

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 93

[FRL- -]

Transportation Conformity Rule Amendment and Solicitation for Participation in the Transportation Conformity Pilot Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to amend the transportation conformity rule to allow EPA to create and implement a conformity pilot program. The conformity rule requires that transportation activities conform to state air quality implementation plans and establishes the criteria and procedures for determining whether or not they do. Conformity to an air quality plan means that transportation activities will not produce new air quality violations, worsen existing violations, or delay timely attainment of national ambient air quality standards.

The pilot program would exempt up to six areas from some of the existing rule's requirements. After EPA approval, the areas will experiment with alternative conformity procedures for the three-year duration of the program. Today's notice invites applications for participation in the pilot program and presents the application and selection process, which will be finalized in the final rule.

Along with recent amendments to the conformity rule, the pilot program is part of an EPA strategy to provide states and localities greater flexibility in meeting federal transportation

conformity requirements while reinforcing Clean Air Act commitments. This strategy results from experience gained in implementing the conformity rule.

The conformity pilot program would allow state and local transportation and air quality agencies the additional flexibility to seek out and test the conformity procedures that work best in their area. Participating areas' experiences will be evaluated and it is possible that successful pilot programs may ultimately lead to further changes in the conformity rule.

DATES: Comments on this action must be received by (insert date 30 days after date of publication in the Federal Register).

Applications may be submitted beginning (insert date of publication in the Federal Register). EPA requests expressions of interest by (insert date 45 days after date of publication in the Federal Register).

ADDRESSES: Interested parties may submit written comments (in duplicate, if possible) to: Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, Attention: Docket No. A-95-55, 401 M. Street, S.W., Washington, DC 20460.

Materials relevant to this proposal have been placed in Public Docket A-95-55 by EPA. The docket is located at the above address in room M-1500 Waterside Mall (ground floor) and may be inspected from 8 a.m. to 4 p.m., Monday through Friday, including all non-governmental holidays.

For informational purposes, areas which submit expressions

of interest and applications will be listed on the EPA's Technology Transfer Network (TTN) bulletin board, on the Office of Mobile Sources (OMS) bulletin board under the Rulemaking: Transportation: Conformity file area. TTN files can be accessed on the first call to (919) 541-5742 or through the internet at TELNET ttnbbs.rtpnc.epa.gov. TTN is off-line every Monday from 8:00 a.m.-12 Noon, and the TTN voice help line is (919) 541-5384.

FOR FURTHER INFORMATION CONTACT: Elizabeth Cummings, Transportation and Market Incentives Group, Regional and State Programs Division, U.S. Environmental Protection Agency, 2565 Plymouth Road, Ann Arbor, MI 48105, (313) 741-7857 or Lucy Garliauskas, Environmental Analysis Division, Office of Environment and Planning, Federal Highway Administration, 400 Seventh Street S.W., Washington, DC 20590, (202) 366-2068.

SUPPLEMENTARY INFORMATION:

Regulated entities. Entities potentially regulated by the conformity rule are those which adopt, approve, or fund transportation plans, programs, or projects under the Intermodal Surface Transportation Efficiency Act or Federal Transit Laws.

Regulated categories and entities include:

<u>Category</u>	<u>Examples of regulated entities</u>
Local government	Local transportation and air quality agencies

State government	State transportation and air quality agencies
Federal government	EPA and Department of Transportation (Federal Highway Administration and Federal Transit Administration)

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by the conformity rule. Other types of entities not listed in the table could also be affected. 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 today's preamble are listed in the following outline:

- I. Background of Transportation Conformity
- II. Transportation Conformity Pilot Program
 - A. Program Objective
 - B. Exemptions from Certain Conformity Requirements
 - C. Eligibility
 - D. Submission of Applications
 - E. Selection Criteria
 - F. Selection Process

III. Conformity SIPs

IV. Administrative Requirements

- A. Administrative Designation
- B. Reporting and Recordkeeping Requirements
- C. Regulatory Flexibility Act
- D. Unfunded Mandates

I. Background of Transportation Conformity

The transportation conformity rule, "Criteria and Procedures for Determining Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Funded or Approved Under Title 23 U.S.C. or the Federal Transit Act," was published November 24, 1993 (58 FR 62188) and amended 40 CFR Parts 51 and 93. It was subsequently amended on August 7, 1995 (60 FR 40098) and November 14, 1995 (60 FR 57179). In addition, EPA is proposing a third set of conformity amendments to further streamline and simplify the conformity rule.

Required under section 176(c) of the Clean Air Act, as amended in 1990, the transportation conformity rule established the criteria and procedures by which the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and metropolitan planning organizations (MPOs) determine the conformity of federally funded or approved highway and transit plans, programs, and projects to state implementation plans (SIPs). The Clean Air Act requires that federally supported activities conform to the implementation plan's purpose of expeditiously attaining and of maintaining the national ambient air quality standards.

Since publication of the transportation conformity rule in November 1993, EPA, the Department of Transportation (DOT), and state and local air and transportation officials have had considerable experience implementing the criteria and procedures in the rule. It is that mutual experience which has lead EPA and DOT to undertake a number of initiatives to streamline the transportation conformity rule. In addition to significant revisions of the conformity rule through three sets of amendments, today's proposal would provide further flexibility through the creation and implementation of a transportation conformity pilot program.

II. Conformity Pilot Program

The purpose of this notice is to propose an amendment to 40 CFR Parts 51 and 93 to create a transportation conformity pilot program. This amendment would allow EPA and DOT to select up to six areas to participate in the program and would allow EPA to exempt the selected areas from certain provisions of the transportation conformity regulation for a period of three years. This notice also describes the pilot program's objectives, application and selection process, and participation requirements, and solicits applications for the program.

A. Conformity Pilot Program Objective

The overall objective of the conformity pilot program would be to seek out and test innovative methods of streamlining regulatory requirements while ensuring that Clean Air Act objectives and requirements are met. EPA and DOT are committed to continuing to encourage procedures which improve the

conformity process. Under the pilot program, state and local air and transportation agencies could identify the conformity processes and procedures that work best for their area, and EPA and DOT would select the applications expected to lead to a more effective conformity process. It is possible that successful pilot projects may ultimately lead to further changes in the federal transportation conformity regulation.

The pilot program would enable as many as six areas to exercise flexibility in meeting certain requirements of the conformity regulation in three areas: modeling, consultation, and coordination of the Intermodal Surface Transportation Efficiency Act (ISTEA) schedules and procedures with conformity deadlines and schedules. EPA would also consider proposals from applicants to extend this flexibility to other aspects of the conformity requirements.

During the third year of the pilot program, EPA and DOT would conduct a national evaluation to see if transportation policy, project selection and investment choices changed as a result of a more flexible approach to meeting the Clean Air Act conformity requirements; if interagency consultation and public participation improved as a result of new procedures; and if Clean Air Act compliance costs were reduced and efficiencies implemented while still ensuring that Clean Air Act goals and requirements were met. Pilot program areas would also propose methods for self-evaluation of their conformity pilot program and cooperate with the national evaluation.

B. Exemption from Certain Conformity Requirements

This proposal would allow EPA and DOT to exempt no more than six areas for no more than three years from certain requirements of 40 CFR Parts 51 and 93, if these areas are selected to participate in this conformity pilot program. EPA and DOT approval of the alternative requirements developed by the applicant areas would be required for selection to participate in the pilot program. In order to obtain EPA and DOT approval, each area would be required to provide an opportunity for public comment on its proposed alternative conformity requirements. The alternative conformity requirements would be proposed to achieve results equivalent to or better than the requirements of 176(c) of the Clean Air Act. Areas selected to participate in the pilot program must comply with their final project agreements. After the three-year duration of the pilot program has expired, the selected areas would again be subject to all of the requirements of 40 CFR Parts 51 and 93. However, EPA may revise 40 CFR Parts 51 and 93 to incorporate elements of effective pilot programs based on results from evaluating the first two years of program implementation.

C. Eligibility

Up to six areas currently subject to the requirements of the transportation conformity regulation would be selected by EPA and DOT to participate in the pilot program. Applications may be submitted by either an MPO, a local air quality agency, a state air quality agency, or a state department of transportation acting as a lead contact for purposes of the pilot program. When

submitting its application, the lead agency must demonstrate that its proposal is endorsed by all state and local air and transportation agencies that participate in the area's interagency consultation process. In certain cases, for example, an MPO that covers more than one nonattainment area or a nonattainment area that covers more than one state, EPA and DOT may subsequently request further endorsement from additional agencies affected by the proposal.

D. Submission of Applications

Applications may be submitted to Elizabeth Cummings, Transportation and Market Incentives Group, Regional and State Programs Division, U.S. Environmental Protection Agency, 2565 Plymouth Road, Ann Arbor, MI 48105. Applications will be accepted beginning (insert date of publication in the Federal Register). EPA will begin accepting applications prior to final action on this rule amendment. If the final rule is different than this proposal, due to public comment received, areas that have already submitted applications may be asked to supplement their application materials.

EPA requests that areas considering applying to the pilot program submit a non-binding "expression of interest" before (insert date 45 days after date of publication in the Federal Register). The "expression of interest" letter could be submitted by the lead agency and would not need to include any preliminary description or endorsement of the application. This would provide EPA and DOT with an approximate number of applications to expect. EPA would list the areas that have

submitted expressions of interest and applications on EPA's Technology Transfer Network (TTN) bulletin board. EPA would also place copies of the submitted applications in the public docket. (See "ADDRESSES" for information on the TTN bulletin board and the public docket.)

Once EPA has taken final action on this proposal, EPA and DOT would be able to jointly select up to six pilot program participants on a rolling basis until six participants are selected, unless the agencies decide to select fewer than six participants. If fewer than six participants are selected in the first iteration of the selection process, EPA and DOT would continue to process applications on a rolling basis.

The following information will enable EPA and DOT to consider an application: 1) a particular proposal for flexibility in applying elements of the conformity regulation; 2) the rationale for change, including: (i) the particular problems in the existing requirements that the proposal intends to address, and (ii) the benefits that the alternative proposal would create (e.g., air quality benefits, resource savings); 3) a description of the alternative methods and/or procedures to be used in meeting conformity requirements; 4) the proposed schedule for making conformity determinations during the pilot program (for a period of up to three years); 5) evidence that sufficient resources to conduct the pilot program will be available (e.g., some of the pilot program activities may be eligible for title 23 State Planning and Research Funds (SPR) or Planning (PL) funds); 6) discussion of any potential

implementation issues that must be overcome for the pilot program to be successful; 7) suggestions for self-evaluation of the pilot program; 8) evidence that the proposal is endorsed by all the state and local air and transportation agencies; and 9) evidence that key stakeholders have been or will be consulted and that appropriate public participation procedures will be undertaken, which may be incorporated into the area's normal interagency consultation process.

Applications should be in narrative form and should be concise while still containing sufficient information to fully describe the proposal. It is EPA and DOT's intent to use the application to conduct preliminary reviews. Further details of the proposal would be incorporated during the consultation stage of the selection process and would be subject to the project agreement, as described below. The extent to which the application addresses the information requested and the application length will depend upon the proposal's complexity.

E. Selection Criteria

Applications would be assessed according to the following criteria: 1) whether the proposed flexibilities fulfill all the statutory requirements for transportation conformity; 2) the degree to which the application fulfills the pilot program's goals of testing innovative methods and streamlining the regulatory process, including, but not limited to, the specified areas of modeling, interagency/public consultation, and coordination of ISTEA and Clean Air Act requirements; 3) the degree of key stakeholder and public support in the geographic

area covered by the proposal; 4) whether the applicant has the resources necessary to effectively implement and evaluate the proposed conformity pilot program; 5) whether the area has adequately demonstrated its intent to comply with Clean Air Act objectives; and 6) the degree to which data and analysis will be provided to help assess air quality, resource savings, public participation, and other program benefits.

In order to assure that the pilot program provides an opportunity to test innovative approaches to conformity in a broad range of circumstances, EPA and DOT would attempt to select a group of participants that is diverse in terms of geographic distribution, nonattainment pollutants, nonattainment classifications, and rural and urban development.

F. Selection Process

The selection process would have three stages: application review, applicant consultation, and project agreement finalization. First, EPA and DOT will review submitted applications. Applications not selected by the agencies during the initial application review will be notified; all other applications will proceed to the consultation stage.

In the consultation stage, EPA and DOT will schedule a conference call with each applicant to clarify any questions about the applicant's proposal, permit the federal agencies to clarify their understanding of what the proposed conformity pilot program would entail, and to evaluate further the suitability of the proposal for inclusion in the pilot program. Then EPA and DOT will arrange for a subset of these applicants to present

their proposals in a review session with federal agency staff. Representatives of the lead agency submitting the pilot program application and other public agencies involved in the applicant's geographic area would participate in the presentation. Based upon the information presented in the application and consultation stages, EPA and DOT could select up to six applicants to participate in the pilot program.

In the final stage, and following finalization of this rule amendment, EPA, DOT and the applicant agencies would negotiate the final project agreement, which would formalize each area's selection as a pilot program participant. Before EPA and DOT approve the final project agreement, the lead agency would be required to demonstrate that it has provided a public comment period of not less than 30 days on its proposed alternative conformity requirements. The lead agency would also be required to demonstrate how it solicited and took into account any public comments during the public comment period. Upon finalization, the project agreement would be fully enforceable under the Clean Air Act.

III. Conformity SIPs

Although this proposal would exempt pilot program participants from certain conformity rule requirements, it could not exempt a pilot program participant from requirements in its approved conformity SIP. Once EPA has approved the conformity SIP, the federal conformity rule no longer applies to those subjects covered by the conformity SIP, and the requirements in the conformity SIP have the force of federal and state law.

Therefore, if an area's submitted conformity SIP has already been approved by EPA, a new SIP would need to be submitted and approved in order for an area to participate in the pilot program and be relieved of certain of its conformity SIP requirements. The area's final project agreement under the pilot program could be submitted as its new conformity SIP.

If a pilot program participant has already submitted a conformity SIP which EPA has not yet approved, then the conformity SIP (or certain portions of the conformity SIP applicable to the particular area) would need to be withdrawn for the duration of the pilot program in order to ensure that the area could be governed by the final project agreement.

Areas that are selected to participate in the pilot program and have not yet submitted a conformity SIP would be exempted from the requirements of §51.396 ("Implementation plan revision") so that they would not be required to submit a conformity SIP for the area for the duration of participation in the pilot program. In addition, areas that are selected to participate in the pilot program would be exempted for the duration of the pilot program from the requirement to submit a SIP revision in response to conformity rule amendments.

IV. 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 or entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof;

(4) Raise novel 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 rule is not a "significant regulatory action" under the terms of Executive Order 12866. EPA has submitted this action to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

B. Reporting and Recordkeeping Requirements

This rule does not contain any information collection requirements from EPA which require approval by OMB under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 requires federal agencies to identify potentially adverse impacts of federal

regulations upon small entities. In instances where significant impacts are possible on a substantial number of these entities, agencies are required to perform a Regulatory Flexibility Analysis (RFA).

EPA has determined that today's regulations will not have a significant impact on a substantial number of small entities. This regulation 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.

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

D. Unfunded Mandates

Under Sections 202, 203, and 205 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must undertake various actions in association with proposed or final rules that include a federal mandate that may result in estimated costs of \$100 million or more to the private sector, or to State, local, or tribal governments in the aggregate.

EPA has determined that to the extent this rule imposes any mandate within the meaning of the Unfunded Mandates Act, this final action does not include a mandate that may result in estimated costs of \$100 million or more to State, local, or tribal governments in the aggregate or to the private sector. Therefore, EPA has not prepared a statement with respect to budgetary impacts.

List of Subjects

40 CFR Part 51

Environmental protection, Administrative practice and procedure, Carbon monoxide, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

40 CFR Part 93

Administrative practice and procedure, Air pollution control, Carbon monoxide, Intergovernmental relations, Ozone.

Date:

Carol M. Browner,
Administrator.

For the reasons set out in the preamble, title 40, chapter I, Parts 51 and 93 of the Code of Federal Regulations are proposed to be amended as follows.

PARTS 51 and 93 -- (AMENDED)

1. The authority citation for parts 51 and 93 continues to read as follows:

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

2. Parts 51 and 93 are proposed to be amended by adding identical sections 51.446 and 93.137 to read as follows:

§ . Special exemptions from conformity requirements for pilot program areas.

EPA and DOT may exempt no more than six areas for no more than three years from certain requirements of this subpart if these areas are selected to participate in a conformity pilot program and have developed alternative requirements that have been approved by EPA and DOT. In order to obtain EPA and DOT approval on its final project agreement, each area must provide a 30-day public comment period and address comments received on its proposed alternative conformity requirements. The alternative conformity requirements must be proposed to fulfill all of the requirements of and achieve results equivalent to or better than section 176(c) of the Clean Air Act. Areas selected to participate in the pilot program must comply with their final project agreements. After the three-year duration of the pilot program has expired, areas will be subject to the requirements of this subpart.