guidance on implementing the transportation control measure (TCM) substitution and addition provision contained in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). SAFETEA-LU, which was signed into law on August 10, 2005, revised a number of aspects of the Clean Air Act's section 176(c) transportation conformity provisions. In addition to amendments to the transportation conformity provisions, SAFETEA-LU also added a provision to section 176(c) to allow states to substitute or add TCMs into approved state implementation plan (SIPs) without the standard SIP revision process.^{1 2} Under this Clean Air Act provision, states are no longer required to include a TCM substitution mechanism in their SIPs in order to expedite the process for making TCM substitutions. The provision also provides a streamlined process for adding TCMs to an approved SIP.

EPA revised the transportation conformity rule (40 CFR parts 51 and 93) on January 24, 2008 (73 FR 4419) to address the transportation conformity-related Clean Air Act amendments made by SAFETEA-LU. EPA determined that it was not necessary to promulgate regulations in order to successfully implement the TCM substitution and addition statutory provision. (73 FR 4432) We are issuing this guidance to assist areas in making TCM substitutions and additions. This guidance document supersedes the guidance on TCM substitutions and additions that was included in the guidance document titled, "Interim Guidance for Implementing the Transportation Conformity Provisions in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users" that was issued on February 14, 2006.³

Areas are likely to use this statutory process either to make a TCM substitution in an approved SIP or to add a TCM to an approved SIP because the Clean Air Act process will take less time to complete than a standard SIP revision. A standard SIP revision requires rulemaking by both the state air agency and by EPA to complete either a TCM substitution or addition and therefore takes more time to complete than the streamlined Clean Air Act process.

For example, a metropolitan planning organization (MPO) that is beginning work on its next conformity determination may find that a TCM in the area's approved SIP has become delayed. In order for the MPO to both comply with the transportation conformity rule's requirements for timely implementation of TCMs (40 CFR 93.113) and to complete its conformity determination as scheduled, the MPO may use the Clean Air Act process to replace the delayed SIP TCM with a new TCM.

An area would also be interested in this guidance if it is considering adding a new TCM to the SIP through this more streamlined process.

¹ The statutory text of Clean Air Act section 176(c)(8) is included in Appendix A of this guidance document.

² The standard SIP revision process requires notice and comment rulemaking by both the state air agency and EPA in order for the state to revise its SIP and for EPA to approve the revision.

³ It should be noted that the original TCM substitution guidance that was issued on April 7, 2004 was previously withdrawn when EPA issued the SAFETEA-LU interim conformity guidance in February 2006.

There are limited cases where using either the TCM substitution or addition process would not be appropriate. For example, if a state needed to increase the amount of emissions reductions attributed to TCMs in a control strategy SIP or maintenance plan, it could not accomplish its goal solely through the Clean Air Act process to substitute or add TCMs to an approved SIP because the Clean Air Act process does not provide a streamlined process for revising control strategy SIPs or maintenance plans. The state could use the Clean Air Act process to substitute or add new TCMs to its SIP; however, as discussed in Questions 2.12 and 3.4, the state would also need to complete a standard SIP revision to revise the relevant control strategy SIP or maintenance plan and EPA would need to approve that revision in order to incorporate the additional emissions reductions from the substitute or additional TCM into the SIP in order to accomplish the state's goal of increasing the amount of emissions reductions attributable to TCMs. Other situations where it would not be appropriate to use the TCM substitution process are discussed in Questions 2.6 and 2.8.

TCMs can still be substituted or added to an area's SIP through the normal SIP revision process, if desired or when necessary.

1.2 What TCMs are addressed by Clean Air Act section 176(c)(8) and this guidance document?

Clean Air Act section 176(c)(8) and this guidance document pertain to TCMs that apply, or will apply once included in the SIP, for conformity. TCMs that apply for conformity are those in approved SIPs that affect vehicle use or travel. Section 93.101 of the transportation conformity rule defines a TCM as:

any measure that is specifically identified and committed to in the applicable implementation plan, including a substitute or additional TCM that is incorporated into the applicable SIP through the process established in CAA section 176(c)(8), that is either one of the types listed in CAA section 108(f), or any other measure for the purpose of reducing emissions or concentrations of air pollutants from transportation sources by reducing vehicle use or changing traffic flow or congestion conditions. Notwithstanding the first sentence of this definition, vehicle technology-based, fuel-based, and maintenance-based measures which control the emissions from vehicles under fixed traffic conditions are not TCMs for the purposes of this subpart.

We have included the list of measures from Clean Air Act section 108(f) in Appendix B of this guidance document.

Similar types of measures that are included only in an area's transportation plan and transportation improvement program (TIP) and not in the area's approved SIP are not considered TCMs for the purposes of conformity. Because they are not in the SIP, they can be changed without either a standard SIP revision or without using the process in Clean Air Act 176(c)(8). Furthermore, because vehicle technology-based measures (including diesel retrofit projects, vehicle fuel-related programs, and vehicle inspection and maintenance programs) are specifically excluded as TCMs under the transportation conformity rule's TCM definition, these types of

programs cannot be substituted or added into a SIP using the process in Clean Air Act section 176(c)(8).

1.3 What are the transportation conformity rule's requirements for timely implementation of TCMs?

Transportation conformity is required, under Clean Air Act section 176(c), to ensure that federally supported highway and transit project activities are consistent with (“conform to”) the purpose of the 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 “standards”).

Clean Air Act section 176(c)(2)(B) and section 93.113 of the transportation conformity rule (40 CFR) require that TCMs in an approved SIP that are eligible for federal funding under title 23 U.S.C. or under the Federal Transit Laws (Title 49 U.S.C.) must be implemented on the schedule established in the SIP. If a TCM falls behind schedule and the area still intends to implement it, the MPO must demonstrate that past obstacles to implementation have been identified and have been overcome and that state and local agencies with funding authority are giving the delayed TCM maximum priority, according to 40 CFR 93.113(c)(1). If the area no longer wants to implement a delayed TCM, the area can either use the standard SIP revision process to revise the SIP or use the Clean Air Act section 176(c)(8) TCM substitution process to remove the delayed TCM from the SIP and to replace it in the SIP with a new TCM. It should be noted that the original TCM remains in the approved SIP and subject to the conformity rule's timely implementation requirements until either the replacement TCM is adopted through the Clean Air Act substitution process or EPA approves the SIP revision in cases where an area chooses that approach.⁴

1.4 Is a conformity determination or a SIP revision required when a substitution is made or when a TCM is added to the SIP?

No, neither a conformity determination nor a SIP revision is required when an area makes a substitution or adds a new TCM to the approved SIP using the Clean Air Act section 176(c)(8) process. Clean Air Act section 176(c)(8)(D) specifically states that the substitution or addition of a TCM does not require a new conformity determination or SIP revision. However, if the transportation plan and/or TIP need to be amended in order to implement the substitute or additional TCM, the applicable United States Department of Transportation (DOT) transportation planning requirements (23 CFR 450 and 49 CFR 613) would have to be met. If an MPO is making other changes to its transportation plan and/or TIP in addition to a TCM substitution or addition, and, if these other changes would require a plan and/or TIP amendment, a conformity determination would be required. In such situations the relevant EPA and DOT offices are available to assist the MPO to ensure that all transportation conformity and transportation planning requirements are met.

1.5 Does this guidance create new requirements?

⁴ The course of action to be taken if a TCM in an approved SIP falls behind schedule must be determined through interagency consultation, per 40 CFR 93.105(c)(1)(iv).

No, this guidance is based on the requirements for transportation control measure substitutions and additions contained in Clean Air Act section 176(c)(8) and does not create any new requirements. This guidance merely explains how to implement those TCM substitution and addition-related provisions and any other related requirements.

The statutory provisions and the US Environmental Protection Agency (EPA) regulations described in this document contain legally binding requirements. This document is not a substitute for those provisions or regulations, nor is it a regulation itself. Thus, it does not impose legally binding requirements on EPA, DOT, states, or the regulated community, and may not apply to a particular situation based upon the circumstances. EPA retains the discretion to adopt approaches on a case-by-case basis that may differ from this guidance, but still comply with the statute and SIP and conformity regulations. Any decisions regarding a particular TCM substitution or addition will be made based on the statute and regulations, after appropriate public input and rulemaking procedures where applicable. This guidance may be revised periodically without public notice.

1.6 Who can I contact for more information?

For specific questions concerning a particular nonattainment or maintenance area, please contact the SIP or transportation conformity staff person responsible for your state at the appropriate EPA regional office. A listing of EPA regional offices, the states they cover, and contact information for EPA regional conformity staff can be found at the following website: <http://www.epa.gov/otag/stateresources/transconf/contacts.htm> .

General questions about this guidance can be directed to:

Rudy Kapichak at EPA's Office of Transportation and Air Quality,
kapichak.rudolph@epa.gov or 734-214-4574.

1.7 Where can I find more information on the web?

Additional information on the transportation conformity rule and associated guidance can be found on EPA's website at: <http://www.epa.gov/otag/stateresources/transconf/index.htm> .

Section 2: Substituting Transportation Control Measures in an Approved SIP

2.1 When can states use the TCM substitution provision in the Clean Air Act?

Nonattainment and maintenance areas that do not have TCM substitution mechanisms in their approved SIPs have been able to rely on this statutory mechanism to make TCM substitutions since August 10, 2005, when SAFETEA-LU was signed into law.

Several nonattainment and maintenance areas adopted TCM substitution mechanisms in their approved SIPs prior to SAFETEA-LU's enactment.⁵ These areas must continue to use their SIP-approved TCM substitution mechanisms in addition to the new statutory provision as applicable to make substitutions. However, there may be conflicts between an already approved mechanism and Clean Air Act section 176(c)(8). In the event of such a conflict, the area would follow the Clean Air Act requirements. EPA will work with areas with approved mechanisms on a case-by-case basis to answer any questions. These areas may revise their SIPs to remove the approved TCM substitution mechanism, and rely solely on the federal statute for future actions once EPA approves the SIP revision.

2.2 What does the Clean Air Act require in order for a TCM substitution to occur?

For a TCM in an approved SIP to be removed and replaced with a substitute TCM, the Clean Air Act requires that:

- the substitute TCM(s) must achieve equal or greater emissions reductions;
- the substitute TCM(s) must be implemented on a schedule that is consistent with the schedule for the TCM(s) being removed from the SIP; or, if the implementation date has passed for the TCM(s) being replaced, the replacement TCM must be implemented as soon as practicable but not later than the date on which emissions reductions from the TCM(s) are necessary to achieve the purpose of the SIP;
- the substitute TCM(s) must be accompanied by evidence of adequate personnel, and funding and authority under state or local law to implement, monitor and enforce the TCM(s);
- the substitute TCM(s) must be developed through a collaborative process that includes participation by all affected jurisdictions (state and local air pollution control agencies and state and local transportation agencies such as the MPO, state DOT, and transit providers); consultation with EPA; and reasonable notice and opportunity for public comment; and
- the equivalency of the substitute TCM(s) must be concurred on by the state air pollution control agency, the MPO,⁶ and EPA. That is, EPA, the state air agency, and the MPO must all agree that on the estimated emissions reductions from the substitute TCM(s) and agree that the estimated emissions reductions equal or surpass those that would have resulted from the original TCM(s) in the approved SIP.

⁵ Portland, OR; Albuquerque, NM; and Texas; have TCM substitution mechanisms in their approved SIPs.

⁶ The state DOT would concur on TCM substitutions in isolated rural areas because these areas do not have MPOs. See question 4.4 for more information.

The remainder of this section and Section 4 below contain further details on how to comply with these specific requirements. Appendix C contains an example of how to carry out a TCM substitution using the process in Clean Air Act section 176(c)(8).

2.3 What additional information should be provided to support a TCM substitution?

The material prepared to support a substitution should clearly identify and describe the original TCM in the approved SIP and the substitute TCM. The substitute TCM should meet all of the requirements of Clean Air Act section 110 and EPA's 1989 TCM SIP Guidance (EPA 450/2-89-020), which can be found at:

http://www.epa.gov/otaq/stateresources/policy/transp/tcms/state_plan_guidance.pdf.

The documentation for each TCM substitution must include all of the information necessary to demonstrate that the Clean Air Act requirements are met including the demonstration that the substitute TCM provides equivalent or greater emissions reductions. The documentation for each substitution should also include:

- 1) the name of the original TCM in the approved SIP that is proposed to be replaced;
- 2) the name of the proposed substitute TCM;
- 3) a brief but thorough description of both the original and substitute TCMs including their locations and implementing agencies;
- 4) the steps and schedule for completing and operating the substitute TCM; and
- 5) a brief explanation of why the substitution is necessary.

2.4 How does a state air agency, MPO or other transportation agency demonstrate that a substitute TCM provides equivalent emissions reductions?

In order to demonstrate that the new TCM provides equal or greater emissions reductions, the emissions benefits of the substitute TCM must be analyzed in a manner consistent with the planning assumptions and modeling used for analysis of the existing TCMs in the approved SIP, unless more recent planning assumptions and/or a newer emissions model are now available. If updated assumptions and/or a newer emissions model are available, the relevant state or local agency must recalculate the emissions benefits of the original TCM and use that emissions estimate in determining if the substitute TCM provides equivalent or greater emissions reductions as required by Clean Air Act section 176(c)(8)(A)(i). If the SIP relied upon emissions reductions from a TCM to address a localized violation, a new hot-spot analysis must be done to ensure that the SIP continues to fulfill its purpose and meet all applicable SIP requirements.⁷ If such a hot-spot analysis were necessary it would be completed for SIP purposes not to fulfill the transportation conformity rule's project-level requirements.

In determining whether or not a substitute TCM provides equivalent or greater emissions reductions, the agency preparing the analysis should document that the substitute TCM provides emissions reductions that are:

⁷ Applicable requirements may include approved methodologies such as those specified in 40 CFR part 51, Appendix W (Guideline on Air Quality Models) for CO analyses or applicable requirements for PM₁₀ and PM_{2.5} analyses.

- permanent for the time period relied upon in the applicable SIP;
- for the same time of year (e.g., during the winter carbon monoxide season) or during a specific time of day (e.g., the morning or evening rush hour) relied upon in the applicable SIP;
- for the same pollutant or precursor as the original SIP TCM, unless the area has a SIP-approved trading mechanism that would allow trading between precursors or between a pollutant and its precursor(s); and
- for the same geographic location, if such a location is identified as critical for the emissions reductions in the applicable SIP. For example, if a TCM was included in an approved SIP to address a specific local air quality problem such as a violation of the CO standard, the substitute TCM would have to be implemented in a location to address the same violation. Alternatively, if a facility such as a park-and-ride lot was included in the SIP to serve a particular community or development project, the substitute TCM would need to be located so that it serves the same community or development project.

In order to ensure equivalent or greater reductions in all cases, the agency doing the analysis must also consider whether or not the substitution will have an effect on any other SIPs for the area. For example, if a TCM is relied upon in more than one SIP (e.g., a TCM provides both VOC and NO_x emissions reductions in an approved ozone attainment demonstration and provides carbon monoxide emissions reductions in an approved carbon monoxide maintenance plan), the emissions analysis that is performed for the substitution would need to demonstrate that the substitute TCM provides equivalent or greater emissions reductions of all of the same pollutants and precursors as the original TCM in the approved SIPs. Another example could occur if an area is nonattainment or maintenance for several pollutants and a TCM is included in an approved SIP for one pollutant but not explicitly included in the approved SIP or maintenance plan for other pollutants. This situation is discussed in Question 2.9.

Nonattainment and maintenance areas must meet all relevant Clean Air Act requirements. Nonattainment areas must continue to meet the Clean Air Act's requirements for implementation of Reasonably Available Control Measures (RACM);⁸ and serious PM₁₀ nonattainment areas must continue to meet requirements for implementation of Best Available Control Measures (BACM).⁹ Serious, severe and extreme ozone areas and moderate and serious carbon monoxide areas that have adopted TCMs to comply with Clean Air Act sections 182(c)(5), 182(d)(1)(A), 182(e)(4), 187(a)(2)(A) or 187(b)(2) may substitute TCMs through the Clean Air Act substitution process; however, they must continue to comply with the Clean Air Act requirements that apply in ozone and carbon monoxide nonattainment areas.

⁸ RACM requirements do not apply in maintenance areas.

⁹ Provided that all applicable RACM and BACM requirements are met, EPA believes that TCMs substituted through the use of the Clean Air Act TCM substitution mechanism would fulfill the requirements of Clean Air Act section 193 because the substitute TCMs provide equivalent emission reductions and therefore would not interfere with reasonable further progress or attainment. The requirements in Clean Air Act section 110(l) would not apply to substitutions made through this mechanism because section 110(l) only applies to control measures approved into the SIP by EPA and these substitutions do not require EPA SIP approval.

2.5 If the SIP does not include any emissions reductions from a TCM, can it be substituted with another TCM without an analysis?

No. Some approved SIPs include TCMs for which no emissions reduction credit was claimed. If such a TCM is to be replaced through a TCM substitution, an emissions analysis must be performed for both the existing SIP-approved TCM and the proposed substitute TCM in order to demonstrate that there will be an equivalent or greater reduction in emissions as a result of the substitution, as required by Clean Air Act section 176(c)(8)(A)(i).

2.6 Can the TCM substitution process be used to remove a TCM from the applicable SIP without providing a substitute measure?

No. The Clean Air Act section 176(c)(8) TCM substitution process only provides legal authority for an area to remove a TCM from the applicable SIP if it is replaced with a TCM that provides equivalent or greater emissions reductions, even if these reductions are not claimed in the SIP's demonstration. TCMs can be removed from an applicable SIP without substitution through a standard SIP revision. Such a SIP revision would have to be shown to meet Clean Air Act section 110(l) requirements (e.g., the area would have to show that removal of the TCM would not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable Clean Air Act requirement).

2.7 If a substitute TCM cannot be implemented on the same schedule as the original TCM, what is necessary in order to fulfill the Clean Air Act requirement that "the replacement TCM must be implemented as soon as practicable but not later than the date on which emissions reductions are necessary to achieve the purpose of the implementation plan?"

If it is not possible for the substitute TCM to be implemented by the same deadline as the original TCM, the substitute TCM would have to be implemented as expeditiously as practicable so that emissions reductions can be achieved by the year required by the SIP. For example, 8-hour ozone nonattainment areas classified as moderate have an attainment date of June 2010. In such an area, if the TCM being replaced was to be implemented in 2008 and was included in the area's 8-hour ozone attainment demonstration, the substitute TCM should be fully implemented no later than the beginning of the 2009 ozone season (i.e., the final complete ozone season before the June 2010 attainment date). In this example, the substitute TCM would be implemented by the time reductions are needed to support the SIP, in this case by the beginning of the 2009 ozone season.

2.8 Can the substitution process be used if the substitute TCM could not be implemented until after the date on which emissions reductions are necessary to achieve the purpose of the implementation plan?

No, reliance on the TCM substitution provision would not be appropriate in the case where both the implementation date for the original TCM and SIP milestone date have passed. The TCM substitution process cannot be used for a given substitution if it would interfere with any applicable requirement for reasonable further progress, timely attainment, or maintenance of any NAAQS. For example, if a TCM that was included in an attainment demonstration for a

moderate 8-hour ozone nonattainment area was to be in place at the beginning of 2009 and became delayed, it would not be appropriate to use the TCM substitution mechanism to replace it with a TCM that could not be implemented until 2011. In this case, a standard SIP revision would be required to address the attainment demonstration as well as the substitute TCM, to ensure that sufficient control measures are in place to demonstrate timely attainment.

2.9 How would the TCM substitution process work in an area that is nonattainment and/or maintenance for two or more pollutants, where the original TCM is included in the SIP for only one pollutant?

An area could use the TCM substitution process to replace a TCM that is included in an approved SIP for one pollutant but not explicitly included in the approved SIP or maintenance plan for other pollutants if certain conditions are met. The substitution must meet all of the requirements of Clean Air Act section 176(c)(8). The documentation for the substitution must include an emissions analysis that demonstrates that the substitute TCM provides equivalent or greater emissions reductions for the same pollutants and precursors that original TCM provided in the applicable SIP. The material must also document that the substitution will not result in increased emissions of the other pollutants and precursors for which the area is designated nonattainment or maintenance. This additional information for the other pollutants and/or precursors is necessary to demonstrate that the substitution will not interfere with any applicable requirement concerning attainment, reasonable further progress, maintenance or any other applicable Clean Air Act requirement that applies to the other pollutants for which the area is designated nonattainment or maintenance. If the substitution does not include information to document that it provides equivalent or greater emissions reductions for all pollutants for which the area is designated nonattainment or maintenance, the net effect of the substitution could be an increase in emissions for the pollutants and/or precursors not addressed in the demonstration, and call into question the air quality demonstrations supporting the SIPs for those pollutants.

2.10 Can the TCM substitution process be used to replace a TCM in an approved SIP for an air quality standard that has been revoked if the area remains nonattainment and/or maintenance for other pollutants?

Yes, a nonattainment or maintenance area could use the TCM substitution process to replace a TCM in an approved SIP for an air quality standard that has been revoked if certain conditions are met. First, the substitution would have to meet any applicable anti-backsliding requirements associated with the revoked air quality standard. Second, the substitution must meet all of the requirements of Clean Air Act section 176(c)(8). The documentation for the substitution must include an emissions analysis that demonstrates that the substitute TCM provides equivalent or greater emissions reductions for the same pollutants and precursors that original TCM provided in the applicable SIP. The material must also document that the substitution will not result in increased emissions of the other pollutants and precursors for which the area is designated nonattainment or maintenance. This additional information for the other pollutants and/or precursors is necessary to demonstrate that the substitution would not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable Clean Air Act requirement that applies to the other pollutant(s) for which the area is designated nonattainment or maintenance. If the substitution does not include information to

document that it provides equivalent or greater emissions reductions for all pollutants for which the area is designated nonattainment or maintenance, the net effect of the substitution could be an increase in emissions for the pollutants and/or precursors not addressed in the demonstration, and call into question any air quality demonstrations supporting the SIPs for those pollutants.

EPA addressed this situation as it pertains to requirements for the timely implementation of TCMs contained in 1-hour ozone SIPs in areas that are now designated as nonattainment or maintenance for the 8-hour ozone standard in the July 1, 2004 new standards rulemaking. Specifically, EPA stated that:

Section 93.113 of the existing conformity rule requires that transportation plans, TIPs, and projects which are not from a conforming plan and TIP must provide for the timely implementation of TCMs from an approved SIP. EPA notes that today's final rule does not change the implementation of these requirements for any existing or new nonattainment or maintenance area, including 8-hour nonattainment areas that have approved 1-hour SIPs that contain TCMs.

Clean Air Act section 176(c) requires that TCMs in approved SIPs be implemented in a timely manner according to the schedules in the SIP. This requirement is not contingent on what type of SIP, pollutant, or standard for which the approved TCM was established. Conformity determinations for any pollutant and standard must provide for the timely implementation of TCMs in approved SIPs, including TCMs in approved SIPs for the 1-hour ozone standard after that standard is revoked. (69 FR 40013)

Any area considering such changes should consult with the EPA regional office in order to determine how best to meet the requirements described above.

2.11 When can an MPO make a conformity determination based on a substitution?

An MPO can make a conformity determination as soon as the state air pollution control agency, the MPO and EPA have concurred on the substitution.¹⁰ The MPO does not have to wait until after the state air agency has submitted the substitute TCM to EPA for incorporation into the codified applicable SIP before it makes a conformity determination. At this point the MPO would rely on the substitute TCM to meet the transportation conformity rule's requirements for timely implementation and may include the emissions reductions benefits of the substitute TCM in the regional emissions analysis for the area. If the substitute TCM provides greater emissions reductions than the original SIP-approved TCM, the MPO would be able to use those extra emissions reductions in its regional emissions analysis. Once all of these agencies have concurred, the substitute TCM is considered to be adopted. Once adopted under this process, the substitute TCM becomes part of the federally enforceable SIP for the area. The adoption of the substitute TCM also serves to remove the original TCM from the federally enforceable SIP.

¹⁰ However, it should be noted that substituting a TCM in a SIP does not require a new conformity determination – see Question 1.4 for more information.

Therefore, once the adoption occurs, the original TCM is no longer subject to Clean Air Act SIP and transportation conformity rule requirements for timely implementation of TCMs in approved SIPs. Subsequent to adoption, EPA will incorporate the substitute or new TCM(s) into the federal codification of the SIP to clarify for the public which TCMs are part of the federally enforceable SIP.

If the transportation plan and/or TIP need to be amended in order to implement the substitute TCM, DOT's transportation planning requirements (23 CFR 450 and 49 CFR 613) would have to be met. Additionally, if the MPO is making other changes to its transportation plan and/or TIP in addition to a TCM substitution or addition, and, if these other changes would require a plan and/or TIP amendment, a conformity determination would be required. In such situations the relevant EPA and DOT offices are available to assist the MPO to ensure that all transportation conformity and transportation planning requirements are met.

2.12 What must a state air agency do if a substitute TCM provides greater emissions reductions than the original TCM and the agency wants to incorporate the additional reductions into its control strategy SIP or maintenance plan?

A state air agency is not required to revise a SIP to incorporate any additional reductions beyond those accounted for in the existing SIP. However, if such a situation occurs, the state air agency would need to revise its control strategy SIP or maintenance plan and associated motor vehicle emissions budgets, and EPA would need to approve such a SIP revision in order for the state to incorporate these additional emissions reductions in the area's control strategy SIP or maintenance plan. This would also apply if the SIP did not include any emissions reductions from the original TCM, but the state now wants to include the emissions reductions from the substitute TCM in the relevant control strategy SIP or maintenance plan. These actions would be separate from and in addition to the TCM substitution process.

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Section 3: Adding Transportation Control Measures to an Approved SIP

3.1 What is required in order for a new TCM to be added to an area's approved SIP through the process established in Clean Air Act section 176(c)(8)?

In order for an area to add a new TCM to an approved SIP through the process established in Clean Air Act section 176(c)(8):

- the new TCM must be accompanied by evidence of adequate personnel, and funding and authority under state or local law to implement, monitor and enforce the TCM;
- the new TCM must be developed through a collaborative process that includes participation by all affected jurisdictions and agencies (e.g., state and local air pollution control agencies and state and local transportation agencies); consultation with EPA; and reasonable notice and opportunity for public comment; and
- the MPO, the state air pollution control agency, and EPA must concur on the addition of the new TCM to the SIP.

Section 4 of this guidance document below contains further details on how to comply with these specific requirements. Appendix D contains an example of how to carry out a TCM addition using the statutory process.

It should be noted that TCMs can still be added to an area's SIP through the standard SIP process, if desired.

3.2 What additional information should be provided to support the addition of a TCM to an approved SIP?

The material prepared to support a TCM addition should clearly identify and describe the new TCM to be added to the approved SIP. The additional TCM should meet all of the requirements of Clean Air Act section 110 and EPA's 1989 TCM SIP Guidance (EPA 450/2-89-020). The documentation for each TCM addition must include all of the information necessary to demonstrate that the Clean Air Act requirements for TCM additions are met. The documentation for each TCM to be added to the approved SIP should also include:

- 1) the name of the proposed additional TCM;
- 2) a brief but thorough description of the additional TCM including its location and implementing agency;
- 3) the steps and schedule for completing and operating the additional TCM; and
- 4) a brief explanation of why the addition is being made.

3.3 Can all nonattainment and maintenance areas add TCMs to their approved SIPs?

Yes, any nonattainment or maintenance area can add new TCMs to its approved SIP by following the criteria contained in Clean Air Act section 176(c)(8)(A)(iii)-(v) and described in Question 3.1 above. It is not necessary for a given area to already have TCMs in its approved SIP in order to add new TCMs through this statutory process. However, if the transportation plan and/or TIP need to be amended in order to implement the additional TCM, DOT's

transportation planning requirements (23 CFR 450 and 49 CFR 613) would have to be met. Additionally, if the MPO is making other changes to its transportation plan and/or TIP in addition to a TCM substitution or addition, and, if these other changes would require a plan and/or TIP amendment, a conformity determination would be required. In such situations the relevant EPA and DOT offices are available to assist the MPO to ensure that all transportation conformity and transportation planning requirements are met.

3.4 What must a state air agency do if it wants to incorporate the emissions reductions from an additional TCM into its control strategy SIP or maintenance plan?

If the state air agency wants to incorporate the emissions reductions from the additional TCM into the applicable SIP, the agency would need to revise its control strategy SIP or maintenance plan and associated motor vehicle emissions budgets, and EPA would need to approve such a SIP revision in order for the state to incorporate the emissions reductions from the additional TCM into the area's control strategy SIP or maintenance plan. These actions would be separate from and in addition to the TCM addition process.

Section 4: Process Requirements That Apply When Substituting or Adding Transportation Control Measures to an Approved SIP

4.1 What is necessary for an MPO or other implementing agency to show that it has adequate personnel and funding to implement the substitute or additional TCM?

TCMs that are included in a metropolitan area's transportation plan and TIP need to meet all applicable requirements in DOT's transportation planning regulations, including the transportation plan and TIP fiscal constraint requirement (23 CFR 450 and 49 CFR 613). Therefore, inclusion of the substitute or additional TCM in a fiscally constrained transportation plan and TIP generally would serve as sufficient evidence that adequate resources are available to implement the TCM. In the case of an isolated rural area¹¹ or donut area¹², inclusion of the substitute or additional TCM in the Statewide Transportation Improvement Program (STIP) would indicate that the implementing agency had resources to carry out the project. It is possible that situations will arise where an MPO would need to make a TCM substitution and revise its TIP to remove the original TCM and add the substitute TCM simultaneously. In such situations, the MPO should use the interagency consultation process to reach agreement on the details of these simultaneous actions.

However, if the substitute or additional TCM is not federally funded or is not part of the transportation plan and TIP or STIP, the implementing agency must provide additional information on the availability and commitment of adequate resources as necessary to implement the new TCM in order to meet the requirements of Clean Air Act section 176(c)(8)(A)(iii). For example, the implementing agency could provide documentation that funding has been authorized to implement the substitute or additional TCM, and/or information describing the agency's plan for providing staff to implement the TCM as planned.

4.2 What is necessary for an MPO or other implementing agency to demonstrate that there is adequate authority under state or local law to implement, monitor and enforce the substitute or additional TCM?

Generally, inclusion of the substitute or additional TCM in a metropolitan area's transportation plan and TIP, or in the case of an isolated rural area or donut area, inclusion of the substitute or additional TCM in the STIP, would indicate that the implementing agency had legal authority to carry out the project. However, if the TCM is not federally funded or is not part of the transportation plan and TIP or STIP, the implementing agency must provide additional information on its legal authority to implement the substitute or additional TCM in order to meet the requirements of Clean Air Act section 176(c)(8)(A)(iii). For example, the implementing

¹¹ *Isolated rural nonattainment and maintenance areas* are areas that do not contain or are not part of any metropolitan planning area as designated under the transportation planning regulations. Isolated rural areas do not have Federally required metropolitan transportation plans or TIPs and do not have projects that are part of the emissions analysis of any MPO's metropolitan transportation plan or TIP. Projects in such areas are instead included in statewide transportation improvement programs. These areas are not donut areas. (40 CFR 93.101)

¹² *Donut areas* are geographic areas outside a metropolitan planning area boundary, but inside the boundary of a nonattainment or maintenance area that contains any part of a metropolitan area(s). These areas are not isolated rural nonattainment and maintenance areas. (40 CFR 93.101)

agency could provide a citation to the applicable state or local law that authorizes it to implement such projects, or discuss how implementing such a TCM would fall within its general authority.

Because the substitute or additional TCM becomes part of the approved SIP for the area, Clean Air Act sections 113 and 179(a) grant EPA the authority to enforce the implementation of such a TCM. Implementation of substitute and additional TCMs may also be enforced by citizen suits under Clean Air Act section 304.

4.3 What agencies would be involved in developing substitute and additional TCMs in metropolitan areas?

The agencies involved in the collaborative process used to develop substitute and additional TCMs would be similar to the group that participates in the area's conformity interagency consultation process. The involved agencies must include the state air agency, the MPO, and the EPA regional office because Clean Air Act section 176(c)(8)(B)(i) requires their concurrence. Other agencies that may be involved include the state and local transportation agencies and local air quality agencies. Additionally, all of the jurisdictions affected by the substitution or addition that is being considered should be involved. The process should also include relevant FHWA and FTA field offices. Early consultation with federal agencies is essential to facilitate subsequent concurrence on each substitution by EPA, and conformity determinations based in part on timely implementation of substituted TCMs by FHWA and FTA. Please refer to Question 4.4 for additional information on which transportation agencies must concur on TCM substitutions and additions in donut areas and in isolated rural areas.

4.4 What transportation agency would concur when a TCM substitution or addition is made in a donut area or isolated rural area?

For donut areas (i.e., those areas within a nonattainment or maintenance area but outside the metropolitan planning area), the TCM substitution process should be implemented as above and the MPO associated with the donut area should concur in any substitution or addition of a TCM to an approved SIP.¹³

For isolated rural areas (i.e., those nonattainment or maintenance areas that do not contain any metropolitan area), this provision should be implemented as above, except the state DOT should concur on the substitution or addition because there is no MPO associated with such an area.

In either case the state air agency and EPA regional office would concur on any TCM substitution or addition as described in Question 4.3 and elsewhere in this document.

¹³ It would also be acceptable for the state DOT to concur on a TCM substitution or addition in a donut area instead of the MPO, if that is consistent with local process for determining conformity in the relevant nonattainment or maintenance area.

4.5 What is necessary to demonstrate that the collaborative process used to develop substitute and additional TCMs included reasonable public notice and opportunity for comment?

Reasonable public notice and a public comment period must be provided when a TCM substitution or addition is made. Because EPA's concurrence on a specific substitution or addition would be based on EPA's conclusion that the substitution or addition complies with the requirements set forth in Clean Air Act section 176(c)(8), commenters should be made aware through the announcement that they may submit comments not only on whether the state should concur on the substitution or addition but also on whether EPA should concur with that substitution or addition. The public must be provided access to all material relevant to the substitution or addition. The public comment process could be carried out either by the state or local air quality agency or by the MPO using their existing process for soliciting public comment on other documents. The state and/or local air agency should ensure that the TCM substitution or addition process complies with all applicable laws and regulations for public participation including state or local sunshine laws. Copies of any prepared supporting documentation should be provided to the state and local air quality agencies, the MPO, the EPA regional office, the FHWA division office, the FTA regional office, and any other relevant state and local agencies. All public comments received would be considered and responses documented before proceeding with the substitution or addition. Copies of the public comments and responses should be provided to the state and local air quality agencies, the MPO, the EPA regional office, the FHWA division office, the FTA regional office, and any other relevant state and local agencies.

4.6 How and when do the involved agencies indicate their concurrence on the substitution or addition?

A substitution or addition cannot go into effect unless EPA, the state air agency and the MPO have all concurred on the substitution. If the substitution or addition fulfills all of the requirements specified in Clean Air Act section 176(c)(8), the state air agency and EPA would each indicate its concurrence by sending a letter to the MPO and each other (i.e., the state air agency would send its letter to the EPA and vice versa). The MPO would indicate its concurrence by resolution of the MPO's policy board that is made available to the state air agency and EPA through the MPO's routine process. Within 90 days of its concurrence, the state air agency must submit the substitute or additional control measure and all supporting information to the EPA regional office so that the TCM can be incorporated in the codified applicable SIP.

The consultation process should be used to establish the exact point in the process that concurrence will be given so that it meets Clean Air Act requirements. The Clean Air Act requires that concurrence by the air agency and EPA occur after equivalency of the substitute measure(s) is demonstrated and the SAFETEA-LU conference report clarifies that "adoption occurs when the MPO, state air agency and EPA concur that all four of the general requirements in subparagraph (A) of the provision have been fulfilled."¹⁴ Therefore, concurrence would have

¹⁴ Joint Explanatory Statement of the Committee of Conference, "Section 6011, Transportation Conformity," p. 1065.

to occur sufficiently late in the process so that the agencies are sure that all four criteria have been met.

4.7 Who must concur for EPA on the substitution or addition of TCMs?

Clean Air Act section 176(c)(8) requires concurrence by the Administrator of EPA. However, concurrence has been delegated to the EPA Regional Administrator.¹⁵ The concurrence may be further delegated to the regional air division director.

4.8 What action will EPA take to incorporate the substitute or additional TCM into the codified SIP?

Once a state has submitted the substitute or additional TCM to EPA for incorporation in the codified applicable SIP, EPA will update the Code of Federal Regulations (CFR) to reflect the changes to the SIP. This would be done through the publication of a notice in the *Federal Register*. When a state that has been converted to the “SIP notebook system”¹⁶ substitutes or adds a non-regulatory TCM, EPA will publish an informational notice in the rules section of the *Federal Register* to update the CFR. In states that have not yet been converted to the notebook system, or for TCMs that require regulations to be implemented, EPA would need to take a final action in the *Federal Register* to incorporate the substitute or additional TCM into the CFR.

When EPA takes a final action to incorporate the specific substitute or additional TCM into the CFR, it will do so without additional notice-and-comment rulemaking. EPA believes that it would have good cause under the Administrative Procedure Act to take these actions without additional opportunity for public comment because the substitution or addition was made through the process included in Clean Air Act section 176(c)(8), and because the public would have had the opportunity to comment on the specific substitution or addition during the public comment period on the specific substitution or addition.

¹⁵ On September 29, 2006 the EPA Administrator delegated the authority for concurring on TCM substitutions and additions to the Regional Administrators (Delegation of Authority 7-158: Transportation Control Measure Substitutions and Additions).

¹⁶ The notebook system for compiling SIPs is a process through which EPA revises 40 CFR Part 52 by: 1) revising charts listed in the Identification of Plan section; 2) submitting State regulatory revisions for incorporation by reference into the SIP by means of a revised annual compilation (generally in a looseleaf notebook) of all State regulations listed in these Identification of Plan charts rather than by piecemeal regulation updates; and 3) updating the list of non-regulatory measures in the State’s SIP through the use of an informational notice in the rules section of the Federal Register. Non-regulatory measures are not incorporated by reference into the Code of Federal Regulations; therefore, these materials are maintained in the notebook for the State at the EPA regional office and in a notebook maintained in the Office of the Federal Register.

APPENDIX A

Clean Air Act Section 176(c)(8)

Substitution and Addition of Transportation Control Measures in Approved SIPs

This appendix includes Clean Air Act section 176(c)(8) which was added to the Clean Air Act by SAFETEA-LU. EPA is providing this text for informational purposes only.

SECTION 176(c) (8) SUBSTITUTION OF TRANSPORTATION CONTROL MEASURES.—

(A) IN GENERAL.—Transportation control measures that are specified in an implementation plan may be replaced or added to the implementation plan with alternate or additional transportation control measures

(i) if the substitute measures achieve equivalent or greater emissions reductions than the control measure to be replaced, as demonstrated with an emissions impact analysis that is consistent with the current methodology used for evaluating the replaced control measure in the implementation plan;

(ii) if the substitute control measures are implemented—

(I) in accordance with a schedule that is consistent with the schedule provided for control measures in the implementation plan; or

(II) if the implementation plan date for implementation of the control measure to be replaced has passed, as soon as practicable after the implementation plan date but not later than the date on which emission reductions are necessary to achieve the purpose of the implementation plan;

(iii) if the substitute and additional control measures are accompanied with evidence of adequate personnel and funding and authority under State or local law to implement, monitor, and enforce the control measures;

(iv) if the substitute and additional control measures were developed through a collaborative process that included—

(I) participation by representatives of all affected jurisdictions (including local air pollution control agencies, the State air pollution control agency, and State and local transportation agencies);

(II) consultation with the Administrator; and

(III) reasonable public notice and opportunity for comment; and

(v) if the metropolitan planning organization, State air pollution control agency, and the Administrator concur with the equivalency of the substitute or additional control measures.

(B) ADOPTION.—

(i) Concurrence by the metropolitan planning organization, State air pollution control agency and the Administrator as required by subparagraph (A)(v) shall constitute adoption of the substitute or additional control measures so long as the requirements of subparagraphs (A)(i), (A)(ii), (A)(iii) and (A)(iv) are met.

(ii) Once adopted, the substitute or additional control measures become, by operation of law, part of the State implementation plan and become federally enforceable.

(iii) Within 90 days of its concurrence under subparagraph (A)(v), the State air pollution control agency shall submit the substitute or additional control measure to the Administrator for incorporation in the codification of the applicable implementation plan. Notwithstanding any

other provision of this Act, no additional State process shall be necessary to support such revision to the applicable plan.

(C) NO REQUIREMENT FOR EXPRESS PERMISSION.—The substitution or addition of a transportation control measure in accordance with this paragraph and the funding or approval of such a control measure shall not be contingent on the existence of any provision in the applicable implementation plan that expressly permits such a substitution or addition.

(D) NO REQUIREMENT FOR NEW CONFORMITY DETERMINATION.— The substitution or addition of a transportation control measure in accordance with this paragraph shall not require—

- (i) a new conformity determination for the transportation plan; or
- (ii) a revision of the implementation plan.

(E) CONTINUATION OF CONTROL MEASURE BEING REPLACED.—A control measure that is being replaced by a substitute control measure under this paragraph shall remain in effect until the substitute control measure is adopted by the State pursuant to subparagraph (B).

(F) EFFECT OF ADOPTION.—Adoption of a substitute control measure shall constitute rescission of the previously applicable control measure.

APPENDIX B

Clean Air Act Section 108 Transportation Control Measures

This appendix includes a list of the types of measures included in Clean Air Act section 108(f)(1) that meet the transportation conformity rule's definition of a TCM. This is not an exhaustive list of all of the types of measures that meet the transportation conformity rule's definition of a TCM.

EPA is providing this list of measures for informational purposes only.

The following types of measures listed in Clean Air Act section 108(f) meet the transportation conformity rule's definition of a TCM:

- programs for improved public transit;
- restriction of certain roads or lanes to, or construction of such roads or lanes for use by, passenger buses or high occupancy vehicles;
- employer-based transportation management plans, including incentives;
- trip-reduction ordinances;
- traffic flow improvement programs that achieve emission reductions;
- fringe and transportation corridor parking facilities serving multiple occupancy vehicle programs or transit service;
- programs to limit or restrict vehicle use in downtown areas or other areas of emission concentration particularly during periods of peak use;
- programs for the provision of all forms of high-occupancy, shared-ride services;
- programs to limit portions of road surfaces or certain sections of the metropolitan area to the use of non-motorized vehicles or pedestrian use, both as to time and place;
- programs for secure bicycle storage facilities and other facilities, including bicycle lanes, for the convenience and protection of bicyclists, in both public and private areas;
- programs to control extended idling of vehicles;
- programs to reduce motor vehicle emissions, consistent with title II, which are caused by extreme cold start conditions;
- employer-sponsored programs to permit flexible work schedules;
- programs and ordinances to facilitate non-automobile travel, provision and utilization of mass transit, and to generally reduce the need for single-occupant vehicle travel, as part of transportation planning and development efforts of a locality, including programs and ordinances applicable to new shopping centers, special events, and other centers of vehicle activity;
- programs for new construction and major reconstructions of paths, tracks or areas solely for the use by pedestrian or other non-motorized means of transportation when economically feasible and in the public interest; and
- programs to encourage the voluntary removal from use and the marketplace of pre-1980 model year light duty vehicles and pre-1980 model light duty trucks.

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APPENDIX C

Example of How to Substitute a TCM Using Clean Air Act Section 176(c)(8)

This appendix provides an example of how a nonattainment or maintenance area could use the Clean Air Act process to substitute a new TCM for an existing SIP-approved TCM that has become delayed.

C.1 Why would a nonattainment or maintenance area need to quickly remove a TCM from the approved SIP and replace it with a new one?

For example, an MPO in a moderate 8-hour ozone nonattainment area begins work on a conformity determination that needs to be completed in six months. The 8-hour area is not currently nonattainment or maintenance for any other pollutant, since EPA revoked the 1-hour ozone standard. To comply with the conformity regulation at 40 CFR 93.113, the MPO reviews the status of the four TCMs that were included in the area's approved 8-hour ozone attainment demonstration. During the review, the MPO determines that one of the TCMs is significantly behind schedule. The delayed TCM involves the implementation of a high occupancy toll lane ("HOT lane"). According to the schedule in the 8-hour attainment demonstration, the HOT lane was to open in 2008. However, the MPO determines that the opening will be delayed until 2011, which is after the area's 8-hour ozone attainment date of 2010.

As required by the transportation conformity rule (40 CFR 93.105(c)(1)(iv)), the MPO and the rest of the area's interagency consultation group discuss the issue at their next meeting. The interagency consultation group concludes that it would be impossible to overcome the issues that are delaying the implementation of the HOT lane and therefore the best course of action is to remove it from the SIP and replace it with a substitute TCM(s). They also decide that because the MPO needs to complete the conformity determination in six months, there is not enough time to use the standard SIP revision process. Therefore, they will use the Clean Air Act section 176(c)(8) TCM substitution process, which can be completed in time to allow the MPO to make the conformity determination as planned, while ensuring that the SIP continues to achieve its intended purpose.

C.2 How would the area proceed to make the TCM substitution?

In order to complete the TCM substitution in a timely manner, the MPO and state air agency take the following steps.

Review of the TCM to be removed from the approved SIP

Because the area had previously been a 1-hour ozone maintenance area, the state air agency verifies that the HOT lane had not also been included in the 1-hour ozone maintenance plan. Therefore, there are no backsliding issues that would need to be addressed.¹⁷

¹⁷ If the HOT lane had been included in the area's 1-hour ozone maintenance plan, the state air agency would have to ensure that 8-hour ozone anti-backsliding requirements are met, (69 FR 40013) and that equivalent emissions reductions are obtained for all pollutants. Refer to Question 2.10 for additional information.

The state air agency also confirms that the 8-hour attainment demonstration's emissions inventory for a typical summer day indicates that the HOT lane was to provide 0.35 tons per day of nitrogen oxide (NOx) emissions reductions and 0.2 tons per day of volatile organic compound (VOC) emissions reductions in 2009, which is the year modeled in the attainment demonstration. Therefore, based upon the requirement of Clean Air Act section 176(c)(8)(A)(i), the substitute TCM(s) will need to reduce NOx emissions by at least 0.35 tons per day and VOC emissions by 0.2 tons per day in 2009.

Collaborative process to develop the substitute TCM(s)

Based on the requirements of Clean Air Act section 176(c)(8)(A)(iv)(I), staff from the state air agency, MPO, state department of transportation, and the local transit provider meet to review projects that could be used as the substitute TCM(s).

Based on their review, the agencies conclude that there are three projects in the MPO's current long range transportation plan and transportation improvement program (TIP) that they would consider as viable substitute TCMs. The three projects are: implementation of express bus service to the city's downtown area, implementation of express bus service from the city's downtown area to the airport, and construction of a 1,000-space park-and-ride lot.

These projects meet the transportation conformity rule's definition of a TCM (40 CFR 93.101), are scheduled to be completed by 2008, and have the potential to provide emissions reductions equivalent or greater to the TCM to be removed from the SIP.

Determination of equivalent emissions reductions

The state air agency and MPO agree to work together to calculate the emissions reductions attributable to each of the three projects that are being considered as substitutes for the delayed HOT lane. The state air agency and MPO use the MPO's transportation modeling tools, the latest emission factor model (in this example MOBILE6.2), and the latest available planning assumptions to calculate the emissions reductions from the projects that are being considered as substitutes. They determine that each of the projects would provide the following emissions reductions:

Project	NOx Reductions (tons per day)	VOC Reductions (tons per day)
Express bus service to city's downtown area	0.2	0.1
Express bus service between the city's downtown area and the airport	0.15	0.1
1,000-space park-and-ride lot	0.15	0.1

The state air agency and the MPO agree to present the modeling results to the state department of transportation and the local transit provider and recommend substituting the express bus service to the city's downtown area and the 1,000-space park-and-ride lot for the HOT lane. No single TCM would provide sufficient emissions reductions to serve as a substitute, but these two substitute TCMs together provide NOx and VOC reductions that are equivalent to the original

HOT lane. The state air agency and the MPO share the results with the EPA regional office, the FHWA division office and the FTA regional office.

Collaborative process for TCM substitution

The state air agency, MPO, state department of transportation, local transit provider, EPA regional office,¹⁸ the FHWA division office, and the FTA regional office meet by conference call. They discuss the modeling results, verify that the two projects that will serve as substitutes are in the area's transportation plan and TIP, verify that the two projects are to be completed in 2008, and discuss next steps.

During the call, all of the agencies agree that:

- the two projects taken together meet the criteria that the substitute TCM(s) provide equivalent emissions reductions, as required by Clean Air Act section 176(c)(8)(A)(i);
- the two projects will be completed in 2008, which allows them to comply with Clean Air Act section 176(c)(8)(A)(ii)(I);
- because the two projects are included in the area's transportation plan and TIP, there is evidence of adequate personnel and funding and legal authority to implement the two projects as required by Clean Air Act section 176(c)(8)(A)(iii); and
- for the purposes of this substitution the MPO should start a public comment period to fulfill the requirement of Clean Air Act section 176(c)(8)(A)(iv)(III).¹⁹

Public notice and opportunity to comment

In this example, the MPO uses its established processes to provide notice to the public that a 30-day comment period on the TCM substitution is beginning. The MPO makes all of the relevant supporting information for the substitution available on its website. The supporting information includes:

- a description of the HOT lane being removed from the SIP;
- descriptions of the TCMs that will substitute for the HOT lane;
- the modeling done to demonstrate equivalent emissions reductions;
- a brief explanation as to why the substitution is necessary; and
- a schedule for implementing the substitute TCMs.

The public notice also informs the public that because the Clean Air Act TCM substitution process is being used, EPA will not be conducting a separate public comment period prior to the substitute TCMs being incorporated into the SIP; therefore, the public should make all relevant comments during the MPO's comment period.

The MPO receives several comments during the comment period, one supporting the planned substitution, and two others suggesting alternate TCMs to be used as substitutes. The state air agency and MPO consider the suggestions and decide that neither of the suggested alternatives could be implemented prior to the area's attainment date and therefore these could not be used as

¹⁸ Inclusion of the EPA regional office in this collaborative process fulfills the requirements of Clean Air Act section 176(c)(8)(A)(iv)(II), which requires consultation with EPA during the development of substitute TCMs.

¹⁹ The agencies could have also agreed that the state air agency would carry out the public comment period using the established process for soliciting public comments on SIP revisions.

substitute TCMs. The MPO shares the comments and the responses with the other agencies involved in the substitution.

State air agency, MPO, and EPA regional office concurrence

Following the close of the public comment period, staff from all of the involved agencies meet by conference call. In this example, all agencies agree that the Clean Air Act requirements had been met. The state air agency, MPO, and EPA regional office staff all indicate that their agencies intend to concur.

Following this conference call, the MPO policy board adopts a resolution indicating its concurrence on the substitution. The MPO distributes the adopted resolution to all of the agencies involved in the substitution. The state air agency and EPA Regional Administrator send concurrence letters to each other and the MPO with copies to all of the other agencies involved in the substitution. These actions by the state air agency, MPO, and EPA regional office fulfill the requirement that these agencies concur on the substitution, per Clean Air Act section 176(c)(8)(A)(v).

Adoption of the substitute TCMs

Immediately following the concurrence of the state air agency, MPO, and EPA regional office, the substitute TCMs are considered to be adopted and therefore are incorporated into the federally enforceable SIP as indicated in Clean Air Act section 176(c)(8)(B)(i) and (ii). Additionally, immediately following the adoption of the substitute TCMs, the delayed HOT lane is no longer in effect for SIP and transportation conformity purposes and is removed from the approved SIP as indicated in Clean Air Act section 176(c)(8)(E) and (F). Removing the delayed TCM from the approved SIP and adding the two substitute TCMs that provide equivalent emissions reductions allow the MPO's upcoming conformity determination to meet the transportation conformity rule's requirements for timely implementation of approved SIP TCMs. (40 CFR 93.113) The MPO would include the emissions reductions benefits of the two substitute TCMs in the regional emissions analysis for the area, and the MPO would include these TCMs in its discussion of timely implementation of TCMs in this and subsequent conformity determinations. The substitution also preserves the emissions reductions that were relied on in the SIP attainment demonstration.

Final steps

Because the substitution is complete in less than six months, the MPO is able to make its conformity determination as planned.

As required by Clean Air Act section 176(c)(8)(B)(iii), within 90 days after the adoption of the substitute TCMs the state air agency submits the substitute TCMs and the supporting documentation to the EPA regional office so that EPA can keep the list of SIP-approved TCMs up to date.

The state where this example occurs is not yet on the "SIP notebook system;" therefore, the EPA regional office publishes a final action notice in the *Federal Register* to remove the HOT lane from the list of SIP-approved TCMs for the nonattainment area and to add the two substitute TCMs to the list of SIP-approved TCMs. The *Federal Register* notice indicates that there is

“good cause” under the Administrative Procedure Act to take a final action without additional notice and comment rulemaking. The good cause is based on the two elements. First, the substitution was made according to the Clean Air Act section 176(c)(8) procedures. Second, the public was made aware during the MPO’s comment period that if EPA concurred on the substitution, it would not be conducting a public comment period prior to incorporating the substitute TCMs into the SIP.

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APPENDIX D

Example of How to Add a TCM to an Approved SIP Using Clean Air Act Section 176(c)(8)

This appendix provides an example of how a nonattainment or maintenance area could use the Clean Air Act section 176(c)(8) TCM substitution process to add a new TCM(s) to the area's approved SIP.

D.1 Why would a nonattainment or maintenance area want to quickly add a new TCM to a SIP?

For example, a state air quality agency, MPO, and state department of transportation for an area that is currently designated as nonattainment for the 1997 8-hour ozone standard decide to expeditiously add a particular TCM to the area's SIP as a way to ensure that the project will move forward as currently scheduled and planned. The area is expecting to be designated nonattainment for the 2008 8-hour ozone standard and they would like to ensure that this project will be completed in time to provide emissions reductions that will help the area attain or maintain the 2008 ozone standard. The TCM that they are considering adding to the approved SIP is a light rail project connecting two cities and their suburbs.

D.2 How would the area proceed to add a TCM(s) to the approved SIP?

Collaborative process to develop the TCM(s) to be added to the approved SIP

Based on the requirements of Clean Air Act section 176(c)(8)(A)(iv)(I), staff from the state air agency, MPO, state department of transportation, and the local transit provider meet to discuss the light rail project that they are considering adding to the approved SIP as a TCM.

During their meeting they verify that the light rail project is included in the area's transportation plan and that preliminary design of the project is being funded in the area's current TIP. They conclude that it is in the best interest of the area to add the TCM to the SIP now to ensure that it is completed as currently planned in 2015 and will be in operation in time to provide emissions reductions toward attainment or maintenance of the 2008 8-hour ozone standard.²⁰

The agencies agree to discuss their decision with the EPA regional office, the FHWA division office and the FTA regional office.

Collaborative process for the TCM addition

The state air agency, MPO, state department of transportation, local transit provider, EPA regional office,²¹ the FHWA division office, and the FTA regional office meet by conference

²⁰ EPA revised the 8-hour ozone air quality standard in March 2008. EPA intends to designate nonattainment areas in 2010. SIPs for these areas will be due in 2013 and it is likely that many of these areas will have attainment dates in the range of 2013 to 2019. Therefore, a light rail project that is to begin operation in 2015 would provide emissions reductions that would help the area either attain or maintain the 2008 8-hour ozone standard.

²¹ Inclusion of the EPA regional office in this collaborative process fulfills the requirements of Clean Air Act section 176(c)(8)(A)(iv)(II), which requires consultation with EPA during the development of additional TCMs.

call. They discuss the decision to add the light rail project to the approved SIP, verify that the project is in the area's transportation plan and TIP, and discuss next steps.

During the call, all of the agencies agree that:

- because the project is included in the area's transportation plan and TIP, there is evidence of adequate personnel and funding and legal authority to implement the project as required by Clean Air Act section 176(c)(8)(A)(iii); and
- the state air agency should start a public comment period, to fulfill the requirement of Clean Air Act section 176(c)(8)(A)(iv)(III).²²

Public notice and opportunity to comment

The state air agency uses its established process to provide notice to the public that a 30-day comment period on the TCM addition is beginning. The state air agency makes all of the relevant supporting information for the addition available on its website. The supporting information includes:

- a description of the light rail project that is to be added to the approved SIP;
- a brief explanation as to why the addition is being made;
- an estimate of the emissions reductions expected when the project opens in 2015; and
- a schedule for implementing the additional TCM.

The public notice also informs the public that because the Clean Air Act section 176(c)(8) TCM addition process is being used, EPA will not be conducting a separate public comment period prior to the additional TCM being incorporated into the SIP; therefore, the public should make all relevant comments during this comment period.

The state air agency receives several comments during the comment period, one supporting the planned addition, and two others suggesting other TCMs that could be added to the SIP. The state air agency and MPO consider the suggestions and decide that none of the other suggested TCMs are good candidates to be added to the SIP at this time. The state air agency shares the comments and the responses with the other agencies involved in the TCM addition.

State air agency, MPO, and EPA regional office concurrence

Following the close of the public comment period, staff from all of the involved agencies meet by conference call. In this example, all agencies agree that the Clean Air Act requirements had been met. The state air agency, MPO, and EPA regional office staff all indicate that their agencies intend to concur.

Following this conference call, the MPO policy board adopts a resolution indicating its concurrence on the addition. They distribute the adopted resolution to all of the agencies involved in the addition. The state air agency and EPA Regional Administrator send concurrence letters to each other and the MPO with copies to all of the other agencies involved in the addition. These actions by the MPO, state air agency and EPA regional office fulfill the

²² The agencies could have also agreed that the MPO would carry out the public comment period using the established process for soliciting public comments on conformity determinations.

requirement that these agencies concur on the addition, per Clean Air Act section 176(c)(8)(A)(v).

Adoption of the additional TCMs

Immediately following the concurrence of the state air agency, MPO, and EPA regional office, the additional TCM is considered to be adopted and therefore are incorporated into the federally enforceable SIP as indicated in Clean Air Act section 176(c)(8)(B)(i) and (ii). At this point the MPO would include the emissions reductions benefits of the light rail line in the regional emissions analysis for the area and the MPO would include this TCM in its discussion of timely implementation of TCMs in subsequent conformity determinations.

Final steps

As required by Clean Air Act section 176(c)(8)(B)(iii), within 90 days after the adoption of the additional TCMs the state air agency submits the additional TCM and the supporting documentation to the EPA regional office so that EPA can keep the list of SIP-approved TCMs up to date.

The state where this example occurs is not yet on the “SIP notebook system;” therefore, the EPA regional office publishes a final action notice in the *Federal Register* to add the light rail project to the list of SIP-approved TCMs. The *Federal Register* notice indicates that there is “good cause” under the Administrative Procedure Act to take a final action without additional notice and comment rulemaking. The good cause is based on the two elements. First, the addition was made according to the Clean Air Act section 176(c)(8) procedures. Second, the public was made aware during the state air agency and MPO comment period on the addition that if EPA concurred on the addition, it would not be conducting a public comment period prior to incorporating the additional TCMs into the SIP.

Guidance for Developing Transportation Conformity State Implementation Plans (SIPs)

Guidance for Developing Transportation Conformity State Implementation Plans (SIPs)

Transportation and Regional Programs Division
Office of Transportation and Air Quality
U.S. Environmental Protection Agency



EPA

United States
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Section 1: Introduction

1.1 What is the purpose of this guidance document?

This document provides guidance on the statutory and regulatory requirements for states to develop conformity state implementation plans (conformity SIPs). A conformity SIP includes a state's specific criteria and procedures for certain aspects of the transportation conformity process. Where EPA has approved a state's conformity SIP, the approved conformity SIP governs conformity determinations instead of the federal transportation conformity regulations (or conformity rule), for those aspects of the rule that it addresses and that are applicable.

Clean Air Act section 176(c) is the statutory authority for transportation conformity (42 U.S.C. 7506(c)). This section of the Clean Air Act was amended by provisions contained in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), which was signed into law on August 10, 2005 (Public Law 109-59). Among the changes Congress made to this section of the Clean Air Act was to streamline the requirements for state conformity SIPs. Subsequently, EPA published a final rule on January 24, 2008 to update the requirements for conformity SIPs as well as the other Clean Air Act provisions amended by Congress (73 FR 4420).

This guidance document describes the new requirements for conformity SIPs, so that state and local agencies can prepare an approvable conformity SIP. This guidance document also covers what requirements apply for conformity determinations that occur before and after conformity SIPs are approved.

This guidance supersedes EPA's November 2004 conformity SIP guidance¹ and the portion of the February 2006 interim SAFETEA-LU guidance² related to conformity SIPs.

1.2 What is transportation conformity?

Transportation conformity ensures that federally supported transportation activities are consistent with ("conform to") the purpose of the SIP. Transportation activities include transportation plans, transportation improvement programs (TIPs), and federally funded or approved highway or transit projects. 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 "standards").

Transportation conformity applies under EPA's conformity regulations³ in nonattainment and maintenance areas for the following transportation-related criteria pollutants: ozone, particulate matter (PM_{2.5} and PM₁₀), carbon monoxide (CO), and nitrogen dioxide (NO₂).

¹ Conformity SIP Guidance, EPA420-B-04-017, November 2004.

² Interim Guidance for Implementing the Transportation Conformity Provisions in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), EPA420-B-06-901, February 2006.

³ 40 CFR Part 51, Subpart T and Part 93, Subpart A

EPA develops the conformity regulations in coordination with the Federal Highway Administration (FHWA) and Federal Transit Administration (FTA).

1.3 In what part of the regulations is the requirement for conformity SIPs found?

The regulations that explain the requirements for a conformity SIP are found at 40 CFR 51.390. This portion of the conformity regulation was updated in a final rule published on January 24, 2008 (73 FR 4420).

1.4 What is a conformity SIP and how does it differ from other types of SIPs?

A conformity SIP is required to contain only the state's criteria and procedures for interagency consultation (40 CFR 93.105) and two additional conformity provisions (40 CFR 93.122(a)(4)(ii) and 93.125(c)). Unlike a reasonable further progress SIP, an attainment demonstration, or maintenance plan, a conformity SIP does not contain motor vehicle emissions budgets, emissions inventories, air quality demonstrations, or control measures. A conformity SIP can be developed as a state rule, a memorandum of understanding (MOU), or a memorandum of agreement (MOA). Additional information is provided in Section 4 for developing or revising a MOU/MOA or a state rule. In general, once approved, the conformity SIP governs the conformity process instead of the federal conformity rule for any provisions included in the conformity SIP.

1.5 What agencies are typically involved in the development of a conformity SIP?

A formal interagency consultation process is used to prepare a conformity SIP. The consultation process includes representatives from state and local transportation and air quality agencies, EPA, FHWA, and FTA. Typically, the state air agency is the lead on conformity SIP development; although in limited cases MPOs or local air agencies play this role.

1.6 How is this guidance document organized?

The remaining parts of this guidance cover:

- Section 2: General Requirements for Developing a Conformity SIP: This section provides general information regarding what is required to be included in a conformity SIP and when conformity SIPs are due.
- Section 3: Applicability of Federal Regulations and Conformity SIPs in Conformity Determinations: This section outlines what requirements apply for conformity determinations that occur before and after a conformity SIP is approved.
- Section 4: Specific Requirements For Developing a Conformity SIP Submission: This section provides specific details for developing and submitting a new or revised conformity SIP.
- Appendices: This section provides a checklist to assist in preparing and reviewing a conformity SIP and model conformity SIP language. The Checklist (Appendix A) and Model Rule (Appendix B) are available for downloading at <http://www.epa.gov/otaq/stateresources/transconf/policy.htm#sips>

1.7 Who can I contact and where can I find more information about conformity SIPs?

For specific questions concerning a particular conformity SIP, please contact the SIP or transportation conformity staff person responsible for your state at the appropriate EPA Regional Office. A listing of EPA Regional Offices, the states they cover, and contact information for EPA regional conformity staff can be found on EPA's website at the following address: www.epa.gov/otaq/stateresources/transconf/contacts.htm.

General questions about this guidance can be directed to:

Astrid Larsen at EPA's Office of Transportation and Air Quality,
larsen.astrid@epa.gov or 734-214-4812.

Additional information regarding the transportation conformity rule and associated guidance can be found on EPA's website at: www.epa.gov/otaq/stateresources/transconf/index.htm.

1.8 Does this guidance create new requirements?

No, this guidance is based on Clean Air Act transportation conformity requirements, as amended by SAFETEA-LU, and existing associated regulations and does not create any new requirements. This guidance merely explains how to implement the new Clean Air Act conformity SIP-related provisions.

The statutory provisions and the resulting EPA regulations described in this document contain legally binding requirements. This document is not a substitute for those provisions or regulations, nor is it a regulation itself. Thus, it does not impose legally binding requirements on EPA, DOT, states, or the regulated community, and may not apply to a particular situation based upon the circumstances. EPA retains the discretion to adopt approaches on a case-by-case basis that may differ from this guidance, but still comply with the statute and conformity regulations. Any decisions regarding a particular conformity SIP will be made based on the statute and regulations, after appropriate public input and rulemaking procedures, where applicable. This guidance may be revised periodically without public notice.

Section 2: General Requirements for Developing a Conformity SIP

2.1 What must a conformity SIP contain?

Clean Air Act section 176(c)(4)(E), as amended by SAFETEA-LU (August 2005), significantly streamlined the requirements for state conformity SIPs. Prior to SAFETEA-LU's amendments to the Clean Air Act, states were required to address all of the federal transportation conformity regulations provisions in their conformity SIPs. Most of the sections of the federal rule were previously required to be copied verbatim from the federal rule into a state's conformity SIP.

Clean Air Act section 176(c)(4)(E) and section 51.390(b) of the conformity rule now require states to submit conformity SIPs that address only the following provisions of the federal conformity rule:

- 40 CFR 93.105, which addresses consultation procedures;
- 40 CFR 93.122(a)(4)(ii), which states that conformity SIPs must require that written commitments to control measures be obtained prior to a conformity determination if the control measures are not included in a metropolitan planning organization's (MPO's) transportation plan and TIP, and that such commitments be fulfilled; and
- 40 CFR 93.125(c), which states that conformity SIPs must require that written commitments to mitigation measures be obtained prior to a project-level conformity determination, and that project sponsors comply with such commitments.

These provisions must be tailored to a state's individual circumstances, rather than including the federal conformity rule section verbatim. Section 4 and Appendix B contain additional information and examples of language that can be used to develop a state's conformity SIP.

2.2 Can states include other conformity provisions in their conformity SIP on a voluntary basis?

Yes, the current Clean Air Act and the conformity rule allow states to include additional provisions beyond the three mentioned in Question 2.1. Section 51.390(b) provides that, "A state may elect to include any other provisions of part 93, subpart A." However, as discussed in the January 24, 2008 final rule, EPA strongly encourages states to only include the three required provisions in a conformity SIP to take advantage of the streamlining flexibilities provided by the Clean Air Act, as amended by SAFETEA-LU. The new requirements will reduce the administrative burden for state and local agencies significantly, because the new requirements will minimize the possibility of having to revise the conformity SIP each time the federal rule is revised (73 FR 4430-4432).

Any interested state and local agencies should consult with their EPA Regional Office to discuss the process and potential impacts of developing a conformity SIP that includes more than the required provisions. Additional details for developing such a SIP are included in Section 4 of this guidance document.

2.3 When are conformity SIPs due?

Section 51.390(c) of the conformity rule explains when states are required to submit a new or revised conformity SIP. A conformity SIP must be submitted:

- by November 25, 1994 or within 12 months of an area's nonattainment designation if the state has not previously submitted one;
- within 12 months of the publication date of any final amendments to 40 CFR 93.105, 93.122(a)(4)(ii), and 93.125(c);
- within 12 months of the publication date of any other final conformity amendments if a state's conformity SIP includes the provisions of such final amendments.

EPA discussed conformity SIP deadlines in the preamble to its January 2008 final rule (73 FR 4432).

Once a state has an approved conformity SIP that addresses only the three required sections, the state would need to revise its conformity SIP only if EPA substantively changes one of these three sections of the conformity rule, or the state chooses to revise one of these three provisions. Any future changes to the federal conformity rules that do not affect these three provisions would apply immediately in any state that has only the three provisions in its approved conformity SIP, and such changes would not need to be adopted into the state's SIP to be applicable.

2.4 Does the Clean Air Act, as amended by SAFETEA-LU, create any new conformity SIP deadlines to submit a conformity SIP?

No, these amendments to the Clean Air Act did not create any new deadlines for conformity SIPs. See Question 2.3 for further information regarding when conformity SIPs must be submitted to EPA.

2.5 How should states proceed if a conformity SIP was never submitted to EPA in the past?

States that have never submitted a conformity SIP are required to address only the three provisions noted above in Question 2.1.

2.6 How should states proceed if a conformity SIP was submitted in the past that was never approved?

In some cases, states have submitted conformity SIPs to EPA for approval, but EPA has not yet acted on them. Such a situation can occur when a state submits a conformity SIP that becomes outdated prior to EPA approval. For example, a state's conformity SIP can become outdated when a new rulemaking is promulgated or a court decision is issued and the conformity SIP does not reflect the latest revised requirements. EPA can only approve a conformity SIP provision that addresses the requirements of the Clean Air Act and EPA's transportation conformity regulations that are in place at the time of EPA's approval.

In cases where a state has submitted a conformity SIP to EPA that EPA has not approved, states can send a letter to their EPA Regional Office and request that EPA approve only the three provisions that are required to be included in their SIPs, and that EPA take no action on the remainder of the submitted conformity SIP. Alternatively, the state could send a letter to its EPA Regional Office requesting to withdraw the entire submission (73 FR 4431, January 24, 2008). The state would then submit a new conformity SIP consistent with the current Clean Air Act and transportation conformity regulations.

States should work closely with their EPA Regional Office when requesting action on or withdrawing a previous conformity SIP submission.

2.7 How should states update previously approved conformity SIPs?

States with EPA-approved conformity SIPs that decide to eliminate the provisions that are no longer mandatory would need to revise the SIP to eliminate those provisions (73 FR 4431, January 24, 2008). EPA will consider using either parallel processing (when requested by the state) or direct final approval to expedite the approval of such conformity SIP revisions. Such a conformity SIP revision should not be controversial because the provisions are no longer required by the current Clean Air Act. In addition, their elimination from a state's conformity SIP should not change conformity's implementation in practice, because the federal conformity rule applies for any provision not addressed in a state's conformity SIP.

States may also need to revise an approved conformity SIP that includes provisions that are now outdated (e.g., if EPA promulgated a final rule that substantively revised the federal conformity rule provisions on which a conformity SIP is based).

States are encouraged to work with their EPA Regional Office as early in the process as possible to ensure the conformity SIP submission meets all requirements and is fully approvable.

2.8 What are the format options for adopting a conformity SIP and what are the requirements of each?

A conformity SIP can be adopted as a state rule, as a memorandum of understanding (MOU), or memorandum of agreement (MOA). See Section 4 for additional information for developing or revising conformity SIPs, either as an MOA/MOU or state rule. The appropriate form of the state conformity procedures depends upon the requirements of local or state law, as long as the selected form complies with all Clean Air Act requirements for adoption, submission to EPA, and implementation of SIPs. EPA will accept state conformity SIPs in any form provided the state can demonstrate to EPA's satisfaction that, as a matter of state law, the state has adequate authority to compel compliance with the requirements of the conformity SIP (58 FR 62209-62209, November 24, 1993).

A state can use an MOU or MOA for its conformity SIP if such a memorandum meets the following requirements:

1. it is fully enforceable under state law against all parties involved in interagency consultation and in approving, adopting and implementing transportation plans, TIPs, or transportation projects;
2. the state submits it to EPA for inclusion into the SIP; and,
3. it has been signed by all agencies that are covered by the conformity rule, including federal agencies and the recipients of funds designated under title 23 U.S.C. or the Federal Transit Laws (see the definition in 40 CFR 93.101). For example, MOU/MOA signers would include MPOs, local and state air agencies, state DOTs, transit agencies, FHWA, FTA, and EPA, and all current recipients of title 23 U.S.C. or the Federal Transit Laws funds (as defined under 40 CFR 93.101).

If the conformity SIP is in the form of a state rule, then any new agencies not previously covered by the conformity rule are automatically covered by the rule. This could happen if an area that has never been subject to conformity before were to become a newly designated nonattainment area. In such a case, there would be agencies in that area that are new to the interagency consultation process.

For a conformity SIP in the form of an MOU/MOA, the MOU must provide that the signatories will require new federal funding recipients to sign the MOU/MOA.

Section 3: Applicability of Federal Regulations and Conformity SIPs in Conformity Determinations

This section outlines the general applicability of conformity criteria and procedures in areas with and without approved conformity SIPs. Questions 3.1 and 3.2 cover the general requirements, while Question 3.3 covers the exception to these general requirements.

3.1 What criteria and procedures apply for conformity determinations in the absence of an approved state conformity SIP?

States without an approved conformity SIP must meet Clean Air Act section 176(c) requirements when performing transportation plan, TIP and project-level conformity determinations. Transportation conformity determinations must meet the conformity rule provisions found in 40 CFR 51.390(a), which states:

The federal conformity rules under part 93, subpart A, of this chapter, in addition to any existing applicable state requirements, establish the conformity criteria and procedures necessary to meet the requirements of the Clean Air Act section 176(c) until such time as EPA approves the conformity implementation plan revision required by this subpart...The federal conformity regulations contained in part 93, subpart A, of this chapter would continue to apply for the portion of the requirements that the state did not include in its conformity implementation plan and the portion, if any, of the state's conformity provisions that is not approved by EPA.

For example, areas without any approved conformity SIP provisions are required to follow all of the relevant provisions of the conformity rule. Similarly, in states with approved conformity SIPs that address only the three provisions now required, (i.e., §§93.105, 93.122(a)(4)(ii), and 93.125(c)), conformity must be determined according to all of the relevant provisions of the conformity rule, and the requirements for consultation and written commitments governed by the state's conformity SIP.

Please see Question 3.2 for more information regarding areas with approved conformity SIPs. There can also be exceptions to this general case where neither the federal conformity rule nor an approved conformity SIP provisions apply; see Question 3.3 below for further information.

3.2 What criteria and procedures apply for conformity determinations when a state has an approved conformity SIP?

Conformity determinations must meet any provisions in an EPA-approved conformity SIP that are consistent with section 176(c) of the Clean Air Act, even if the conformity SIP provisions are different than those in the conformity rule. Section 40 CFR 51.390(a) states that, "any previously applicable implementation plan conformity requirements remain enforceable until the state submits a revision to its applicable implementation plan to specifically remove them and that revision is approved by EPA." Therefore, states whose conformity SIPs address provisions that are still consistent with the statute but that have subsequently been updated in the conformity

rule cannot take advantage of EPA's updated regulations unless and until the state revises its conformity SIP and EPA approves it.

For example, some areas may have approved conformity SIPs that include outdated versions of the PM₁₀ hot-spot requirements. If an approved conformity SIP includes the PM₁₀ hot-spot provisions prior to those promulgated in the March 10, 2006 final rule, then all project-level conformity determinations must include a PM₁₀ hot-spot analysis (71 FR 12468). In contrast, the federal conformity rule now requires only some project-level conformity determinations in PM₁₀ areas to include hot-spot analyses (40 CFR 93.123(b)).

This example illustrates the advantages to updating any previously approved conformity SIPs, to ensure that conformity rule changes apply upon EPA's promulgation. The interagency consultation process should be used to determine what requirements apply for conformity determinations in states with approved conformity SIPs.

Please note there are cases where neither the conformity rule nor approved conformity SIP provisions apply. See Question 3.3 for further information.

3.3 What criteria and procedures apply for conformity determinations when there are changes in statutes and court decisions?

Conformity determinations must be consistent with section 176(c) of the Clean Air Act. There have been cases where certain provisions of the federal conformity rule and approved conformity SIP provisions have become outdated, either because Congress amended the Clean Air Act or a federal court issued a decision that vacated a federal conformity rule provision. In such cases, the affected federal conformity rule provision(s) or the affected approved state conformity SIP provision(s) no longer apply. When these cases occur, conformity determinations must meet any new or revised requirements, which are usually described by interim federal guidance issued prior to a conformity rule revision. Once EPA updates the conformity rule to reflect such changes, the revised conformity rule applies immediately upon its effective date.

For example, when the Clean Air Act was amended by SAFETEA-LU in August 2005, the required frequency for transportation plan and TIP conformity determinations was changed from every three years to every four years. Therefore, the provisions in the conformity rule and in any approved conformity SIPs that required conformity of transportation plans and TIPs every three years no longer applied. EPA and DOT issued interim guidance⁴ to ensure that conformity determinations would be consistent with the statutory changes prior to EPA's January 2008 final rule (73 FR 4420). The revised four-year frequency of conformity determinations for transportation plans and TIPs applied in all nonattainment and maintenance areas upon SAFETEA-LU's enactment in August 2005, even in areas with approved conformity SIPs that included outdated provisions. In this case, a conformity SIP revision is not required prior to the application of the new frequency requirement.

3.4 How can I find out what conformity criteria and procedures apply in my area?

⁴ Interim Guidance for Implementing the Transportation Conformity Provisions in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), EPA420-B-06-901, February 2006.

To find out if an approved conformity SIP already applies in your area, please contact the transportation conformity staff person at the appropriate EPA Regional Office. A list of these regional transportation conformity staff and their contact information can be found at the following website: [Regional Contacts](#) | [State & Local Transportation Resources](#) | [US EPA](#).

Section 4: Specific Requirements for Developing a Conformity SIP

As described in Question 2.1, section 51.390(b) of the conformity rule requires states to submit conformity SIPs that address the following provisions of the conformity rule:

- 40 CFR 93.105, which addresses consultation procedures;
- 40 CFR 93.122(a)(4)(ii), which states that conformity SIPs must require that written commitments to control measures be obtained prior to a conformity determination if the control measures are not included in an MPO's transportation plan and TIP, and that such commitments be fulfilled; and
- 40 CFR 93.125(c), which states that conformity SIPs must require that written commitments to mitigation measures be obtained prior to a project-level conformity determination, and that project sponsors comply with such commitments.

This section covers how to address these specific requirements within a conformity SIP submission. Appendix A includes a checklist for developing a conformity SIP and Appendix B contains a model conformity rule.

4.1 How should a state include the three required provisions in a conformity SIP?

To assist states with developing a conformity SIP, EPA has provided suggested language, in the form of a Model Rule, to meet the requirements of 40 CFR 93.105, 93.122(a)(4)(ii), and 93.125(c) in Appendix B. While the Appendix is presented in the order of the conformity rule, states are not bound by this order and are free to rearrange the requirements to best suit their needs.

Consultation procedures that fulfill 40 CFR 93.105 will make up the majority of a state's conformity SIP. Once approved by EPA, the conformity SIP will guide a nonattainment or maintenance area's future consultation for conformity determinations. Because of the importance of the consultation process and the number of conformity rule provisions required by 40 CFR 93.105, the state should carefully prepare this portion of the conformity SIP to ensure that all the requirements are covered and organized in a logical fashion.

4.2 Can a conformity SIP be prepared by repeating section 93.105 of the federal rule verbatim or by incorporating this section of the conformity rule by reference?

No, a conformity SIP that repeats 40 CFR 93.105 verbatim or incorporates this provision by reference would not meet statutory and regulatory requirements. Section 93.105 only describes what must be included in the conformity SIP and does not contain specific criteria and procedures that states would need to adopt to meet the consultation requirements, as required by the Clean Air Act. In addition, such a conformity SIP would not be practical, since creating a specific interagency consultation process is one of the primary purposes of developing a conformity SIP.

4.3 How should a state include more provisions in their conformity SIP from 40 CFR part 93 if desired?

States may include additional transportation conformity provisions in their conformity SIP on a voluntary basis, as described in Question 2.2. If they do so, the provisions must be adopted verbatim. This requirement is found in the conformity rule at 40 CFR 51.390(b), “A state may elect to include any other provisions of part 93, subpart A....such provisions must be included in verbatim form, except insofar as needed to clarify or give effect to a stated intent...”

4.4 If a state has prepared its conformity SIP by incorporating the conformity rule into the conformity SIP by reference rather than repeating the rule verbatim, do the changes made to the federal rule automatically apply in that state, or does the state still have to update the conformity SIP to take advantage of changes to the federal rule?

The answer depends on what the conformity SIP indicates:

- If a state incorporates the conformity rule into its conformity SIP by reference, it may have incorporated the conformity rule that existed as of the date of the incorporation. If so, subsequent updates to the conformity rule do not automatically apply and a revision to the conformity SIP must be submitted within 12 months of the effective date of a change to the conformity rule.
- However, a conformity SIP that incorporates the conformity rule by reference could also indicate that it also incorporates by reference any future changes made to the conformity, although this is rare. In this case, the conformity SIP does not need to be revised when the conformity rule is updated.

If your state has an approved conformity SIP that incorporates the conformity rule by reference, and you are unsure about whether the conformity SIP includes the latest conformity rule provisions, please consult with your EPA Regional Office (see Question 1.7 for contact information).

4.5 Can a conformity SIP include provisions that are more stringent than the federal conformity rule?

Yes, states can include criteria and procedures in their conformity SIPs that are more stringent than the conformity rule as long as they apply equally to federal and non-federal entities, pursuant to 40 CFR 51.390(b) (see also 58 FR 62209).

4.6 How should conformity SIPs address any agency, such as an MPO, that covers portions of more than one state?

Special consultation provisions need to be included in a conformity SIP when it covers an MPO whose jurisdiction covers parts of more than one state. In these cases, it is important that MPOs can follow similar conformity procedures in the different states, since each conformity SIP applies only within each own state. For example, in multi-state nonattainment and maintenance

areas where the states work together to make conformity determinations, it is necessary for consultation procedures to be substantially similar in each state's portion of the area. In these cases, EPA recommends that the interagency consultation process be used to develop similar consultation procedures that each state would then include in its own conformity SIP. Such states may also want to consider additional provisions for dealing with interstate conflicts (40 CFR 93.105(d)), to ensure that an appropriate process is in place if necessary.

4.7 If a state has a conformity SIP that refers to general types of agencies (e.g., MPOs) rather than specific agencies (e.g., an MPO for a specific area), do the provisions of the conformity SIP apply for new or expanded nonattainment areas?

The answer depends on the wording of the conformity SIP itself. If the SIP's wording could be interpreted to include expanded or new nonattainment areas in the state, the provisions of the conformity SIP would apply to these areas. However, if the conformity SIP includes wording that limits its applicability to particular areas, then it may not apply to new or expanded areas. If your state has an approved conformity SIP and you are unsure whether it applies to your particular area, please consult with your EPA Regional Office (see Question 1.7 for contact information).

4.8 When in the process does EPA, FHWA, or FTA sign an MOU or MOA?

The EPA Regional Administrator, FHWA, and FTA would sign an MOU/MOA before it is endorsed by the governor and submitted to EPA as part of the SIP. EPA, FHWA, and FTA cannot sign the MOU after it is submitted to EPA because these agencies cannot amend a submitted SIP.

4.9 If a state wants to revise its MOU/MOA, must it be done through the SIP process, or can the state and other agencies revise the MOU/MOA through the interagency consultation process?

An MOU/MOA revision would have to be approved through the SIP process because the MOU/MOA is part of the SIP.

4.10 How does a state develop a new conformity SIP or revise an existing conformity SIP, whether done via an MOU/MOA or state rule?

To develop a new conformity SIP or revise an existing conformity SIP, either as a state rule or MOU/MOA, the process is generally the same for either format (state rule or MOU/MOA):

Step 1: The conformity SIP is developed or revised through consultation of the interagency workgroup at the state and/or local level.

Step 2: The state holds a public comment period on the document.

Step 3: The document is submitted to EPA as a SIP revision.

Step 4: Once at the EPA, the submission would then continue through the usual SIP process for approval/disapproval.

The difference between a state rule versus an MOU/MOA is that after the revision is prepared, a conformity SIP developed as a state rule has to go through a state's regulatory process and be adopted. In contrast, a conformity SIP revision prepared as an MOU/MOA requires signatures from all the relevant parties before it is submitted to EPA.

Before a state decides to use the MOU/MOA format, the state must determine if the state has the legal authority to use this method, as described in Question 2.8.

APPENDICES

The Checklist for Developing a Conformity SIP (Appendix A) and Conformity Model Rule (Appendix B) are available for downloading at

<http://www.epa.gov/otaq/stateresources/transconf/policy.htm#sips>

Appendix A: Checklist for Developing a Conformity SIP

This checklist is intended to guide state and local agencies as they develop their conformity SIPs; this checklist does not replace existing statutory or regulatory requirements. Within each section of the checklist, the requirements are shown in the left-hand column. The right-hand column can be used to record the locations in the consultation and conformity SIP that address the required elements.

INTERAGENCY CONSULTATION	
GENERAL: [93.105(a)]. A conformity SIP shall include procedures for interagency consultation, conflict resolution, and public consultation. EPA encourages development of “extensive, effective consultation procedures that will resolve problems as early in the process as possible.” 58 FR 62188 at 62201, November 24, 1993. The procedures must be written in a manner that gives them full legal effect. 40 CFR 51.390.	
Consultation is required on the development of the regional transportation plan (RTP), the transportation improvement program (TIP), on conformity determinations, and on the development of state implementation plan (SIP) revisions that affect transportation. [93.105(a)(1)].	
MPOs and State departments of transportation must provide reasonable opportunity for consultation with State air agencies, local air quality and transportation agencies, DOT, and EPA, including consultation on specific processes for interagency consultation. [93.105(a)(2)]	
INTERAGENCY CONSULTATION PROCEDURES: GENERAL FACTORS [93.105(b)]. States shall provide well defined consultation procedures in the implementation plan. Organizations with responsibilities for developing, submitting or implementing provisions of an implementation plan (including MPOs, State and local air quality planning agencies, and State and local transportation agencies) must consult with each other with and local or regional offices of EPA, the Federal Highway Administration (FHWA), and the Federal Transit Administration (FTA).	
The interagency consultation procedures must include, at a minimum, the following general factors:	
procedures that require that agencies consult on the development of the implementation plan, the transportation plan, the TIP, and associated conformity determinations [93.105(b)(1)];	

the roles and responsibilities of each agency at each stage in the SIP development process and the transportation planning process, including technical meetings [93.105(b)(2)(i)];	
the organizational level of regular consultation ⁵ [93.105(b)(2)(ii)];	
a process for circulating (or providing ready access to) draft documents and supporting materials for comment before formal adoption or publication [93.105(b)(2)(iii)];	
the frequency of, or process for convening, consultation meetings and responsibility for establishing meeting agendas [93.105(b)(2)(iv)];	
a process for responding to significant comments of involved agencies [93.105(b)(2)(v)]; and	
a process for the development of a list of the transportation control measures (TCMs) that are in the applicable implementation plan [93.105(b)(2)(vi)].	
SPECIFIC PROCESSES Interagency consultation procedures shall include the specific processes listed below [93.105(c)]:	
A process involving at least the MPO(s), State and local air quality planning and transportation agencies, EPA, and the Department of Transportation (DOT) for the following [93.105(c)(1)]:	
Evaluating and choosing models and associated methods and assumptions for hot-spot and regional emissions analyses [93.105(c)(1)(i)];	
Determining which minor arterials and other projects are “regionally significant” ⁶ for the regional emissions analysis (in addition to those functionally classified as principal arterials or higher or fixed guide way systems or extensions that offer an alternative to regional highway travel) [93.105(c)(1)(ii)];	
Determining which projects should be considered to have a significant change in design concept and scope from the RTP or TIP [93.105(c)(1)(ii)];	
Evaluating whether otherwise exempt projects (see 93.126 and 93.127) should be treated as non-exempt where adverse impacts are possible for any reason [93.105(c)(1)(iii)];	
Determining whether past obstacles to implementation of transportation control measures (TCMs) in approved SIPs have been identified and are being overcome (for TCMs behind SIP schedules) [93.105(c)(1)(iv); 93.113(c)(1)];	

⁵ Generally, interagency consultation procedures should include information such as the organizational level and procedures for the people who schedule, lead, and attend meetings.

⁶ This is in addition to the projects required to be included by application of the definition of “regionally significant project” in 40 CFR 93.101.

	Determining whether State and local agencies are giving maximum priority to approval and funding for TCMs in approved SIPs [93.105(c)(1)(iv)];	
	Determining whether delays in the implementation of approved SIP TCMs necessitate revisions to the SIP to remove or substitute such TCMs or other emission reduction measures [93.105(c)(1)(iv)];	
	Notification of transportation plan and TIP amendments which only add or delete exempt projects listed in 93.126 and 93.127 [93.105(c)(1)(v)]; and	
	Choosing conformity tests and methodologies for isolated rural nonattainment and maintenance areas, as required by 93.109(l)(2)(iii) [93.105(c)(1)(vi)].	
A process involving at least the MPO and State and local air and transportation agencies for [93.105(c)(2)]:		
	Evaluating events that will trigger new conformity determinations in addition to those required by 93.104 [93.105(c)(2)(i)]; and	
	Consulting on emissions analysis for transportation activities which cross borders of MPOs, nonattainment areas or air basins [93.105(c)(2)(ii)].	
Where the metropolitan planning area does not include the entire nonattainment or maintenance area, procedures must specify a process involving the MPO and the State DOT for cooperative planning and analysis for determining conformity of projects outside the metropolitan area and within the nonattainment or maintenance area [93.105(c)(3)].		
Specifies a process to ensure disclosure of plans for regionally significant non-FHWA/FTA projects (including projects for which alternatives are still being considered) to the MPO on a regular basis, and immediate disclosure of any changes to those plans [93.105(c)(4)].		
Provides a process involving the MPO and other federal funds recipients for assuming project location and design concept/scope where these features not adequately defined for regional emissions analysis [93.105(c)(5)].		
Specifies a process for consulting on design, schedule, and funding of research and data collection efforts and regional transportation model development by the MPO [93.105(c)(6)].		
Specifies a process for providing final documents and supporting information to each agency (including federal agencies) after approval or adoption [93.105(c)(7)].		
RESOLVING CONFLICTS [93.105(d)].		
The process for resolving conflicts must specify that:		
	Unresolvable conflicts among state agencies or between state	

	agencies and an MPO shall be escalated to the Governor or Governor's designee (designee can not be the State or local air agency, State department of transportation, State transportation commission or board, or an MPO) [93.105(d)];	
	The State air agency has 14 calendar days (the implementation plan should define the procedures for starting the 14-day clock) to appeal to the Governor after the State DOT or MPO has notified the State air agency head of the resolution of his or her comments [93.105(d)]; and	
	If the State air agency appeals to the Governor, the final conformity determination must have Governor's concurrence. If there is no appeal, the MPO or state DOT may proceed with the final conformity determination [93.105(d)].	
<p>PUBLIC CONSULTATION PROCEDURES. Affected agencies⁷ making conformity determinations on transportation plans, TIPs, and projects shall establish a proactive public involvement process [93.105(e)]. This general requirement can be satisfied by referencing the MPO's procedures,⁸ in addition to specifying or referencing the additional items listed below.</p>		
<p>Consultation procedures must set out a public process that, at a minimum:</p>		
	Provides for reasonable public access to technical and policy information considered by the agency at the beginning of the public comment period and prior to taking formal action on a transportation plan or TIP conformity determination, consistent with 93.105 and 23 CFR 450.316(a) [93.105(e)];	
	Ensures that any charges imposed for public inspection or copying are reasonable [49 CFR 7.43, 93.105(e)];	
	Provides that agencies must specifically address in writing all public comments that plans for regionally significant non-FHWA/FTA projects are not properly reflected in the emissions analysis [93.105(e)]; and	
	Provides opportunity for public involvement in project conformity determinations as otherwise required by law [93.105(e)].	

⁷ Interagency consultation portions of transportation conformity SIPs should define the "affected agencies" that are responsible for fulfilling 40 CFR 93.105(e) requirements.

⁸ The specific requirements and criteria for MPO public involvement are set forth at 23 CFR 450.316(a). Under these requirements, MPOs are directed to periodically review their public involvement process to assure that full and open access is provided to MPO decision-making processes (see 23 CFR 450.316(a)(1)(x)). Public involvement provisions are reviewed in the context of certification or planning reviews, which are conducted by FHWA and FTA under 23 CFR 450.334(b) no less often than once every four years for certain MPOs.

<p>OTHER CONFORMITY PROCEDURES: Under Clean Air Act, as amended by SAFETEA-LU, conformity SIPs must also include conformity procedures that address 40 CFR 93.122(a)(4)(ii) and 93.125(c). All other federal conformity regulations apply automatically and states are not required to address them in conformity SIPs.</p>	
<p>ENFORCEABLE WRITTEN COMMITMENTS REQUIRED FOR EMISSIONS REDUCTION CREDIT: Emissions reduction credit from any control measures that are not included in the transportation plan and TIP and that do not require a regulatory action in order to be implemented may not be included in the emissions analysis unless the conformity determination includes written commitments to implementation from the appropriate entities [93.122(a)(4)(ii)].</p>	
<p>Language addressing 93.122(a)(4)(ii) should include, at a minimum, the following:</p>	
<p>In accordance with 40 CFR 93.122(a)(4)(ii), prior to making a conformity determination on the Transportation Plan or TIP, <i>[insert MPO name]</i> will not include emissions reduction credits from any control measures that are not included in the Transportation Plan or TIP and that do not require a regulatory action in the regional emissions analysis used in the conformity analysis unless <i>[insert MPO name]</i> or FHWA/FTA obtains written commitments, as defined in 40 CFR 93.101, from the appropriate entities to implement those control measures. The written commitments to implement those control measures must be fulfilled by the appropriate entities [93.122(a)(4)(ii)].</p>	
<p>ENFORCEABILITY OF DESIGN CONCEPT AND SCOPE AND PROJECT-LEVEL MITIGATION AND CONTROL MEASURES: Before a conformity determination is made, written commitments must be obtained for any project-level mitigation or control measures. [93.125(c)]</p>	
<p>Language addressing 93.125(c) should include, at a minimum, the following:</p>	
<p>In accordance with 40 CFR 93.125(c), prior to making a project-level conformity determination for a transportation project, FHWA/FTA must obtain from the project sponsor and/or operator written commitments, as defined in 40 CFR 93.101, to implement any project-level mitigation or control measures in the construction or operation of the project identified as conditions for NEPA process completion. The written commitments to implement those project-level mitigation or control measures must be fulfilled by the appropriate entities. Prior to making a conformity determination on the Transportation Plan or TIP, <i>[insert MPO name]</i> will ensure any project-level mitigation or control measures are included in the project design concept and scope and are appropriately identified in the regional emissions analysis used in the conformity analysis. Prior to making a project-level conformity determination, written commitments will be obtained before such mitigation or control measures are used in a project-level hot-spot conformity analysis.</p>	

Appendix B: Conformity Model Rule⁹

CONFORMITY TO STATE IMPLEMENTATION PLANS (SIPs) OF TRANSPORTATION PLANS, PROGRAMS, AND PROJECTS DEVELOPED, FUNDED OR APPROVED UNDER TITLE 23 U.S.C. OR THE FEDERAL TRANSIT LAWS

I. Introduction

The purpose of this state rule is to fulfill the requirement in 40 CFR 51.390(b) to establish a SIP revision that includes the following three sections of the federal transportation conformity rule:

- 40 CFR 93.105, which addresses consultation procedures;
- 40 CFR 93.122(a)(4)(ii), which states that conformity SIPs must require that written commitments to control measures be obtained prior to a conformity determination if the control measures are not included in a metropolitan planning organization's (MPO's) transportation plan and transportation improvement program (TIP); and that such a commitment be fulfilled; and
- 40 CFR 93.125(c), which states that conformity SIPs must require that written commitments to mitigation measures be obtained prior to a project-level conformity determination, and that project sponsors comply with such commitments.

Once this state rule is approved by EPA into the [*name of state*] implementation plan, it has full legal effect. Conformity determinations will be governed by these criteria and procedures as well as any applicable portions of the federal conformity rules that are not addressed by the state rule.

II. Consultation

(a) General.

This rule provides procedures for federal, state, and local interagency consultation, public consultation and resolution of conflicts. Such consultation procedures shall be undertaken by MPOs, the State department of transportation, other local transportation agencies, and DOT with State and local air quality agencies and EPA before making conformity determinations, and by State and local air agencies and EPA with MPOs, the State department of transportation, and DOT in developing applicable implementation plans.

(b) Interagency consultation procedures: General factors.

(1)(A) Representatives of the MPOs, State and local air quality planning agencies, State and local transportation agencies, and [*specify any other organizations within the State with responsibilities for developing, submitting, or implementing provisions of an implementation*

⁹This model rule was adapted from *Transportation and General Conformity Under the Clean Air, Model Rules for State and Local Agencies*, STAPPA-ALAPCO, June 1994. EPA was consulted in the development of this document.

plan required by the CAA] shall undertake an interagency consultation process in accordance with this section with each other and with local or regional offices of EPA, FHWA, and FTA on the development of the SIP, the transportation plan, and the TIP, and associated conformity determinations.

(B) The State air quality agency [*specify name, unless another entity has responsibility for submitting SIPs*] shall be the lead agency responsible for preparing the final document or decision and for assuring the adequacy of the interagency consultation process with respect to the development of SIPs and the list of TCMs in the approved SIP. The MPO [*specify name or names, where possible*] shall be the lead agency responsible for preparing the final document or decision and for assuring the adequacy of the interagency consultation process with respect to the transportation plan, the TIP, any amendments or revisions thereto, and any conformity determinations. In the case of non-metropolitan areas, the State department of transportation [*specify name*] shall be the lead agency responsible for preparing the final document or decision and for assuring the adequacy of the interagency consultation process with respect to the development of any conformity determinations in these areas.

(C) In addition to the lead agencies identified in subparagraph (B), other agencies entitled to participate in any interagency consultation process under this rule include the State department of transportation [*specify name*], each affected MPO [*specify name or names for each affected area*], the Federal Highway Administration field office [*specify name*], the Federal Transit Administration regional office [*specify name*], any county congestion management agencies [*specify name*], the State air quality agency [*specify name*], any air quality management district, air pollution control district or other local air quality agency [*specify name or names for each affected area*], any other organization within the State responsible under State law for developing, submitting or implementing transportation-related provisions of an implementation plan [*specify name, if any*], and any local transportation agency or local government as appropriate [*specify name or names for each affected area*].

(D) It shall be the role and responsibility of each lead agency in an interagency consultation process, as specified in subparagraph (B), to confer with all other agencies identified under subparagraph (C) with an interest in the document to be developed, provide all appropriate information to those agencies needed for meaningful input, solicit early and continuing input from those agencies, conduct the consultation process described in the applicable paragraphs of 40 CFR 93.105, where required, assure policy-level contact with those agencies and prior to taking any action, consider the views of each such agency and respond to those views in a timely, substantive written manner prior to any final decision on such document, and assure that such views and written response are made part of the record of any decision or action. It shall be the role and responsibility of each agency specified in subparagraph (C), when not fulfilling the role and responsibilities of a lead agency, to confer with the lead agency and other participants in the consultation process, review and comment as appropriate (including comments in writing) on all proposed and final documents and decisions in a timely manner, attend consultation and decision meetings, assure policy-level contact with other participants, provide input on any area of substantive expertise or responsibility (including planning assumptions, modeling, information on status of TCM implementation, and interpretation of regulatory or other requirements), and provide technical assistance to the lead agency or consultation process in accordance with this paragraph when requested.

[To address the requirements of 93.105(b)(2)(i) and (ii)]

(E) Specific roles, responsibilities, and organizational level of various participants in the interagency consultation process shall be as follows ***[Note: This is a partial, illustrative list only. Current responsibilities and needed assignments should be taken into account.]***

(i) The State air quality agency *[or local air quality agency, if appropriate under State law; specify name; these functions may have to be allocated between State and local agencies to reflect State law]* shall be responsible for developing (I) emissions inventories, (II) emissions budgets, (III) air quality modeling, (IV) SIP demonstrations, including emissions budgets as necessary, (V) any SIP TCMs, and (VI) ...;

(ii) The MPO *[specify name]* shall be responsible for (I) developing transportation plans and TIPs, (II) evaluating TCM transportation impacts, (III) developing transportation and socioeconomic data and planning assumptions for use in emissions analysis to determine conformity of transportation plans, TIPs, and projects, (IV) monitoring regionally significant projects, (V) developing system- or facility-based or other programmatic TCMs, (VI) providing technical and policy input on emissions budgets, (VII) performing transportation modeling, regional emissions analyses and documentation of timely implementation of TCMs needed for conformity assessments, and (VIII) ...;

(iii) The State department of transportation *[specify name]* shall be responsible for (I) providing technical input on proposed revisions to motor vehicle emissions factors, (II) distributing draft and final project environmental documents to other agencies, (III) convening air quality technical review meetings on specific projects when requested by other agencies or as needed, and (IV) ...;

(iv) FHWA and FTA shall be responsible for (I) assuring timely action on final findings of conformity, after consultation with other agencies as provided in this section, (II) providing guidance on the transportation planning process to agencies in interagency consultation, and (III) ...; and

(v) EPA shall be responsible for (I) reviewing, finding adequate, and approving updated motor vehicle emissions budgets, (II) providing guidance on conformity criteria and procedures to agencies in interagency consultation, and (III)....

[NOTE: The model rule in paragraph (2) below expresses general principles of consultation. It is not intended to be adopted in this form, but should be adapted to the circumstances of the State, the usual relationships of parties to the negotiation, and other factors. A State may wish to adopt more than one consultation procedure, with differing complexity, to apply to different documents or decisions, as appropriate for the subject matter. An approvable conformity implementation plan revision will need to incorporate more detail on consultation than provided by this model rule. Among the terms that may require further definition by the State are "early in the process," "timely," "period for review," "policy level," "the record of any decision or action," "all relevant documents," "all appropriate information," "consider" and "respond." Where "final document" is referred to, this shall also include any decisions or actions not requiring a specific document.]

[To address the requirements of 40 CFR 93.105(b)(2)(iii), (iv), (v), and (vi)]

(2)(A) It shall be the affirmative responsibility of the agency with the responsibility for preparing the final document or decision subject to the interagency consultation process to initiate the process by notifying other participants, convene consultation meetings early in the process of decision on the final document, appoint the convenors of technical meetings, and assure that all relevant documents and information are supplied to all participants in the consultation process in a timely manner.

(B) Regular consultation on major activities such as the development of a SIP, the development of a transportation plan, the development of a TIP, or any determination of conformity on transportation plans or TIPs, shall include meetings at regular, scheduled intervals no less frequently than *[insert frequency - monthly/quarterly/ semiannually to determine appropriate interval for the agencies and subject matter involved]* and shall be attended by representatives of each agency. In addition, technical meetings shall be convened as necessary.

(C) Each lead agency in the consultation process required under this section (that is, the agency with the responsibility for preparing the final document subject to the interagency consultation process) shall confer with all other agencies identified under paragraph (1) with an interest in the document to be developed, provide all appropriate information to those agencies needed for meaningful input, and, prior to taking any action, consider the views of each such agency and respond to those views in a timely, substantive written manner prior to any final decision on such document. Such views and written response shall be made part of the record of any decision or action.

(D) The lead agency for developing the SIP will prepare a list of the TCMs in the approved SIP and provide this list to the interagency consultation process in accordance with paragraph (b).

[To address the requirements of 93.105(c)]

(c) Interagency consultation procedures: Specific processes.

(1) An interagency consultation process in accordance with paragraph (b) involving the MPO, State and local air quality planning agencies, State and local transportation agencies, EPA, FHWA, and FTA shall be undertaken for the following:

(i) Evaluating and choosing a model (or models) and associated methods and assumptions to be used in hot-spot analyses and regional emissions analyses to be initiated by *[identify lead agency]* and conducted in accordance with paragraph (b).

(ii) Determining which minor arterials and other transportation projects should be considered "regionally significant" for the purposes of regional emissions analysis (in addition to those functionally classified as principal arterial or higher or fixed guideway systems or extensions that offer an alternative to regional highway travel), and which projects should be considered to have a significant change in design concept and scope from the transportation plan or TIP, to be initiated by *[identify lead agency]* and conducted in accordance with paragraph (b);

(iii) Evaluating whether projects otherwise exempted from meeting the requirements of 40 CFR Part 93 (i.e. projects described in 40 CFR 93.126 and 93.127) should be treated as non-exempt in

cases where potential adverse emissions impacts may exist for any reason, to be initiated by [*identify lead agency*] and conducted in accordance with paragraph (b);

(iv) Making a determination, as required by 40 CFR 93.113(c)(1), whether past obstacles to implementation of TCMs which are behind the schedule established in the applicable implementation plan have been identified and are being overcome, and whether State and local agencies with influence over approvals or funding for TCMs are giving maximum priority to approval or funding for TCMs, to be initiated by [*identify lead agency*] and conducted in accordance with paragraph (b). This consultation process shall also consider whether delays in TCM implementation necessitate revisions to the applicable implementation plan to remove TCMs or substitute TCMs or other emission reduction measures;

(v) Notification of transportation plan or TIP revisions or amendments which merely add or delete exempt projects listed in 40 CFR 93.126, to be initiated by [*identify lead agency*] and conducted in accordance with paragraph (b);

(vi) Choosing conformity tests and methodologies for isolated rural nonattainment and maintenance areas, as required by 40 CFR 93.109(1)(2)(iii) to be initiated by [*identify lead agency*] and conducted in accordance with paragraph (b).

(2) An interagency consultation process in accordance with paragraph (b) involving the MPO, State and local air quality planning agencies, and State and local transportation agencies, shall be undertaken for the following:

(i) Evaluating events which will trigger new conformity determinations in addition to those triggering events established in 40 CFR 93.104, to be initiated by [*identify lead agency*] and conducted in accordance with paragraph (b); and

(ii) Consulting on emissions analysis for transportation activities which cross the borders of MPOs or nonattainment areas or air basins, to be initiated by [*identify lead agency*] and conducted in accordance with paragraph (b).

(3) Where the metropolitan planning area does not include the entire nonattainment or maintenance area, an interagency consultation process involving the MPO and the State department of transportation shall be undertaken for cooperative planning and analysis for purposes of determining conformity of all projects outside the metropolitan area and within the nonattainment or maintenance area, to be initiated by [*identify lead agency*] and conducted in accordance with paragraph (b).

(4)(i) An interagency consultation process in accordance with paragraph (b) involving the MPO, State and local air quality planning agencies, State and local transportation agencies, and recipients of funds designated under title 23 U.S.C. or the Federal Transit Act shall be undertaken to assure that plans for construction of regionally significant projects which are not FHWA/FTA projects (including projects for which alternative locations, design concept and scope, or the no-build option are still being considered), including all those by recipients of funds designated under title 23 U.S.C. or the Federal Transit Act are disclosed to the MPO on a regular basis, and to assure that any changes to those plans are immediately disclosed.

(ii) During preparation of the transportation plan and TIP, the MPO will request that participants of the interagency consultation process identify all non-FHWA/FTA transportation projects and their design concept and scope, including those where detailed design features have not yet been decided, and determine which ones meet the definition of regionally significant for regional emissions modeling. Any recipient of federal funding, as defined in 40 CFR 93.101, is required to disclose to the MPO information regarding all non-FHWA/FTA regionally significant projects and any changes to these plans shall be immediately disclosed.

(5) An interagency consultation process in accordance with paragraph (b) involving the MPO and other recipients of funds designated under title 23 U.S.C. or the Federal Transit Act shall be undertaken for assuming the location and design concept and scope of projects that are disclosed to the MPO as required by paragraph (c)(4) of this section but whose sponsors have not yet decided these features, in sufficient detail to perform the regional emissions analysis according to the requirements of 40 CFR 93.122, to be initiated by [*identify lead agency*] and conducted in accordance with paragraph (b).

(6) An interagency consultation process involving the MPO, State and local air quality planning agencies, and State and local transportation agencies, shall be undertaken for the design, schedule, and funding of research and data collection efforts and regional transportation model development by the MPO (e.g., household/ travel transportation surveys), to be initiated by [*identify lead agency*] and conducted in accordance with paragraph (b).

(7) A process for providing final documents (including SIPs, transportation plans, TIPs, plan/TIP amendments and conformity determinations) and supporting information to each agency after approval or adoption. This process is applicable to all agencies including MPOs, State department of transportation, State and local air quality agencies, FHWA, FTA and EPA.

(d) Resolving conflicts.

(1) Any conflict among State agencies or between State agencies and an MPO shall be escalated to the Governor if the conflict cannot be resolved by the heads of the involved agencies. In the first instance, such agencies shall make every effort to resolve any differences, including personal meetings between the heads of such agencies or their policy-level representatives, to the extent possible.

(2)(A) The State air quality agency has 14 calendar days to appeal a proposed determination of conformity (or other policy decision under this rule) to the Governor after the State DOT or MPO has notified the State air quality agency of the resolution of all comments on such proposed determination of conformity or policy decision. Such 14-day period shall commence when the MPO or the State DOT has confirmed receipt by the director of the State air agency of the resolution of the comments of the State air quality agency. If the State air quality agency appeals to the Governor, the final conformity determination must have the concurrence of the Governor. The State air quality agency must provide notice of any appeal under this subsection to the MPO and the State DOT. If the State air quality agency does not appeal to the Governor within 14 days, the MPO or State DOT may proceed with the final conformity determination.

(B) In the case of any comments with regard to any proposed determination of conformity, the State DOT has 14 calendar days to appeal a proposed determination of conformity (or other policy decision under this rule) to the Governor after the MPO has notified the State air quality agency or the State DOT of the resolution of all comments on such proposed determination of conformity or policy decision. Such 14-day period shall commence when [*insert defining action, e.g., the MPO has confirmed receipt by the director of the State air quality agency or the State DOT of the resolution of the comments of the State DOT*]. If the State DOT appeals to the Governor, the final conformity determination must have the concurrence of the Governor. The State DOT must provide notice of any appeal under this subsection to the MPO and the State air quality agency. If the State DOT does not appeal to the Governor within 14 days, the MPO may proceed with the final conformity determination.

(3) The Governor may delegate the role of hearing any such appeal under this subsection and of deciding whether to concur in the conformity determination to another official or agency within the State, but not to the head or staff of the State air quality agency or any local air quality agency, the State department of transportation, a State transportation commission or board, any agency that has responsibility for only one of these functions, or an MPO.

(e) Public consultation procedures.

The [*list affected agencies*] making conformity determinations on transportation plans, programs, and projects shall establish and make available a proactive public involvement process which provides opportunity for public review and comment. At a minimum, this process should include providing reasonable public access to technical and policy information considered by the agency at the beginning of the public comment period and prior to taking formal action on a conformity determination for all transportation plans and TIPs, consistent with those requirements and those of 23 CFR 450.316(a).

Charges imposed for public inspection and copying are consistent with the fee schedule contained in 49 CFR 7.43.

In addition, [*list the agencies*] will specifically address in writing all public comments that known plans for a regionally significant project which is not receiving FHWA or FTA funding or approval have not been properly reflected in the emissions analysis supporting a proposed conformity finding for a transportation plan or TIP. [*List the agencies*] will also provide opportunity for public involvement in conformity determinations for projects where otherwise required by law.

III. Commitments for Regional Emissions Analysis

In accordance with 40 CFR 93.122(a)(4)(ii), the [*identify MPO*] will not include emissions reduction credits from control measures that are not included in the transportation plan or transportation improvement program and that do not require a regulatory action in the regional emissions analysis used in the conformity determination unless [*identify name of MPO*] or FHWA/FTA obtain written commitments, as defined in 40 CFR 93.101, from the appropriate entities to implement those control measures. The written commitments to implement those control measures must be fulfilled by the appropriate entities.

IV. Commitments for Project-Level Mitigation and Control Measures

In accordance with 40 CFR 93.125(c), prior to making a project-level conformity determination for a transportation project, FHWA/FTA must obtain from the project sponsor and/or operator a written commitment, as defined in 40 CFR 93.101, to implement any project-level mitigation or control measure in the construction or operation of the project identified as a condition for NEPA process completion. The written commitment to implement such a project-level mitigation or control measure must be fulfilled by the appropriate entity. Prior to making a conformity determination for the transportation plan or TIP, [*identify name of MPO*] will ensure any project-level mitigation or control measures for which a written commitment has been made are included in the project design concept and scope and are appropriately identified in the regional emissions analysis used in the conformity analysis. Written commitments must be obtained before such mitigation or control measures are used in a project-level hot-spot conformity analysis for a project-level determination.

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Parts 50 and 51**

[EPA-HQ-OAR-2007-0956, FRL-8762-5]

RIN 2060-AO96

Proposed Rule To Implement the 1997 8-Hour Ozone National Ambient Air Quality Standard: Revision on Subpart 1 Area Reclassification and Anti-Backsliding Provisions Under Former 1-Hour Ozone Standard; Proposed Deletion of Obsolete 1-Hour Ozone Standard Provision**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Proposed rule.

SUMMARY: The EPA proposes to revise the rule for implementing the 1997 8-hour ozone national ambient air quality standard (NAAQS) for several of the limited portions of the rule vacated by the U.S. Circuit Court of Appeals for the District of Columbia. The proposal addresses the classification system for the subset of initial 8-hour ozone nonattainment areas that the implementation rule originally covered under Clean Air Act (CAA or Act) title I, part D, subpart 1. The proposal also addresses how 1-hour ozone contingency measures that apply for failure to attain or make reasonable progress toward attainment of the 1-hour standard should apply under the anti-backsliding provisions of the implementation rule. In addition, the proposal removes language relating to the vacated provisions of the rule that provided exemptions from the requirements of nonattainment new source review (NSR) and CAA section 185 penalty fees under the 1-hour standard. The EPA plans to issue a separate proposed rule providing additional guidance as to how these two requirements (185 fees and NSR) now apply.

In addition, this proposal includes the deletion of an obsolete provision in the 1-hour ozone standard itself.

DATES: *Comments.* Comments must be received on or before February 17, 2009.

Public Hearing. If anyone contacts us requesting a public hearing by January 26, 2009, we will hold a public hearing approximately 30 days after publication in the **Federal Register**. Additional information about the hearing would be published in a subsequent **Federal Register** notice.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2007-0956, by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.

- *E-mail:* a-and-r-docket@epa.gov.

- *Fax:* (202) 566-9744.

- *Mail:* Air and Radiation Docket and Information Center, Attention Docket ID No. EPA-HQ-OAR-2007-0956, Environmental Protection Agency, 1301 Constitution Ave., NW., Washington, DC 20460. *Mail Code:* 2822T. Please include two copies if possible.

- *Hand Delivery:* Air and Radiation Docket and Information Center, Attention Docket ID No. EPA-HQ-OAR-2007-0956, Environmental Protection Agency in the EPA Headquarters Library, Room Number 3334 in the EPA West Building, located at 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation will be 8:30 a.m. to 4:30 p.m. Eastern Standard Time (EST), Monday through Friday, Air and Radiation Docket and Information Center.

Instructions: Direct your comments to Docket ID No. EPA-HQ-OAR-2007-0956. The EPA's policy is that all comments received will be included in the public docket without change and may be made available on-line at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov, or e-mail. The www.regulations.gov Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

For additional instructions on submitting comments, go to the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in www.regulations.gov. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the Air and Radiation Docket and Information Center in the EPA Headquarters Library, Room Number 3334 in the EPA West Building, located at 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.

Public Hearing: If a hearing is held, it will be held at the U.S. Environmental Protection Agency, 109 TW Alexander Drive, Research Triangle Park, North Carolina 27709, Building C.

FOR FURTHER INFORMATION CONTACT: For further general information or information on the issue of reclassification of subpart 1 areas, contact Mr. John Silvasi, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, (C539-01), Research Triangle Park, NC 27711, phone number (919) 541-5666, fax number (919) 541-0824 or by e-mail at silvasi.john@epa.gov. For information on the 1-hour contingency measures issue discussed in this notice, contact Ms. Denise Gerth, Office of Air Quality Planning and Standards, (C504-03), U.S. EPA, Research Triangle Park, North Carolina 27711, phone number (919) 541-5550 or by e-mail at gerth.denise@epa.gov, fax number (919) 541-0824. To request a public hearing, contact Mrs. Pamela Long, Office of Air Quality Planning and Standards, (C504-03), U.S. EPA, Research Triangle Park, North Carolina 27711, telephone number (919) 541-0641 or by e-mail at long.pam@epa.gov, fax number (919) 541-5509.

SUPPLEMENTARY INFORMATION:**I. General Information***A. Does This Action Apply to Me?*

Entities potentially affected directly by the subject rule for this action include state, local, and Tribal governments. Entities potentially

affected indirectly by this action include owners and operators of sources of emissions (volatile organic compounds (VOCs) and nitrogen oxides (NO_x)) that contribute to ground-level ozone concentrations.

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

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

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

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

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

In addition to being available in the docket, an electronic copy of this notice is also available on the World Wide Web. A copy of this notice will be

posted at <http://www.epa.gov/ttn/naaqs/ozone/o3imp8hr/>.

D. What Information Should I Know About the Public Hearing?

EPA will hold a hearing only if a party notifies EPA by January 26, 2009, expressing its interest in presenting oral testimony on issues addressed in this notice. Any person may request a hearing by calling Mrs. Pamela Long at (919) 541-0641 before 5 p.m. by January 26, 2009. Persons interested in presenting oral testimony should contact Mrs. Pamela Long at (919) 541-0641. Any person who plans to attend the hearing should also contact Mrs. Pamela S. Long at (919) 541-0641 or visit the EPA's Web site at <http://www.epa.gov/ttn/naaqs/ozone/o3imp8hr/> and to learn if a hearing will be held.

If a public hearing is held on this notice, it will be held at the EPA, Building C, 109 T.W. Alexander Drive, Research Triangle Park, NC 27709. Because the hearing will be held at a U.S. Government facility, everyone planning to attend should be prepared to show valid picture identification to the security staff in order to gain access to the meeting room. Please check our Web site at <http://www.epa.gov/ttn/naaqs/ozone/o3imp8hr/> for information and updates concerning the public hearing.

If held, the public hearing will begin at 10 a.m. and end 1 hour after the last registered speaker has spoken. The hearing will be limited to the subject matter of this document. Oral testimony will be limited to 5 minutes. The EPA encourages commenters to provide written versions of their oral testimony either electronically (on computer disk or CD-ROM) or in paper copy. The list of speakers will be posted on EPA's Web site at <http://www.epa.gov/ttn/naaqs/ozone/o3imp8hr/>. Verbatim transcripts and written statements will be included in the rulemaking docket.

A public hearing would provide interested parties the opportunity to present data, views, or arguments concerning issues addressed in this notice. The EPA may ask clarifying questions during the oral presentations, but would not respond to the presentations or comments at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as any oral comments and supporting information presented at a public hearing.

E. How Is This Document Organized?

The Information Presented in This Document is Organized as Follows

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 - H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use
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II. What Is the Background for This Proposal?

A. Litigation on EPA's 8-Hour Ozone NAAQS Implementation Rule (40 CFR Part 51, Sections 51.900 Through 51.918 (Collectively Subpart X))

On April 30, 2004 (69 FR 23951), EPA published Phase 1 of a final rule that addressed the following key elements for implementing the 1997 8-hour ozone NAAQS: Classifications for the 1997 8-hour NAAQS; revocation of the 1-hour NAAQS (i.e., when the 1-hour NAAQS will no longer apply); anti-backsliding principles for 1-hour ozone

requirements to ensure continued progress toward attainment of the 1997 8-hour ozone NAAQS; attainment dates; and the timing of emissions reductions needed for attainment.

Following publication of the April 30, 2004 final Phase 1 Rule, the Administrator received three petitions, pursuant to section 307(b)(7)(B) of the CAA requesting reconsideration of a number of aspects of the final rule.¹ In final rulemaking on one of these petitions, EPA further clarified the implementation rule in two respects: (a) Section 185 penalty fees under the 1-hour standard would no longer be applicable after revocation of the 1-hour standard, and (b) the effective date of designations under the 1997 8-hour standard (i.e., for almost all areas, June 15, 2004) is the date for determining which 1-hour control measures continue to apply in an area once the 1-hour standard is revoked.² Additionally, EPA clarified that the requirement to have 1-hour contingency measures for failure to make progress or failure to attain would no longer apply once the 1-hour standard was revoked. On April 4, 2005 (70 FR 17018), we published a proposed rule to take comment on the issue of whether we should interpret the Act to require areas to retain major NSR requirements that apply to certain 1-hour ozone nonattainment areas in implementing the 1997 8-hour standard. We took final action on the NSR issues on June 30, 2005 (70 FR 39413; July 8, 2005), to interpret the CAA to not require NSR under the 1-hour standard once the 1-hour standard was revoked.

Several parties challenged EPA's Phase 1 Rule and the two reconsideration rules, and on December 22, 2006, the Court upheld certain challenges and rejected others, but purported to vacate the Phase 1 Implementation Rule in its entirety. *South Coast Air Quality Management District, et al., v. EPA*, 472 F.3d 882 (D.C. Cir. 2006) *reh'g denied* 489 F.3d 1245 (clarifying that the vacatur was limited to the issues on which the court granted the petitions for review).

The EPA requested rehearing and clarification of the ruling and on June 8, 2007, the Court clarified that it was

vacating the rule only to the extent that it had upheld petitioners' challenges. Thus, the following provisions of the Phase 1 rule were vacated:

- The provisions that placed 8-hour ozone nonattainment areas under subpart 1, part D, title I of the CAA instead of subpart 2.
- The provisions that waived obligations under the revoked 1-hour standard for NSR, section 185 penalty fees, and contingency measures for failure to attain or to make reasonable progress toward attainment of the 1-hour standard.³

B. Obsolete Provision in 1-Hour Ozone Standard (40 CFR Part 50)

When EPA promulgated the 8-hour ozone standard on July 18, 1997 (62 FR 38856), EPA initially revised 40 CFR 50.9 to revoke the 1-hour ozone standard once EPA determined that an area had air quality meeting the 1-hour standard. Subsequently, because the pending litigation over the 8-hour NAAQS created uncertainty regarding the 8-hour NAAQS and our implementation strategy, we revised 40 CFR 50.9 to place two limitations on our authority to apply the revocation rule: (1) The 8-hour NAAQS must no longer be subject to legal challenge, and (2) it must be fully enforceable.⁴ (65 FR 45182, July 20, 2000). These limitations were codified as § 50.9(c). In the final Phase 1 Rule, we again revised § 50.9, this time to revise § 50.9(b) to provide for revocation of the 1-hour standard one year after designation of areas under the 1997 8-hour ozone standard. However, we neglected to remove paragraph (c) which was no longer necessary as the 8-hour standard was no longer subject to legal challenge and the standard had been upheld and was enforceable. *American Trucking Assoc. v. EPA* 283 F.3d 355 (DC Cir. 2002) (resolving all remaining legal challenges to the 8-hour ozone standard and upholding EPA's rule establishing that standard.)

III. This Action

A. Reclassification of Subpart 1 8-Hour Ozone Nonattainment Areas

1. Current Rule

In the Phase 1 implementation rule, EPA established which planning

requirements of part D of title I of the Act would apply to areas for purposes of implementing the 8-hour ozone standard. 40 CFR 51.902. ("Which classification and nonattainment area planning provisions of the CAA shall apply to areas designated nonattainment for the 8-hour NAAQS?") Paragraph (a) provided that areas with a 1-hour ozone design value equal to or greater than 0.121 parts per million (ppm) at the time of 8-hour NAAQS nonattainment designation (April 2004) would be classified in accordance with CAA title I, part D, section 181 of the CAA as interpreted in 40 CFR 51.903(a) for purposes of the 8-hour NAAQS, and would be subject to the requirements of CAA title I, part D, subpart 2 that apply for the area's classification. 40 CFR 51.903(a) set forth a translation into 8-hour design values of the CAA section 181 classification table, which is written in terms of 1-hour ozone design values. The preamble to the Phase 1 Rule provides the rationale and procedure for that translation. (See 69 FR 23958 *et seq.*) Section 181 in subpart 2 provides for specific classifications of each area by the magnitude of the ozone problem, providing shorter time periods for attainment for lower classifications and longer time periods for higher classifications. Higher classified areas also face additional specified control requirements than lower classified areas. A summary listing of the subpart 2 requirements by classification compared to subpart 1 requirements appeared in the proposed 8-hour ozone implementation rule. (See 68 FR 32864, Appendix A; June 2, 2003.)

Paragraph (b) of § 51.902 provided that 1997 8-hour ozone nonattainment areas with a 1-hour design value less than 0.121 ppm at the time of 8-hour NAAQS nonattainment designation would be covered under section 172(a)(1) of the CAA and would be subject to the requirements of CAA title I, part D, subpart 1 and not those of subpart 2.

The EPA designated areas for the 1997 8-hour standard on April 30, 2004 (69 FR 23858), and in accordance with section 181(a), the areas subject to subpart 2 under the Phase 1 Rule were classified by operation of law at that time. Of the 126 areas designated nonattainment, 84 were classified as under subpart 1, and the remaining 42 as under subpart 2.⁵

¹ Three petitions for reconsideration of the Phase 1 Rule were filed by: (1) Earthjustice on behalf of the American Lung Association, Environmental Defense, Natural Resources Defense Council, Sierra Club, Clean Air Task Force, Conservation Law Foundation, and Southern Alliance for Clean Energy; (2) the National Petrochemical and Refiners Association and the National Association of Manufacturers; and (3) the American Petroleum Institute, American Chemistry Council, American Iron and Steel Institute, National Association of Manufacturers and the U.S. Chamber of Commerce.

² 70 FR 30592 (May 26, 2005).

³ The Court's June clarification confirmed that the December 2006 decision was not intended to establish a requirement that areas continue to demonstrate conformity for the 1-hour ozone standard for anti-backsliding purposes.

⁴ In addition, in June 2003, we stayed our authority to apply the revocation rule pending our reconsideration in this rulemaking of the basis for revocation. (68 FR 38160, June 26, 2003).

⁵ 13 of the 84 subpart 1 areas and one subpart 2 area were designated as "Early Action Compact Areas" with a deferred effective date for their nonattainment designation.

2. Effect of Court Ruling

In its decisions on the Phase 1 rule, the Court vacated the provisions that subjected any 8-hour ozone nonattainment areas to coverage under subpart 1. As the basis for its decision, the Court first agreed that Congress mandated that certain areas be subject to subpart 2, but ruled that our use of 0.121 ppm 1-hour design value as a dividing line was incorrect, holding that the Supreme Court had required use of 0.09 ppm on the 8-hour scale as the level for determining which areas Congress mandated would be subject to subpart 2.⁶ Furthermore, although recognizing that Congress did not mandate that areas with an 8-hour design value be subject to subpart 2, the Court rejected as unreasonable our rationale for placing certain areas in subpart 1 instead of subpart 2. The Court vacated the Phase 1 rule to the extent it placed certain areas solely under the implementation provisions of subpart 1. Thus, a rule revision is necessary to address which provisions of the Act—only subpart 1 or subpart 2⁷—should apply to those areas that were placed solely under subpart 1 in the Phase 1 Rule.

3. Proposed Rule

We are proposing that all areas designated nonattainment for the 1997 8-hour ozone standard will be classified under and subject to the nonattainment planning requirements of subpart 2. We would modify the regulatory text to remove current § 51.902(b) (which was vacated by the Court), which placed certain areas only under subpart 1. We considered the possibility of proposing to place areas with design values below 0.09 ppm 8-hour design value under subpart 1, but are not proposing this option in the interest of not further delaying implementation of the 8-hour ozone NAAQS that was established over

⁶ “* * * the gap identified in Whitman affords EPA discretion only to the extent that an area is nonattaining but its air quality is not as dangerous as the level addressed by the 1990 Amendments, which now translates to 0.09 ppm on the 8 hour scale. Thus, the gap extends only to the extent that the standard was strengthened and not to the extent that the measurement technique merely changed * * * We therefore hold that the 2004 Rule violates the Act insofar as it subjects areas with 8-hour ozone in excess of 0.09 ppm to Subpart 1. We further hold that EPA’s interpretation of the Act in a manner to maximize its own discretion is unreasonable because the clear intent of Congress in enacting the 1990 Amendments was to the contrary.”

⁷ We note that areas subject to subpart 2 are also subject to subpart 1 to the extent subpart 1 specifies requirements that are not superseded by more specific obligations under subpart 2.

10 years ago.⁸ However, we solicit comment on this part of this proposal.

Because these are the initial classifications for these areas for the 1997 ozone standard, the EPA further proposes to use the 8-hour ozone design values (from 2001–2003 air quality data) that were used to designate these areas nonattainment initially as the basis for classification and that the classification table in 40 CFR 51.903 (established by the Phase 1 Rule) be used for the classification. CAA section 181(a) provides that “at the time” areas are designated for a NAAQS, they will be classified “by operation of law” based on the “design value” of the areas and in accordance with table 1 of that section. Thus, this language specifies that the area will be classified based on the design value that existed for the area “at the time” of designation. Areas were designated nonattainment in 2004, based on design values derived from data from 2001–2003. We are soliciting comment on the approach of classifying these areas based on the same data that was used for designation.

Also, since the classification under this proposal would be the initial one under the 1997 8-hour standard for these areas after court vacatur of the method EPA used to treat these areas under subpart 1 only, EPA proposes that the provision of CAA section 181(a)(4) would apply to these areas, which would allow the Administrator in his discretion to adjust the classification—within 90 days after the initial classification—to a higher or lower classification “* * * if the design value were 5 percent greater or 5 percent less than the level on which such classification was based.” The EPA proposes to address requests for such classification adjustments for the newly-classified areas that were originally covered under subpart 1 in a manner similar to the way described for the original round of subpart 2 classifications.⁹ This process is described at 69 FR 23863 *et seq.* (April 30, 2004).

Of the original 84 subpart 1 areas designated in the April 30, 2004 rulemaking, 13 areas successfully completed participation in the Early

⁸ As the court made clear in its decision on rehearing, the CAA does not mandate coverage under subpart 2 of all areas designated nonattainment for an ozone NAAQS. As EPA moves forward to develop an implementation strategy for the new 2007 ozone NAAQS, we will consider whether subpart 1 alone might apply in some areas for purposes of implementing that NAAQS.

⁹ Note, however, that if a State requests a reclassification from moderate to marginal and the attainment date for marginal areas has passed and the area is violating the standard, EPA would not grant the request for the reclassification.

Action Compacts (EAC) program. As a result, these areas received deferred designations and classifications for as long as they continued to meet program requirements. These requirements were designed to ensure early reductions of ozone and progress toward attainment of the 1997 NAAQS. At the completion of the program, these areas were designated attainment for the 8-hour ozone NAAQS effective April 15, 2008.¹⁰

Despite the proposal to implement the 1997 8-hour standard by classifying nonattainment areas under title I, part D, subpart 2 at this time, EPA reserves the right to propose to cover future ozone nonattainment areas under title I, part D, subpart 1, in accordance with the constraints outlined in the Court’s rulings. The EPA may in the future examine the appropriate role for subpart 1 in classifying nonattainment areas and in flexible, efficient, enforceable implementation of an ozone NAAQS.

Note that CAA section 182(h) (“Rural Transport Areas”) would be available for any nonattainment area that qualifies as a rural transport area under that section. A Rural Transport Area would have to only meet requirements of a marginal area.

4. Consequences of Proposed Rule

Areas originally covered under subpart 1 that have already been redesignated to attainment will not be affected by this rule, including the 13 EAC areas noted above.¹¹ Appendix A provides a listing of the former subpart 1 areas that are still designated nonattainment and that would be classified under subpart 2 under this proposed rule and provides the subpart 2 classification for the area based on the air quality data initially used to designate the area in the 2004 designation rule. All of these areas would be classified as either marginal or moderate.¹² The classification table of 40 CFR 51.903 provides an outside attainment date based on a number of years after the effective date of the

¹⁰ One area (Denver, CO) that was originally part of the EAC program did not successfully complete all milestones and was subsequently designated nonattainment under subpart 1. Thus, this area would be treated the same as all areas classified under subpart 1 under the original provisions of the Phase 1 Rule.

¹¹ See, e.g., 73 FR 11558 (col. 2) (March 4, 2008), together with e.g., 73 FR 1166 (col. 3) (January 8, 2008).

¹² Note that Essex Co (the top of Whiteface Mtn), NY, and Door County, WI would be eligible for consideration under CAA section 182(h) as a Rural Transport Area. This is based on the 1999 definition of Metropolitan Statistical Areas; neither of the above two areas is in or adjacent to an MSA as defined by the Office of Management and Budget (OMB) in 1999 (June 30, 1999; 64 FR 35548).

nonattainment designation (3 years for marginal and 6 years for moderate). For all areas other than Denver, the effective date of designation for the 8-hour standard was June 15, 2004. Thus, marginal nonattainment areas would have a maximum statutory attainment date of June 15, 2007 and moderate areas a maximum date of June 15, 2010. Since the marginal area attainment date

has passed, EPA proposes that any area that would be classified under the proposal as marginal, and that did not attain by June 15, 2007, or that does not meet the criteria for an attainment date extension under CAA section 181(a)(5)(B) and 40 CFR 51.907, would be reclassified immediately as moderate under this rule.

Areas classified marginal or moderate would be required to meet the marginal or moderate area requirements of CAA section 182(a) and/or (b). Moderate area requirements include the requirements for the marginal classification. Briefly, these requirements are depicted in Table 1:

TABLE 1

Element	Subpart 2 ^a	
	Classification	Requirement
Attainment Dates For all areas, attainment should occur as expeditiously as practicable, but no later than specified timeframe.	Marginal	3 years from CAA Amendments enactment.
Reasonable Further Progress (RFP)	Moderate	6 years from CAA Amendments enactment.
	Marginal	None.
Attainment demonstration submission	Moderate	15% VOC reduction from baseline within 6 years of enactment.
	Marginal	None.
NSR and Reasonable Achievable Technology (RACT) major source applicability.	Moderate	Due 3 years after CAA Amendments enactment.
	Marginal	100 tons per year (TPY).
NSR offsets	Moderate	100 TPY.
	Marginal	1.1 to 1.
Bump-up to higher classification	Moderate	1.15 to 1.
	All except severe & extreme.	Required to bump up to higher classification if area doesn't meet attainment date.
NO _x control for RACT	Moderate & above; all areas in Ozone Transport Commission.	Requirements under this subpart for major stationary VOC sources (NSR & RACT) also apply to all major NO _x sources, unless EPA approves NO _x waiver.
	All	Comprehensive emissions inventory within 2 years of enactment; update every 3 years (until area attains). Provision for submission to state of annual emissions statements from VOC and NO _x stationary sources.
RACT	Marginal & above	Pre-1990 RACT fix-up.
	Moderate & above	RACT for all Control Techniques Guidelines sources and all other major sources.
Inspection and Maintenance (I/M)	Marginal	Pre-1990 corrections to previously required I&M programs.
	Moderate	Basic I/M.
Consequences of failure to attain	Marginal, moderate	Bump-up for failure to attain.
Contingency measures	All	Required for failure to meet the Rate of Progress milestones or attain.

^a Note that subpart 1 requirements also apply to subpart 2 areas to the extent that the CAA does not provide an exemption (e.g., 182(a) (last paragraph, which exempts marginal areas from the requirement to submit an attainment demonstration)) or such requirements are not superseded by more specific obligations under subpart 2 (e.g., where subpart 2 specifies specific increments of progress for moderate and above areas in place of the more general requirement for "reasonable further progress" under subpart 1). Subpart 1 requirements that are also applicable to subpart 2 areas (but that are not addressed in subpart 2) include reasonably available control measures (RACM) requirement and transportation and general conformity requirements.

With respect to transportation conformity requirements, current transportation plan and transportation improvement program conformity determinations for the 1997 8-hour ozone standard will remain valid, and are not impacted by this action. Areas that would be reclassified under subpart 2 are already satisfying the applicable CAA section 176(c) conformity requirements for the 1997 8-hour ozone standard. In addition, no new conformity deadline would be triggered in the subject areas after their classification under subpart 2. Nonattainment areas that are classified

as marginal or moderate under Subpart 2 would continue to make future conformity determinations according to the applicable requirements of 40 CFR 93.109(d) and (e). EPA notes that any new moderate areas that continue to be required to use the interim emissions tests will be required to meet additional test requirements that do not apply to marginal areas (40 CFR 93.119(b)(1)).

The Phase 1 Rule provided that states must submit the major SIP elements for the subpart 1 areas no later than June 15, 2007. For areas classified as moderate, EPA also provided a submission date of June 15, 2007 for

most requirements, but required states to submit the reasonably available control technology requirement (RACT) SIP by September 15, 2006. The EPA proposes to require states to submit all required SIP elements for the areas' marginal or moderate classification one year after the effective date of a final rule classifying the areas. The EPA believes this is an appropriate and reasonable amount of time given the attainment dates that will apply to these areas and the fact that the areas should have made significant progress toward meeting these requirements based on the obligations that applied before the

subpart 1 classification provision of the Phase 1 rule was vacated. As subpart 1 areas, these areas should have been well along the path to developing SIPs at the time the Court issued its decision in December 2006. We believe states have already had ample opportunity to complete the technical work to support development of these major SIP elements prior to now. Also, EPA has encouraged states to continue planning for clean air in the prior subpart 1 areas.¹³ Therefore, EPA believes one year from the date of final rule should be sufficient time for states to submit these SIPs. However, EPA solicits comment on this aspect of the proposal.

B. Anti-Backsliding Under 1-Hour Ozone Standard—In General (Also Discussing NSR and Section 185 Penalty Fees)

The EPA codified the anti-backsliding provisions governing the transition from the revoked 1-hour ozone NAAQS to the 1997 8-hour ozone NAAQS in 40 CFR 51.905(a). These provisions, as promulgated, retained most of the 1-hour ozone requirements as “applicable requirements” (defined in 40 CFR 51.900(f)). The requirements that are retained are those that applied in an area based on the area’s 1-hour ozone designation and classification as of the effective date of its 8-hour designation (for most areas, June 15, 2004).

Section 51.905(b) provides that a state remains subject to the listed 1-hour standard obligations until the area attains the 8-hour NAAQS.

Furthermore, § 51.905(b) provides that such obligations cannot be removed from a SIP, even if the area is redesignated to attainment for the 8-hour NAAQS, but must remain in the SIP as applicable requirements or as contingency measures, as appropriate.

Section 51.905(e), as promulgated in 2004, indicated that certain 1-hour standard requirements are not part of the list of anti-backsliding requirements. These include 1-hour NSR, section 185 penalty fees, and 1-hour contingency measures for failure to attain or make reasonable progress toward attainment of the 1-hour NAAQS.¹⁴ The Court

vacated these exemption provisions, and accordingly EPA is proposing to delete these exemptions from the rule. Thus, this proposal would remove language relating to the vacated provisions of the rule that provided exemptions from the requirements of nonattainment NSR and CAA section 185 penalty fees under the 1-hour standard in addition to the provision for contingency measures. The EPA plans to issue a separate proposed rule providing further guidance on how the section 185 fee provisions and the 1-hour NSR requirements apply as a result of the Court’s vacatur.¹⁵

In the following section, in response to the Court vacatur, EPA proposes the manner in which the 1-hour NAAQS contingency measure requirement applies as an anti-backsliding requirement.

C. Contingency Measures

1. Phase 1 Rule

The Phase 1 Rule did not address anti-backsliding provisions related to sections 172(c)(9) and 182(c)(9) of the CAA, which require nonattainment area SIPs to contain contingency measures that would be implemented if an area fails to attain or fails to make RFP toward attainment of the 1-hour NAAQS. In the Reconsideration Rule published on May 26, 2005 (70 FR 30592), we determined that these 1-hour contingency measures would no longer be considered required SIP measures once the 1-hour standard was revoked. This meant that after the 1-hour standard was revoked, areas that had not submitted 1-hour attainment

¹⁵ As noted above in a previous footnote, the Court’s June 2007 clarification confirms that the December 2006 decision was not intended to establish a requirement that areas continue to demonstrate conformity under the 1-hour ozone standard for anti-backsliding purposes. Therefore, no revisions are necessary to 40 CFR 51.905(e)(3) of the Phase 1 implementation rule. Section 40 CFR 51.905(e)(3) establishes that conformity determinations for the 1-hour standard are not required beginning 1 year after the effective date of the revocation of the 1-hour standard and any state conformity provisions in an applicable SIP that require 1-hour ozone conformity determinations are no longer federally enforceable. This provision does not require revision in light of the Court’s decision and clarification, because the Court did not require conformity determinations for the 1-hour standard, and existing regulations already implement the Court’s holding that 8-hour ozone nonattainment and maintenance areas must use 1-hour ozone budgets to determine conformity to the 1997 8-hour standard until such time as 8-hour ozone budgets are approved or found adequate for the area. Therefore, current transportation conformity-related regulations set forth in 40 CFR part 93 and 40 CFR 51.905(e)(3), and the general conformity regulations in 40 CFR part 93 are consistent with the Court’s decision and clarification on the Phase 1 8-hour ozone implementation rule and do not require revision.

¹³ Memorandum of March 19, 2007 from William L. Wehrum to EPA Regional Administrators, re: “Impacts of the Court Decision on the Phase 1 Ozone Implementation Rule” (response to Question 2) and memorandum of June 15, 2007 from Robert J. Meyers to Regional Administrators re: “Decision of the U.S. Court of Appeals for the District of Columbia Circuit on our Petition for Rehearing of the Phase 1 Rule to Implement the 8-Hour Ozone NAAQS” (Implications for Subpart 1 Areas).

¹⁴ Note that if the area is nonattainment for the 1997 8-hour standard, it is subject to nonattainment NSR, contingency measures and (if severe or extreme) the section 185 penalty fee provision for that 1997 NAAQS.

demonstrations or a specific 1-hour RFP SIP would no longer be required to submit contingency measures in conjunction with those SIPs. Also, the reconsideration rule stated that areas with approved section 172 and 182 contingency measures in the adopted SIP could submit a revision to remove them from their SIP when the 1-hour standard was revoked.

2. Effect of Court Ruling

The Court concluded that EPA improperly waived the CAA requirements for contingency measures that would apply based on the failure of an area to meet a 1-hour RFP milestone or 1-hour attainment date. The Court vacated the provision of the Phase 1 Rule that waived this requirement for areas once the 1-hour standard was revoked. Consequently, areas remain subject to the obligation to have contingency measures for failure to attain the 1-hour NAAQS or make RFP toward attainment of the 1-hour NAAQS and cannot remove section 172 or 182 contingency measures from their SIPs based on revocation of the 1-hour standard.

3. Proposed Rule

The EPA is proposing that states be required to retain contingency measures in their SIPs that would apply based on a failure to meet a 1-hour RFP milestone or upon a failure to attain the 1-hour standard by the area’s attainment date. Consistent with the Court’s vacatur of § 51.905(e)(2)(iii), which waived this requirement once the 1-hour standard was revoked, EPA proposes to remove this provision from the regulations. Furthermore, consistent with EPA’s proposal to retain these 1-hour contingency measure requirements as anti-backsliding measures, we also propose to list contingency measures under sections 172(c)(9) and 182(c)(9) of the CAA as applicable requirements under § 51.900(f).

In situations where an area attains the 1-hour NAAQS by its applicable attainment date, the area is not subject to the requirement to implement contingency measures for failure to attain the standard by its attainment date. As a result, any area that meets or has met its attainment deadline, even if the area subsequently lapses into nonattainment, would not be required to implement the contingency measures for failure to attain the standard by its attainment date for purposes of anti-backsliding.

In situations where a 1-hour ozone nonattainment area is in attainment based on current air quality (e.g., after the area’s attainment date), EPA can

propose to make a finding of attainment.¹⁶ This finding would be pursuant to the interpretation set forth in the May 10, 1995 memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, entitled “Reasonable Further Progress, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone Ambient Air Quality Standard” (Clean Data Policy). Under this policy, if EPA determines through rulemaking that the area is meeting the 1-hour ozone standard, the requirements for the state to submit an attainment demonstration and related components such as reasonably available control measures (RACM), RFP demonstration, contingency measures for failure to attain or make reasonable further progress and the section 185 fees program are suspended as long as the area continues to attain the 1-hour ozone NAAQS. If the area subsequently violates the ozone NAAQS, EPA would initiate notice-and-comment rulemaking to withdraw the determination of attainment, which would result in reinstatement of the requirement for the state to submit such plans.

The Tenth, Seventh and Ninth Circuits have upheld EPA rulemakings applying the Clean Data Policy. See *Sierra Club v. EPA*, 99 F. 3d 1551 (10th Cir. 1996); *Sierra Club v. EPA*, 375 F.3d 537 (7th Cir. 2004) and *Our Children’s Earth Foundation v. EPA*, No. 04–73032 (9th Cir. June 28, 2005) memorandum opinion.¹⁷ See also the discussion and rulemakings cited in EPA’s Phase 2, 8-Hour Ozone Implementation Rulemaking, 70 FR 71644–71646 (November 29, 2005), which codified the policy for the 8-hour NAAQS.

Thus if EPA makes a determination of attainment under the Clean Data Policy, EPA would find that the requirement to submit section 172 and 182 contingency measures under the 1-hour anti-backsliding provisions (40 CFR 51.905) would be suspended for so long as the area continues to attain the 1-hour standard.

Under 40 CFR 51.905(b), states remain subject to the obligations under § 51.905(a)(1)(i) and (a)(2) until the area attains the 8-hour NAAQS for purposes of anti-backsliding. After the area attains the 8-hour NAAQS, states may request

that these obligations be shifted to contingency measures, consistent with sections 110(l) and 193 of the CAA; however, the state cannot remove the obligations from the SIP.

D. Deletion of Obsolete 1-Hour Ozone Standard Provision

For the reasons stated above in the background section concerning the obsolete nature of 40 CFR 50.9(c), we are proposing to delete that paragraph. This will have no effect on the status of the 1-hour ozone standard,¹⁸ or on the anti-backsliding provisions which set forth how areas must meet 1-hour requirements that applied to the area at the time the area was designated for the 8-hour standard.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

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

B. Paperwork Reduction Act

This action does not impose any new information collection burden. This action sets forth EPA’s proposed rule for addressing portions of the partial vacatur of EPA’s Phase 1 rule for implementation of the 1997 8-hour ozone NAAQS. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing Phase 1 Rule (April 30, 2004; 69 FR 23951) and the Phase 2 Rule (November 29, 2005; 70 FR 71612) regulations and has been assigned OMB Control Number 2060–0594. The OMB control numbers for EPA’s regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an Agency to prepare a regulatory flexibility analysis of any regulation subject to notice and

comment rulemaking requirements under the Administrative Procedures Act or any other statute unless the Agency certifies the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

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

After considering the economic impact of these proposed revisions to the regulations on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This proposal will not impose any requirements on small entities.

We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This action contains no Federal mandate under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for State, local, or tribal governments or the private sector. The action imposes no enforceable duty on any State, local or tribal governments or the private sector. Therefore, this action is not subject to the requirements of section 202 and 205 of the UMRA.

This action 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. The EPA has determined that these proposed regulation revisions contain no regulatory requirements that may significantly or uniquely affect small governments, including tribal governments because these regulations affect Federal agencies only.

E. Executive Order 13132—Federalism

Executive Order 13132, entitled “Federalism” (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure “meaningful and timely input by state

¹⁶ This applies even if the area did not attain by its attainment date; however, the CAA requires EPA in these cases to make a finding of failure to attain by the attainment date and either reclassify the area or apply other requirements (such as section 185) as specified for the area’s classification.

¹⁷ The Clean Data Policy, as it is embodied in 40 CFR 51.918, is being challenged in the context of the 8-hour ozone standard in the Phase 2 Rule ozone litigation pending in the DC Circuit, *NRDC v. EPA*, No. 06–1045 (DC Cir.).

¹⁸ The 1-hour standard was revoked for most areas on June 15, 2005, the date one-year after the effective date of designation. For the 13 EAC areas designated attainment with an effective date of April 15, 2008, the 1-hour standard will be revoked April 15, 2009, and for the Denver EAC area, which was designated nonattainment effective November 20, 2007, the 1-hour standard will be revoked November 20, 2008.

and local officials in the development of regulatory policies that have Federalism implications." Policies that have "Federalism implications" are defined in the Executive Order to include regulations that have "substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government."

This action does not have Federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This proposed rule, if made final, would restore provisions that existed under the 1-hour ozone standard and that would have continued under the 1-hour standard had not EPA issued a revised ozone standard. Those provisions were revoked when EPA revoked the 1-hour standard itself. Although a court upheld EPA's right to revoke the 1-hour standard, the court ruled that EPA erroneously revoked several 1-hour NAAQS provisions and vacated those portion of EPA's rule. Thus, the court's own ruling restored the former 1-hour NAAQS provisions. This proposed rule merely proposes a corrective regulatory mechanism for restoring the 1-hour contingency measure provision that the court had already restored. Thus, Executive Order 13132 does not apply to these proposed regulation revisions.

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

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

This action does not have Tribal implications as specified in Executive Order 13175. They do not have a substantial direct effect on one or more Indian Tribes, since no Tribe has to develop a SIP under these proposed regulatory revisions. Furthermore, these proposed regulation revisions do not affect the relationship or distribution of power and responsibilities between the Federal government and Indian Tribes. The CAA and the Tribal Air Rule establish the relationship of the Federal

government and Tribes in developing plans to attain the NAAQS, and these revisions to the regulations do nothing to modify that relationship. Thus, Executive Order 13175 does not apply.

EPA specifically solicits additional comment on the proposed revisions to the regulations from Tribal officials.

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

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because these proposed rule revisions address whether a SIP will adequately attain and maintain the NAAQS and meet the obligations of the CAA. The NAAQS are promulgated to protect the health and welfare of sensitive population, including children. However, EPA solicits comments on whether the proposed action would result in an adverse environmental effect that would have a disproportionate effect on children.

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

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer Advancement Act

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

This proposed rulemaking does not involve technical standards. Therefore,

EPA is not considering the use of any voluntary consensus standards.

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

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

EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. The proposed revisions to the regulations would, if promulgated revise procedures for states to follow in developing SIPs to attain the NAAQS, which are designed to protect all segments of the general populations. As such, they do not adversely affect the health or safety of minority or low income populations and are designed to protect and enhance the health and safety of these and other populations.

K. Determination Under Section 307(d)

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

Appendix A to Preamble. Application of the Proposed Classification Scheme

This appendix lists the proposed new subpart 2 classifications for the areas that were originally covered under subpart 1 in the phase 1 rule (April 30, 2004) and that are currently still designated nonattainment. The geographic boundaries of these nonattainment areas are provided in 40 CFR Part 81, Subpart C.

Current nonattainment areas not classified under phase 1 rule, as vacated by the court ^a	2001–2003 8-hour ozone design value ppm	Proposed subpart 2 classification	2004–2006 8-hour ozone design value ppm	2005–2007 8-hour ozone design value ppm
Albany-Schenectady-Troy, NY ^e	0.087	Marginal	0.078	0.079
Allegan Co, MI	0.097	Moderate	0.088	0.093
Amador and Calaveras Cos (Central Mtn), CA ^c	0.091	Moderate	0.093	0.090
Buffalo-Niagara Falls, NY	0.099	Moderate	0.083	0.086
Chico, CA ^e	0.089	Marginal	0.084	0.084
Cincinnati-Hamilton, OH-KY-IN	0.096	Moderate	0.086	0.088
Clearfield & Indiana Cos, PA ^e	0.09	Marginal	0.077	0.080
Columbus, OH	0.095	Moderate	0.084	0.087
Denver-Boulder-Greeley-Ft. Collins-Love, CO ^b	0.087	Marginal	0.081	0.085
Door Co, WI ^d	0.094	Moderate	0.086	0.090
Essex Co (Whiteface Mtn), NY ^d	0.091	Marginal	NAV	NAV
Greene Co, PA ^e	0.089	Marginal	0.079	0.080
Haywood and Swain Cos (Great Smoky NP), NC ^e	0.085	Marginal	0.076	0.078
Jamestown, NY	0.094	Moderate	0.086	0.086
Kern Co (Eastern Kern), CA	0.098	Moderate	0.086	0.085
Knoxville, TN	0.092	Moderate	0.084	0.088
Las Vegas, NV ^e	0.086	Marginal	0.083	0.086
Manitowoc Co, WI ^e	0.09	Marginal	0.082	0.086
Mariposa and Tuolumne Cos (Southern Mtn), CA ^c	0.091	Moderate	0.086	0.085
Nevada Co. (Western Part), CA	0.098	Moderate	0.096	0.095
Phoenix-Mesa, AZ ^e	0.087	Marginal	0.083	0.083
Pittsburgh-Beaver Valley, PA	0.094	Moderate	0.083	0.087
Rochester, NY ^e	0.088	Marginal	0.072	0.080
San Diego, CA	0.093	Moderate	0.088	0.089
Sutter Co (Sutter Buttes), CA ^e	0.088	Marginal	0.082	0.081

^a A number of areas that were placed in Subpart 1 under the vacated portion of the Phase 1 Rule have since attained the 8-hour ozone standard and have been redesignated to attainment. Because these areas are now designated attainment for the ozone standard, they are not nonattainment areas subject to classification and thus are not included in this table.

^b Denver originally participated in the Early Action Compact (EAC) program and was listed in the April 30, 2004 designation action as a nonattainment area under subpart 1; its nonattainment designation was deferred until November 20, 2007, at which time based on a violation of the 1997 8-hour ozone NAAQS, Denver's nonattainment designation became effective. Denver has planning requirements as a former EAC area.

^c Area would have been marginal but did not have attaining design values by the marginal area attainment date (June 15, 2007) (based on 2004-2006 design values).

^d Essex Co (the top of Whiteface Mtn), NY, and Door County, WI, would be eligible for consideration under CAA section 182(h) as Rural Transport Areas. This is based on the 1999 definition of Metropolitan Statistical Areas; neither of the above two areas is in or adjacent to an MSA as defined by the Office of Management and Budget (OMB) in 1999 (June 30, 1999; 64 FR 35548). Essex Co does not have a design value for the 2005-2007 period (indicated by NAV (not available)).

^e These areas had attaining design values as of the marginal area attainment date (June 15, 2007) (based on 2004–2006 design values).

List of Subjects

40 CFR Part 50

Environmental protection, Air pollution control, Carbon monoxide, Lead, Nitrogen dioxide, Ozone, Particulate matter, Sulfur oxides.

40 CFR Part 51

Air pollution control, Intergovernmental relations, Ozone, Particulate matter, Transportation, Volatile organic compounds.

Authority: 42 U.S.C. 7409; 42 U.S.C. 7410; 42 U.S.C. 7511–7511f; 42 U.S.C. 7601(a)(1).

Dated: January 9, 2009.

Stephen L. Johnson,
Administrator.

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

PART 50—NATIONAL PRIMARY AND SECONDARY AMBIENT AIR QUALITY STANDARDS

1. The authority citation for part 50 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

§ 50.9 [Amended]

2. Section 50.9 is amended by removing and reserving paragraph (c).

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

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

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

Subpart X—[Amended]

4. Section 51.900 is amended by adding paragraph (f)(14) to read as follows:

§ 51.900 Definitions.

* * * * *

(f) * * *

(14) Contingency measures under CAA sections 172(c)(9) and 182(c)(9) that would be triggered based on a failure to attain the 1-hour NAAQS by the applicable attainment date or to make reasonable further progress toward attainment of the 1-hour NAAQS.

* * * * *

5. Section 51.902 is revised to read as follows:

§ 51.902 Which classification and nonattainment area planning provisions of the CAA shall apply to areas designated nonattainment for the 8-hour NAAQS?

(a) An area designated nonattainment for the 8-hour NAAQS will be classified in accordance with section 181 of the CAA, as interpreted in § 51.903(a), for purposes of the 8-hour NAAQS, and will be subject to the requirements of subpart 2 that apply for that classification.

(b) [Reserved]

6. Section 51.905 is amended as follows:

a. By adding a sentence to the end of paragraph (b).

- b. By removing and reserving paragraphs (e)(2)(ii) and (e)(2)(iii).
c. By removing paragraph (e)(4).

§ 51.905 How do areas transition from the 1-hour NAAQS to the 8-hour NAAQS and what are the anti-backsliding provisions?

* * * * *

(b) * * * Once an area attains the 1-hour NAAQS, the section 172 and 182 contingency measures under the 1-hour NAAQS can be shifted to contingency measures for the 8-hour ozone NAAQS and must remain in the SIP until the area is redesignated to attainment for the 8-hour NAAQS.

* * * * *

[FR Doc. E9-806 Filed 1-15-09; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R02-OAR-2008-0497, FRL-8763-4]

Approval and Promulgation of Implementation Plans; New Jersey Reasonable Further Progress Plans, Reasonably Available Control Technology, Reasonably Available Control Measures and Conformity Budgets

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing action on portions of two State Implementation Plan revisions submitted by New Jersey that are intended to meet several Clean Air Act (Act) requirements for attaining the 0.08 part per million (ppm) 8-hour ozone national ambient air quality standards. EPA is proposing approval of: The 2008 reasonable further progress plan and associated 2008 ozone projection year emission inventories, contingency measures for the 2008 reasonable further progress plan, 2008 conformity budgets used for planning purposes, and the reasonably available control measure analysis. In addition, EPA is proposing a conditional approval of New Jersey's efforts to meet the reasonably available control technology requirement. The intended effect of this action is to approve those programs that meet Act requirements and to further achieve emission reductions that will be critical to attainment of the national ambient air quality standard for ozone in New Jersey's two nonattainment areas.

DATES: Comments must be received on or before February 17, 2009.

ADDRESSES: Submit your comments, identified by Docket Number EPA-R02-OAR-2008-0497, by one of the following methods:

- <http://www.regulations.gov>: Follow the on-line instructions for submitting comments.

- *E-mail:* Werner.Raymond@epa.gov.
- *Fax:* 212-637-3901

- *Mail:* Raymond Werner, Chief, Air Programs Branch, Environmental Protection Agency, Region 2 Office, 290 Broadway, 25th Floor, New York, New York 10007-1866.

- *Hand Delivery:* Raymond Werner, Chief, Air Programs Branch, Environmental Protection Agency, Region 2 Office, 290 Broadway, 25th Floor, New York, New York 10007-1866. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30 excluding Federal holidays.

Instructions: Direct your comments to Docket No. EPA-R02-OAR-2008-0497. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov> your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters or any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

www.regulations.gov or e-mail. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov> your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters or any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

Docket: All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at the Environmental Protection Agency, Region II Office, Air Programs Branch, 290 Broadway, 25th Floor, New York, New York 10007-1866. EPA requests, if at all possible, that you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8 a.m. to 4 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Raymond Forde (forde.raymond@epa.gov) concerning emission inventories and reasonable further progress and Paul Truchan (truchan.paul@epa.gov) concerning other portions of the SIP revision, Air Programs Branch, Environmental Protection Agency, 290 Broadway, 25th Floor, New York, New York 10007-1866, (212) 637-4249.

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