

Executive Order 13132—Federalism

This rule does not have federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to “establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.” Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be “in accordance with” the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations “consistent with” regulations issued by the Secretary under SMCRA.

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that, to the extent allowed by law, this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

Executive Order 13211—Regulations That Significantly Affect The Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and because it is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

Section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that a decision on a proposed State regulatory program provision does not constitute a major Federal action within the meaning of section 102(2)(C) of the National Environmental Policy Act (NEPA) (42 U.S.C. 4332(2)(C)). A determination has been made that such decisions are categorically excluded from the NEPA process (516 DM 8.4.A).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal which is the subject of this rule is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

- Does not have an annual effect on the economy of \$100 million.
- Will not cause a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions.
- Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises.

This determination is based upon the fact that the State submittal which is the subject of this rule is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal

regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose a cost of \$100 million or more in any given year on any governmental entity or the private sector.

List of Subjects in 30 CFR Part 904

Intergovernmental relations, Surface mining, Underground mining.

Dated: September 5, 2001.

Malcolm B. Ahrens,

Acting Regional Director, Mid-Continent Regional Coordinating Center.

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ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 93**

[FRL-7075-6]

RIN 2060-AJ70

Transportation Conformity Rule Amendments: Minor Revision of 18-Month Requirement for Initial SIP Submissions and Addition of Grace Period for Newly Designated Nonattainment Areas

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing two minor revisions to the transportation conformity rule. Transportation conformity is required by the Clean Air Act to ensure that federally supported highway and transit project activities are consistent with (“conform to”) the purpose of a state air quality implementation plan (SIP). Conformity to the purpose of the SIP means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment of the national ambient air quality standards. EPA’s transportation conformity rule establishes the criteria and procedures for determining whether transportation activities conform to the state air quality plan.

Today’s proposal would implement a recent Clean Air Act amendment that provides a one-year grace period before conformity is required in areas that are designated nonattainment for a given air quality standard for the first time. This Clean Air Act amendment was enacted on October 27, 2000. Today’s proposal formally adds the one-year conformity grace period to the conformity rule, but the grace period can already be used by

newly designated nonattainment areas as a matter of law.

This proposal would also revise the timing for determining conformity after a State submits a control strategy implementation plan or maintenance plan for the first time (an "initial" SIP submission). The current conformity rule requires a conformity determination within 18 months of the submission of an initial SIP. The proposed rule would change this requirement, so that conformity would be required within 18 months of EPA's affirmative finding that the SIP's motor vehicle emissions budgets are adequate. EPA is proposing this revision as a result of the March 2, 1999, ruling by the U.S. Court of Appeals for the District of Columbia Circuit Court (*Environmental Defense Fund v. EPA, et al.*, 167 F. 3d 641, D.C. Cir. 1999). The court stated that motor vehicle emissions budgets from an initial SIP submission can only be used for conformity once EPA affirmatively finds the budgets adequate. Under this approach, state and local agencies have sufficient time to redetermine conformity where initial SIPs are submitted and after EPA finds such budgets adequate. The preamble to the proposal also clarifies what is considered an initial SIP submission under the conformity rule.

DATES: Comments on this action must be received by November 5, 2001.

ADDRESSES: Comments should be submitted (in duplicate, if possible) to: Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, Attention: Docket No. A-2001-12, 1200 Pennsylvania Avenue, Mail Code 6102, Washington, DC 20460.

Materials relevant to this rulemaking are in Public Docket A-2001-12 located at the U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460 in Room M-1500, Waterside Mall (ground floor). Ph: 202-260-7548. The docket is open and supporting materials are available for review between 8 a.m. and 5:30 p.m. on all federal government workdays. You may have to pay a reasonable fee for copying docket materials.

This proposal is available electronically from our web site. See **SUPPLEMENTARY INFORMATION** for information on accessing and downloading files.

FOR FURTHER INFORMATION CONTACT: Denise Kearns, State Measures and Conformity Group, Transportation and Regional Programs Division, U.S. Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI

48105, kearns.denise@epa.gov, (734) 214-4240; or Meg Patulski, State Measures and Conformity Group, Transportation and Regional Programs Division, U.S. Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105; patulski.meg@epa.gov; (734) 214-4842.

SUPPLEMENTARY INFORMATION: You can access and download today's proposal on your computer by going to the following address on EPA's Web site:

Internet Web Site

<http://www.epa.gov/otaq/traq> (Once at the site, click on "conformity.")

Regulated Entities

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

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

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

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

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I. What Is Transportation Conformity?

Transportation conformity is required under section 176(c) of the Clean Air Act (42 U.S.C. 7506(c)) to ensure that federally supported highway and transit project activities are consistent with ("conform to") the purpose of a state air quality implementation plan (SIP). Conformity to the purpose of the SIP means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment of the national ambient air quality standards. EPA's transportation conformity rule (40 CFR parts 51 and 93) establishes the criteria and procedures for determining whether transportation activities conform to the state air quality plan.

EPA first published the transportation conformity rule on November 24, 1993 (58 FR 62188). Minor revisions were initially made to the rule in 1995 (60 FR 40098, August 7, 1995 and 60 FR 57179, November 14, 1995), and more recently in the spring of 2000 (65 FR 18911, April 10, 2000).

On August 15, 1997, a comprehensive set of amendments was published that clarified and streamlined language from the 1993 transportation conformity rule (62 FR 43780). However, several provisions from the 1997 rulemaking were affected by the U.S. Court of Appeals for the District of Columbia Circuit in a decision made on March 2, 1999 (*Environmental Defense Fund v. EPA, et al.*, 167 F. 3d 641, D.C. Cir. 1999). Today's proposal addresses the impact of the March 2, 1999, court decision on one provision of the conformity rule. In addition to today's action, we are preparing a future proposal that will further amend the 1997 conformity rule based on the remaining issues addressed by the court's March 2, 1999, decision.

In the interim, areas where conformity applies are currently operating under

administrative guidance that EPA and the U.S. Department of Transportation (DOT) issued to address the provisions directly affected by the court decision [May 14, 1999, Memorandum from Gay MacGregor, then-Director of the Regional and State Programs Division of EPA's Office of Transportation and Air Quality, to Regional Air Division Directors, "Conformity Guidance on Implementation of March 2, 1999, Conformity Court Decision;" and June 18, 1999, Memorandum from Kenneth R. Wykle, then-Administrator, Federal Highway Administration (FHWA), and Gordon J. Linton, then-Administrator, Federal Transit Administration (FTA), to FHWA Division Administrators, Federal Lands Highway Division Engineers, and FTA Regional Administrators, "Additional Supplemental Guidance for the Implementation of the Circuit Court Decision Affecting Transportation Conformity"]. See EPA's web site listed in the **SUPPLEMENTARY INFORMATION** section to download an electronic version of any of these memoranda.

II. One-year Grace Period for Newly Designated Nonattainment Areas

A. Background

Newly designated nonattainment areas are any geographic areas or portions of such areas which EPA designates as nonattainment for the first time for a given air quality standard. EPA designates an area as "nonattainment" when its air quality violates the national ambient air quality standards (NAAQS) set by EPA to protect public health. EPA designates areas nonattainment through the **Federal Register**. Nonattainment areas that are reclassified (or "bumped up") to a higher classification of nonattainment for a given standard are not considered newly designated nonattainment areas. An area that is redesignated from nonattainment to attainment (i.e., becomes a maintenance area) is not considered a newly designated nonattainment area. Finally, a maintenance area that is redesignated from attainment to nonattainment is also not considered a newly designated nonattainment area for the purposes of this proposal.

Areas can be designated nonattainment for more than one air quality standard. For example, if an area is currently designated as a carbon monoxide nonattainment area but now has monitoring data which show that it is violating an ozone standard, the area would be considered a newly designated nonattainment area for ozone

once EPA's final ozone nonattainment designation is effective.

In the November 1995 conformity rule, EPA gave newly designated nonattainment areas a one-year grace period before conformity applied for a given standard (§ 93.102(d) of the November 14, 1995 final rule, 60 FR 57179). However, this provision was challenged by the Sierra Club, and the U.S. Court of Appeals for the District of Columbia Circuit overturned the grace period on November 4, 1997 (*Sierra Club v. EPA, et al.*, 129 F.3d 137, D.C. Cir. 1997). The court concluded that the Clean Air Act in effect at that time did not provide such a grace period. In compliance with the court's decision, EPA deleted § 93.102(d) in a final rule published on April 10, 2000 (65 FR 18911).

However, on October 27, 2000, an amendment to the Clean Air Act was enacted providing for the one-year grace period for conformity in newly designated nonattainment areas, effective immediately [42 U.S.C. 7506(c)(6)].

B. What Are We Proposing?

As a result of Congress' action, EPA is proposing to add the one-year conformity grace period for newly designated nonattainment areas for a given air quality standard to the transportation conformity rule. We are proposing this change to make the transportation conformity rule consistent with the amended Clean Air Act.

C. How Soon Does Conformity Apply in a Newly Designated Nonattainment Area?

Under the current Clean Air Act as amended in October 2000, conformity applies one year after EPA first designates an area or portion of an area nonattainment for a given air quality standard. More specifically, conformity applies one year after the effective date of EPA's final nonattainment designation, as published in the **Federal Register**.

Therefore, one year after the effective date of EPA's designation of an area to nonattainment for a given standard, a conforming transportation plan and transportation improvement program (TIP) must be in place in order to fund or approve transportation projects, or the area will be in a conformity lapse.

In the absence of a conforming transportation plan and TIP, no new project-level conformity determinations may be made. According to existing guidance, exempt projects listed in § 93.126, projects listed in § 93.127, and projects that have received final funding

commitments or approvals from the FHWA or FTA can proceed toward implementation. Transportation control measures (TCMs) that EPA has approved into a SIP can also proceed during a conformity lapse. TCMs are projects which support air quality goals by reducing travel or affecting congestion. A new conformity determination for the transportation plan and TIP based on all pollutants that apply is necessary to end the conformity lapse.

The transportation plan and TIP must conform with respect to all pollutants for which the area is designated nonattainment. Transportation conformity applies in areas that are designated nonattainment for an ozone standard, carbon monoxide, particulate matter, and nitrogen dioxide criteria pollutants. For example, a carbon monoxide nonattainment area which is subsequently designated nonattainment for ozone has a one-year grace period before conformity determinations must be made for ozone; conformity would continue to apply in the interim for CO. By the end of the one-year grace period, a transportation plan and TIP conformity determination must be in place for all pollutants in a given area, in this case, for carbon monoxide and ozone.

D. Why Is a One-year Grace Period Beneficial for Newly Designated Nonattainment Areas?

Although there are opportunities for newly designated areas to prepare for the conformity process prior to the effective date of a nonattainment designation, areas with little or no conformity experience will find a one-year grace period beneficial. The grace period will provide these areas with additional time to evaluate their long range transportation plans, TIPs, and projects, and to complete the conformity process.

III. Conformity Determinations for Initial SIP Submissions

A. Background

Under § 93.104(e)(2) of the current conformity rule, a new conformity determination for the transportation plan and TIP is required no later than 18 months after the date that a State submits for the first time a SIP (i.e., an initial SIP submission) that establishes motor vehicle emissions budgets. This provision was created in the November 14, 1995, final rule (60 FR 57179) and August 15, 1997, final rule (62 FR 43780) amending the conformity requirement. See these final rules and the proposals (60 FR 44790, August 29,

1995, and 61 FR 36111, July 9, 1996) for more background information.

An initial SIP submission is a control strategy SIP (i.e., a reasonable further progress or attainment demonstration SIP) or a maintenance plan that is submitted for the first time to address a specific Clean Air Act requirement and includes budgets that can be used for conformity purposes. A revision to an existing approved SIP for a certain Clean Air Act requirement is not considered an initial SIP submission and therefore would not start a new 18-month clock under § 93.104(e)(2).

Under the current conformity rule, if conformity is not determined within 18 months of an initial SIP submission, the conformity status of the transportation plan and TIP lapse. See Section II.C. of this proposal for more information of which projects can proceed during a lapse. A new conformity determination based on the initial SIP's budgets that EPA has found adequate and any other adequate budgets is necessary to avoid or end a conformity lapse.

There may be limited cases where an initial SIP is submitted, EPA finds its budgets adequate, but then the state submits a revision to the initial SIP with budgets that EPA also finds adequate. In this case, if conformity has not yet been determined to the budgets in the first submission, the conformity determination to satisfy the 18-month clock must be demonstrated to the budgets in the revised SIP. The budgets in the previous SIP submission would no longer apply for conformity purposes, since EPA has found the new budgets adequate.

As stated in the preamble to the August 29, 1995 proposal (60 FR 44792), "[t]he 18-month time period for determining conformity would not be affected by subsequent changes to the submitted control strategy SIP. For example, if within the 18-month period the initial submission is revised before conformity has been determined, the 18-month clock would not be restarted. However, when conformity is eventually determined, the relevant motor vehicle emissions budgets must be used. If conformity to the initial submission has been demonstrated and that submission is subsequently revised, no 18-month clock would be started, until, as required in (§ 93.104(e)(3)), the SIP is approved by EPA."

B. What Are We Proposing?

EPA is proposing a minor revision to § 93.104(e)(2) to ensure that transportation planners have sufficient time to consider new air quality information in the transportation planning process, so that the goals of air

quality plans are achieved. EPA proposes to change the trigger point or starting point of the requirement to determine conformity from within 18 months of an initial SIP submission to within 18 months of the effective date of the **Federal Register** notice announcing EPA's finding that the budgets in an initial SIP submission are adequate. The net effect is that areas will have the full 18 months to satisfy the conformity requirement for initial submissions. See Section III.D. for examples of how today's proposal would be implemented.

Today's proposal does not change the current requirement to redetermine conformity for each initial SIP that is submitted for a given pollutant, standard, and Clean Air Act requirement. For example, an 18-month conformity clock would still be started for the first attainment demonstration for a given pollutant and standard that an area submits and EPA finds adequate. Other conformity determinations would be triggered by the first rate-of-progress SIP or maintenance plan that is submitted and found adequate for each standard that applies. Today's proposal changes only the date on which these 18-month clocks begin to run. As previously discussed, if an area revises its initial SIP submission and EPA finds the revised budgets adequate before § 93.104(e)(2) is satisfied, then the conformity determination would be based on the budgets in the most recent submission found to be adequate.

Finally, today's proposal does not change the current rule's requirement that an area need only satisfy the 18-month requirement to determine conformity to an initial SIP submission once for a given Clean Air Act requirement. Once § 93.104(e)(2) is satisfied, EPA believes that it does not have to be satisfied again for subsequent submissions of the same type prior to EPA SIP approval. EPA required the 18-month conformity determination clock to introduce new air quality data into the conformity process quickly. Once this has been done, it would be unreasonable to require further determinations where SIP submissions are revised. A new 18-month clock also starts when EPA approves each control strategy SIP revision and maintenance plan which establishes or revises a motor vehicle emissions budget, according to § 93.104(e)(3) of the transportation conformity rule. EPA believes that this requirement, along with other transportation planning and conformity requirements, provides a sufficient opportunity for periodically

introducing new air quality information into the conformity process.

C. Why Are We Proposing This Change?

The proposal would ensure that all areas have the full 18 months from the time motor vehicle emissions budgets become adequate to make transportation plan and TIP conformity determinations to initial SIP submissions, which is not the case under the current conformity rule.

In the 1997 conformity rule (40 CFR 93.118(e)(1)), areas could use the motor vehicle emissions budgets from an initially submitted SIP for conformity 45 days after we received the SIP, unless EPA declared the budgets inadequate for conformity purposes. On March 2, 1999, the U.S. Court of Appeals for the D.C. Circuit issued a decision on a challenge to the 1997 transportation conformity rule (*Environmental Defense Fund v. EPA, et al.*, 167 F. 3d 641, D.C. Cir. 1999). The court ruled that SIP budgets cannot be used for conformity until EPA affirmatively finds those budgets adequate.

In response to the court's decision, EPA issued guidance regarding the process that is used to review the adequacy of budgets for conformity purposes. The process described in this guidance has been in effect since shortly after the court's March 2, 1999, ruling (May 14, 1999, EPA memorandum from Gay MacGregor, then-Director of the Regional and State Programs Division in the Office of Transportation and Air Quality, to Regional Air Division Directors, "Conformity Guidance on Implementation of March 2, 1999, Court Decision").

Today's action would align the conformity rule with EPA's existing guidance and with the March 2, 1999, conformity court decision. Requiring conformity following the effective date of EPA's adequacy finding on the budgets, instead of the date that an initial SIP is submitted, ensures that new information is incorporated in a timely and reasonable manner.

As described in the May 14, 1999, memorandum, EPA's current adequacy process starts when a new SIP is submitted and ends with the effective date of our adequacy finding, which we formally announce through a **Federal Register** notice. EPA tries to complete an adequacy review in approximately three months, although in some cases additional time is needed.

Areas cannot begin the process of determining conformity using the submitted budgets with certainty until EPA has determined that the budgets are adequate. Under our current conformity rule and the court decision, a

conformity determination cannot be made until budgets are found adequate, and therefore, transportation agencies may not want to invest time and resources completing a regional emissions analysis and conformity determination prior to knowing which SIP budgets apply. As a result, under the current rule, areas have a maximum of 15 months to determine conformity following an initial SIP submission (i.e., the 18-month conformity clock for initial submissions minus the three months minimally required for EPA to determine adequacy). Where adequacy review is complex and subsequently delayed, areas may have even less time to determine conformity under the current rule. As a practical matter, if budgets cannot be used until EPA completes its adequacy review and the finding becomes effective, the 18-month clock for conformity should not start until that time. EPA believes it is more equitable for areas to have the full 18 months to complete conformity determinations.

There can also be situations where EPA finds submitted budgets adequate, but later finds them inadequate because new information has become available that affects the adequacy of the budgets. In these situations, conformity implementers may try in good faith to determine conformity to adequate budgets in an initial SIP submission within 18 months, only to have the budgets found inadequate before a conformity determination is made.

To address the situations described above and based on our experience in implementing conformity to date, EPA continues to believe that areas should have the full 18 months to determine conformity. An 18-month period provides areas with the time needed to assess new information contained in a SIP. We continue to encourage air quality and transportation planners to coordinate their processes so that new air quality plans can be used expeditiously in the transportation conformity and planning processes.

Finally, today's proposal does not weaken the conformity rule provisions or the SIP process. For example, EPA considered whether starting the 18-month clock from adequacy (rather than from the state's submission of the SIP) would result in SIPs being submitted with inadequate budgets.

EPA does not believe that this situation would be encouraged by today's proposal. There are many other considerations, aside from the conformity process, that are in place to encourage the development of SIPs that can be approved with adequate budgets. Due to the significant level of state and

local government resources that are involved in developing a SIP that meets Clean Air Act requirements, it is unlikely that a state or area would choose to submit a SIP with inadequate budgets simply to avoid an 18-month conformity clock from starting for an initial SIP submission.

D. Examples: When Would an 18-Month Clock Start for an Initial SIP Submission?

The following examples help illustrate what types of situations trigger or do not trigger the 18-month conformity requirement for initial SIP submissions. There could be other cases that are not described here but could be implemented under this proposal.

How would this proposal affect areas where an 18-month clock is currently running? In areas where an 18-month clock for an initial submission has already started and has not yet been satisfied, this proposed change would alter those clocks. In these areas, EPA proposes that a new 18-month clock would be started on the effective date of EPA's positive adequacy finding for budgets contained in an initial SIP submission. If EPA has already found budgets in the initial SIP submission adequate and conformity has not been determined to these budgets, the new 18-month clock would begin on the effective date of EPA's affirmative adequacy finding. An 18-month clock would not yet be started if EPA is still reviewing budgets for adequacy, or if EPA subsequently finds submitted budgets inadequate.

For example, suppose an area submitted its first attainment demonstration 15 months ago. EPA found the budgets in the attainment demonstration adequate, and our finding was effective five months after submission. A conformity determination on the transportation plan and TIP has yet to be made. Under our current rule, the area would have only three more months to do conformity (i.e., the current rule requires conformity to be determined 18 months after submission, and it has been 15 months since the SIP was submitted). In contrast, under today's proposal, the area would still have eight months to determine conformity to the budgets in the initial SIP (i.e., the clock would start on the effective date of EPA's adequacy finding which happened 10 months ago).

Is a new conformity determination triggered if EPA finds the budgets inadequate during its adequacy review? No, if EPA finds budgets inadequate, the 18-month clock for a conformity determination would not be triggered. Inadequate budgets cannot be used for

conformity determinations, and the requirement to conduct a determination is only triggered by budgets that can be used for conformity. An 18-month conformity clock would be triggered in the future if a new SIP is submitted for the same Clean Air Act requirement and EPA finds its budgets adequate. This new SIP would be considered an initial submission since the prior SIP's budgets were found inadequate.

What happens if EPA finds the budgets adequate but later finds them inadequate? There have been limited cases where EPA finds the budgets adequate during our initial adequacy review, but EPA later reverses its decision because of new information that indicates that the budgets are in fact inadequate.

In such a case under the current rule and under this proposal, if a conformity determination had been approved by the metropolitan planning organization (MPO) and the Department of Transportation (DOT) before the effective date of the **Federal Register** notice announcing EPA's subsequent finding that the budgets are inadequate, the requirement to determine conformity within 18 months of the initial attainment demonstration would be satisfied. The conformity determination for the transportation plan and TIP would continue to remain valid, pursuant to § 93.118(e)(3) of the current conformity rule and this proposal. In this particular case, a new 18-month conformity clock for an initial submission would not start if the state subsequently makes a new initial SIP submission containing budgets that EPA also finds adequate. A new 18-month clock would not start in this situation because the conformity requirement for initial submissions only needs to be satisfied once for a specific Clean Air Act requirement.

However, if the MPO and DOT had not determined conformity to the submitted budgets before EPA found the budgets inadequate, the requirement to determine conformity within 18 months of an initial SIP submission under § 93.104(e)(2) would not be satisfied. In this situation, EPA is proposing that an 18-month clock would start when the state makes a new initial SIP submission and EPA finds its budgets adequate for conformity purposes. Transportation agencies would have a new 18-month time period to determine conformity once the new budgets are in place.

In certain ozone areas, is a new 18-month conformity clock started when EPA finds budgets adequate that are submitted to reflect additional control measures or MOBILE6 estimates of Tier 2 vehicle and fuel standards? No, EPA

has already stated that these SIP revisions are not initial SIP submissions that start 18-month clocks under § 93.104(e)(2).¹ EPA addressed this question in the July 28, 2000, supplemental notice of proposed rulemaking (65 FR 46386) for certain ozone nonattainment areas.

IV. How Would Today's Proposal Affect Conformity SIPs?

Clean Air Act section 176(c)(4)(C) requires states to submit revisions to their SIPs to reflect the criteria and procedures for determining conformity.

Section 51.390(b) of the conformity rule specifies that after EPA approves a conformity SIP revision, the federal conformity rule no longer governs conformity determinations (for the parts of the rule that are covered by the approved conformity SIP). In some areas, EPA has already approved conformity SIPs which include § 93.104(e)(2) from the 1997 transportation conformity rule. In these areas, the final rule amendment that changes this requirement as described in today's proposal will be effective only when this amendment is included in a conformity SIP revision and EPA approves that SIP revision. EPA will work with states to approve such revisions as expeditiously as possible through flexible administrative techniques such as parallel processing and direct final rulemaking.

In contrast, the one-year conformity grace period applies as a statutory matter for all newly designated nonattainment areas, including areas that have EPA-approved conformity SIPs, since this grace period is already required as a matter of law.

V. Administrative Requirements

A. Executive Order 12866

Under Executive Order 12866, [58 FR 51735 (October 4, 1993)] the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines significant "regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more, or otherwise adversely affect in a material way the economy, a sector of the

economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof;

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this proposal is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review.

B. Paperwork Reduction Act

This proposal does not impose any new information collection requirements from EPA which require approval by OMB under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information, unless it displays a currently valid OMB control number.

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

C. Regulatory Flexibility Analysis

The Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires the agency to conduct a regulatory flexibility analysis of any significant impact a rule will have on a substantial number of small entities. Small entities include small businesses, small not-for-profit organizations and small government jurisdictions.

EPA has determined that today's proposed rule will not have a significant impact on a substantial number of small entities. This regulation directly affects federal agencies and metropolitan

planning organizations, which by definition are designated only for metropolitan areas with a population of at least 50,000. These organizations do not constitute small entities. The Regulatory Flexibility Act defines a "small governmental jurisdiction" as the government of a city, county, town, school district or special district with a population of less than 50,000.

Therefore, as required under section 605 of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, I certify that this proposed rule will not have a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates

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

EPA has determined that this proposed rule does not contain a Federal mandate that may result in

¹ In this answer, EPA is assuming that the original attainment budgets that included interim MOBILE5-based Tier 2 estimates were adequate and approved as part of the attainment demonstration. If the original MOBILE5-based budgets were found inadequate prior to being used in a conformity determination, then the MOBILE6 budgets would be considered an initial submission that starts an 18-month clock under § 93.104(e)(2).

expenditures of \$100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. These rule amendments simplify the conformity rule and make it more practicable to implement and are being promulgated to formalize what the court and Congress have already decided as a legal matter. They do not impose any additional burdens. Thus, today's proposed rule is not subject to the requirements of sections 202 and 205 of the UMRA and EPA has not prepared a statement with respect to budgetary impacts.

E. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law No. 104-113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This rulemaking does not involve technical standards. Therefore, the use of voluntary consensus standards does not apply to this proposed rule.

F. Executive Order 13045

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

This proposal is not subject to Executive Order 13045 because it is not economically significant within the meaning of Executive Order 12866 and does not require the consideration of relative environmental health or safety risks.

G. Executive Order 13084

On January 1, 2001, EO13084 was superseded by EO13175. However, this proposed rule was developed during the period when EO13084 was still in force, and so tribal considerations were addressed under EO13084. Development of the final rule will address tribal considerations under EO13175. Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

The Clean Air Act requires conformity to apply in nonattainment and maintenance areas, and today's proposed rule does not significantly or uniquely affect the communities of Indian tribal governments. The proposed rule does not impose any requirements on tribal governments. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this proposed rule.

H. Executive Orders on Federalism

Executive Order 13132, Federalism (64 FR 43255, August 10, 1999), revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). Executive Order 13132 requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is 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." Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

If EPA complies by consulting, Executive Order 13132 requires EPA to provide to the Office of Management and Budget (OMB), in a separately identified section of the preamble to the rule, a federalism summary impact statement (FSIS). The FSIS must include a description of the extent of EPA's Prior consultation with State and local officials, a summary of the nature of their concerns and the Agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met. Also, when EPA transmits a draft rule with federalism implications to OMB for review pursuant to Executive Order 12866, EPA must include a certification from the Agency's Federalism Official stating that EPA has met the requirements of Executive Order 13132 in a meaningful and timely manner.

This proposed rule, which amends a regulation that is required by statute, will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The Clean Air Act requires conformity to apply in nonattainment and maintenance areas, and the U.S. Court of Appeals for the District of Columbia Circuit directed EPA to find the motor vehicle emissions budgets contained in a SIP affirmatively adequate before the budgets can be used in conformity determinations. To effectively implement the court's directive on this matter, we believe it is necessary to modify the timing of when one of our existing frequency requirements for conformity is required. The rule also

would provide newly designated nonattainment areas with a one-year grace period before conformity becomes applicable, as required by a recent amendment to the Clean Air Act.

In summary, this proposed rule is required by statute and the court's interpretation of the statute, and by itself will not have substantial impact on States. Thus, the requirements of section 6 of the Executive Order do not apply to this proposed rule.

I. Executive Order 13211

This rule is not subject to Executive Order 13211, "Action Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866.

List of Subjects in 40 CFR Part 93

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

Dated: September 28, 2001.

Christine Todd Whitman,
Administrator.

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

PART 93—[AMENDED]

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

Authority: 42 U.S.C. 7401–7671q.

2. Section 93.102 is amended by adding paragraph (d) to read as follows:

§ 93.102 Applicability.

* * * * *

(d) *Grace period for new nonattainment areas.* For areas or portions of areas which have been designated attainment or not designated for any standard for ozone, CO, PM₁₀ or NO₂ since 1990 and are subsequently redesignated to nonattainment or designated nonattainment for any standard for any of these pollutants, the provisions of this subpart shall not apply for 12 months following the effective date of final designation to nonattainment for each standard for such pollutant.

3. § 93.104 is amended by revising paragraph (e)(2) to read as follows:

§ 93.104 Frequency of conformity determinations.

* * * * *

(e) * * *

(2) The effective date of EPA's finding that motor vehicle emissions budgets from an initially submitted control strategy implementation plan or maintenance plan are adequate pursuant to § 93.118 and can be used for transportation conformity purposes;

* * * * *

[FR Doc. 01–25017 Filed 10–4–01; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 141 and 142

[WH–FRL–7076–2]

RIN 2040–AB75

National Primary Drinking Water Regulations; Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of data availability.

SUMMARY: Today's action announces the availability of three reports and recommendations on the science, cost of compliance, and benefits analyses in support of a rule on arsenic in drinking water. These reports were prepared by panels convened by the National Academy of Sciences, the National Drinking Water Advisory Council, and the EPA Science Advisory Board. The establishment and operation of each of these independent, expert panels was described in a July 19, 2001, **Federal Register** proposed rule. The July 19 proposal also requested comment on whether data and analyses support setting the enforceable arsenic drinking water standard, or Maximum Contaminant Level (MCL), at 3 micrograms per liter (ug/L) (the feasible level), 5 ug/L (the level proposed in June 2000), 10 ug/L (the level published in the January 2001 rule), 20 ug/L, or some other level. The availability of these three reports allows commenters to consider this information in preparing their comments on the July 19, 2001, proposal, and to comment on the data, analyses, and conclusions that EPA should consider.

DATES: Comments must be in writing and either postmarked or received by EPA's Water Docket by October 31, 2001.

ADDRESSES: EPA accepts comments by three delivery methods:

(1) Mailed to the W–99–16–VI Arsenic Comments Clerk, Water Docket (MC–4101); U.S. EPA, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

(2) Hand delivered (e.g., courier or overnight delivery service) to EPA's Water Docket, located at 401 M Street, SW; East Tower Basement Room 57, in Washington, DC; between 9 a.m. and 3:30 p.m. Eastern Daylight Time, Monday through Friday, except holidays.

(3) Electronically sent to *ow-arsenic-docket@epa.gov*. See **SUPPLEMENTARY INFORMATION** for file formats and other information about electronic filing and docket review.

FOR FURTHER INFORMATION CONTACT: The Safe Drinking Water Hotline, phone: (800) 426–4791 or (703) 412–3330, e-mail: *hotline-sdwa@epa.gov* for general information, meeting information, and copies of arsenic regulations and support documents. For other inquiries, contact Richard Reding, (202) 260–4441, e-mail: *reding.richard@epa.gov*.

SUPPLEMENTARY INFORMATION:

Additional Information for Commenters

No facsimiles (faxes), compressed or zipped files will be accepted, and comments must be submitted in writing. Please submit an original and three copies of your comments and enclosures (including references) and identify your submission by the docket number W–99–16–VI. To ensure that EPA can read, understand, and therefore properly respond to comments, the Agency would prefer that comments cite, where possible, the question(s) or sections and page numbers in the document or supporting documents to which each comment refers. Commenters should use a separate paragraph for each issue discussed. Commenters who want EPA to acknowledge receipt of their comments should include a self-addressed, stamped envelope.

EPA uses WordPerfect as its standard software, so electronic attachments (including 3.5 inch floppy disks) must be identified as docket submissions for W–99–16–VI and submitted in WordPerfect 8 (or older version) or ASCII file format (unless four hard copies are also submitted). Comments attached in other electronic formats (e.g., Word, pdf, Excel, and compressed or zipped files) must also be submitted as hard copies. If you submit your comment both electronically and as a hard copy, please note this on both submissions so the Docket can link your submissions as one comment rather than two separate comments. Electronic comments on this document may be filed online at many Federal Depository Libraries.

There is no need to submit a comment to repeat views stated in previous comments, or if you do not have