



---

Thursday  
March 18, 1999

---

**Part II**

**Environmental  
Protection Agency**

---

40 CFR Part 93  
Transportation Conformity Rule  
Amendment for the Transportation  
Conformity Pilot Program; Final Rule

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 93**

[FRL-6309-6]

RIN 2060-AG79

**Transportation Conformity Rule Amendment for the Transportation Conformity Pilot Program**

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

**ACTION:** Final rule.

**SUMMARY:** EPA is finalizing the amendment to the transportation conformity rule which allows 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.

EPA and DOT will select up to six areas to participate in the pilot program. Each selected pilot area must submit its pilot procedures to EPA as a conformity SIP revision; if approved, these alternative procedures will be enforceable and replace the sections of the federal conformity rule that are addressed by each pilot program. Each pilot area will implement its pilot procedures for the three-year duration of the program. Today's action also

describes the final application and selection process.

The conformity pilot program allows 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.

Along with recent amendments to the conformity rule, the pilot program is part of an EPA and DOT strategy to provide states and localities greater flexibility in meeting federal transportation conformity requirements while reinforcing Clean Air Act transportation and air quality commitments.

**DATES:** This rule is effective on April 19, 1999. EPA has been accepting applications since July 9, 1996, and the deadline for submitting applications and expressions of interest is open-ended.

**ADDRESSES:** Materials relevant to this rulemaking are contained in Docket No. A-95-55. The docket is located in room M-1500 Waterside Mall (ground floor) at the Environmental Protection Agency, 401 M Street S.W., Washington, DC 20460. The docket may be inspected from 8 a.m. to 5:30 p.m., Monday through Friday, including all non-government holidays. See **SUPPLEMENTARY INFORMATION** for obtaining an electronic version of the final rule.

**FOR FURTHER INFORMATION CONTACT:** Meg Patulski, Transportation and Market

Incentives Group, Regional and State Programs Division, U.S. Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105, (734) 214-4842.

**SUPPLEMENTARY INFORMATION:**

**Electronic Version of Final Rule**

The final rule is available electronically from the EPA internet web site. Users are able to access and download files using a personal computer according to the following information:

*Internet Web Sites*

<http://www.epa.gov/docs/fedrgstr/EPA-AIR/> (either select desired date or use Search feature) OR <http://www.epa.gov/oms/traq> (look in What's New or under the Conformity file area)

The electronic version of this final rule should be available today on any of the above-listed sites. For informational purposes, areas which submit expressions of interest and applications will be listed on the Conformity file area at the above web address. Please note that due to differences between the software used to develop the final rule and the software into which the document may be downloaded, changes in format, page length, etc. may occur.

**Regulated Entities**

Entities potentially regulated by the conformity rule are primarily 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 include:

Category	Examples of regulated entities
Local government .....	Local transportation and air quality agencies.
State government .....	State transportation and air quality agencies.
Federal government .....	EPA, 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 potentially affected by this rule. 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 regulated. To determine whether your organization is regulated by this action, you should carefully examine the applicability requirements in § 93.102 of the conformity rule. If you have questions regarding the applicability of this action to a particular entity, see the

**FOR FURTHER INFORMATION CONTACT section.**

The contents of today's preamble are listed in the following outline:

- I. Background on Transportation Conformity
- II. Discussion of Major Changes From the Proposal: Conformity SIPs
  - A. Description of Final Rule
  - B. Rationale and Response to Comments
  - C. Implications for Applicants and Participants
  - D. Responses to Other Comments
- III. Conformity SIP Revisions for Selected Pilot Areas
  - A. Content of Conformity SIPs in Pilot Areas

- B. Existing Requirements for Conformity SIP Revisions
- IV. Application and Selection Process:
  - General Overview
  - A. Application Process
  - B. Selection Criteria
  - C. Selection Process
- V. Administrative Requirements
  - A. Executive Order 12866
  - B. Paperwork Reduction Act
  - C. Regulatory Flexibility Act
  - D. Submission to Congress and the Comptroller General
  - E. Unfunded Mandates
  - F. Petitions for Judicial Review
  - G. Children's Health Protection
  - H. National Technology Transfer and Advancement Act

- I. Executive Order 12875: Enhancing Intergovernmental Partnerships
- J. Executive Order 13084: Consultation and Coordination with Indian Tribal Governments

## I. Background on Transportation Conformity

Today's action creates a transportation conformity pilot program by amending the transportation conformity rule, as most recently amended on August 15, 1997 (62 FR 43780). Required under section 176(c) of the Clean Air Act, the transportation conformity rule established the criteria and procedures by which the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and local metropolitan planning organizations (MPOs) determine the conformity of federally funded or approved highway and transit plans, programs, and projects to state air quality implementation plans (SIPs). Conformity ensures that transportation plans, programs, and projects do not produce new air quality violations, worsen existing violations, or delay timely attainment of national ambient air quality standards (NAAQS). According to the Clean Air Act, federally supported transportation activities must conform to the SIP's purpose of attaining and maintaining these standards.

Since publication of the original 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. This experience has led EPA and DOT to streamline the conformity process through today's action and several past amendments to the conformity rule. EPA finalized minor amendments to the rule on August 7, 1995 (60 FR 40098), and November 14, 1995 (60 FR 57179). EPA also finalized a more significant third set of conformity amendments on August 15, 1997 (62 FR 43780). The amendments and the conformity pilot program were created through a stakeholder process which has included both federal agencies, state and local air and transportation planning agencies, and environmental and transportation interest groups.

The Notice of Proposed Rulemaking (NPRM) for today's rule was published in the **Federal Register** on July 9, 1996 (61 FR 35994). EPA worked with conformity stakeholders in developing the proposal, with input from the National Governors' Association (NGA), state DOTs, state and local

environmental agencies, MPOs, environmentalists, other local officials, and DOT. In December of 1995, EPA circulated a draft of the proposal to stakeholders for comment, and a conference call was held to discuss the draft proposal.

The NPRM described an application and selection process and proposed regulatory text to create the pilot program. The proposal also opened the pilot program's application period and requested that interested areas submit a non-binding expression of interest letter for the pilot program.

The proposal's comment period ended August 8, 1996. EPA received three comments on the proposal. EPA has received expressions of interest in the pilot program from the following five agencies: the Southern California Association of Governments (SCAG); the Washington State Department of Ecology; the Birmingham Regional Planning Commission in Alabama; the Idaho Division of Environmental Quality; and the Las Vegas Regional Transportation Commission. In addition to these letters, SCAG submitted a brief draft paper outlining its potential ideas for a pilot program. As of today's final rule, EPA has not received any formal applications to the pilot program. Copies of all present and future comments, expression of interest letters, applications, and other submitted documents for the pilot program in their entirety can be obtained from the EPA docket for the final rule (see **ADDRESSES**). The docket also includes a complete Response to Comments document for this rulemaking.

As described in the proposal, the pilot program allows areas to submit applications that propose specific flexibility for three aspects of the conformity rule: modeling, consultation, and coordination of the Intermodal Surface Transportation Efficiency Act (ISTEA) schedules and procedures with conformity deadlines and schedules. EPA and DOT will also consider applications proposing to extend flexibility to other aspects of the conformity rule. EPA and DOT will award \$25,000 to each selected pilot program to facilitate in the implementation of a pilot area's proposed flexibility.

During the third year of the pilot program, EPA and DOT will 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's conformity provisions; 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. Selected pilot areas will also propose methods for self-evaluation of their conformity pilot program and cooperate with the national evaluation.

## II. Discussion of Major Changes From the Proposal: Conformity SIPs

### A. Description of Final Rule

As proposed, today's final rule allows no more than six areas to participate in the transportation conformity pilot program for no more than three years. The final rule enables selected pilot areas to substitute their alternative conformity procedures for the relevant requirements of the federal conformity rule for the three-year duration of the pilot program.

The final rule changes the proposal by requiring that each selected pilot area submit a conformity SIP revision containing the area's alternative conformity procedures, and requiring that EPA approve the conformity SIP revision before a pilot area can implement these new procedures. The proposed application requirements, selection criteria, and the majority of the selection process has not changed in the final rule.

EPA proposed that selected pilot areas submit their alternative procedures as project agreements, which would have undergone a 30-day public comment period but would not have been processed through notice-and-comment rulemaking as formal conformity SIP revisions. Under the proposal, EPA and DOT would have finalized project agreements after the completion of the public comment period (assuming that no adverse comments were received and that the agreements met the established criteria). These agreements would then have been fully enforceable under the Clean Air Act.

In response to comments, EPA has revised how pilot programs will be finalized. Under the final rule, each selected pilot area must submit its alternative pilot procedures to EPA as a formal conformity SIP revision. If such SIPs are approved, these procedures will replace the sections of the federal conformity rule or previously approved conformity SIP that the area has chosen to address in its pilot program as the federally enforceable conformity requirements for the area. The alternative conformity procedures must achieve results equivalent to or better than the requirements of 176(c) of the Clean Air Act. Only selected pilot areas will be required to submit conformity

SIP revisions pursuant to the pilot program. EPA and DOT are not requiring that interested areas submit their initial pilot applications as conformity SIP revisions. EPA and DOT will jointly select up to six pilot programs. If fewer than six participants are selected in the first iteration of the selection process, EPA and DOT will continue to process applications on a rolling basis.

After EPA's approval of a pilot area's conformity SIP, an area will implement its pilot procedures for three years. After the pilot program has expired, pilot areas will again be subject to all of the requirements of the existing federal transportation conformity rule (40 CFR Parts 51 and 93) and/or previously approved conformity SIPs. 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.

Selected pilot areas must also submit a conformity SIP revision in a timely manner according to § 51.390 of the conformity rule, which requires all nonattainment and maintenance areas to submit a SIP revision incorporating all of the federal conformity requirements in the August 15, 1997 rule amendments. Conformity SIP revisions for pilot programs will fulfill the SIP submission requirement of § 51.390 for the duration of the pilot program for only those sections/paragraphs that are addressed by the area's alternative pilot procedures.

Since 1993, the transportation conformity rule has been included in 40 CFR part 51 and largely duplicated in 40 CFR part 93. At the time of the pilot program proposal, EPA proposed to amend both parts 51 and 93 because of this duplication in the CFR. However, the August 15, 1997 conformity rule amendments streamlined the CFR and eliminated all but § 51.390 from part 51. Therefore, today's action only amends 40 CFR part 93. The pilot program proposal had not proposed any changes to § 51.390.

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

EPA has changed the proposal and required selected pilot areas to submit their alternative conformity procedures as conformity SIP revisions for several reasons. First, EPA agrees with commenters that Congress clearly intended that conformity SIPs be used to establish state and local conformity procedures in all areas subject to conformity requirements, pursuant to Clean Air Act section 176(c)(4)(C).

Because EPA will approve conformity procedures for selected pilot areas

through the SIP process, the final rule addresses commenters' concerns that pilot area conformity procedures must be subject to the Administrative Procedures Act's (APA) notice-and-comment requirements. One commenter stated that adequate public comment would not be available under the proposal because selected pilot areas would only have been required to hold a 30-day local public comment period on final pilot project agreements, instead of the national comment period provided for EPA conformity SIP approvals. Since selected pilot areas would use alternative procedures as a substitute for the existing federal conformity rule, some commenters believed that pilot procedures should be subject to the same APA process as the existing rule. The final rule addresses these concerns because conformity SIP revisions must be subject to APA notice-and-comment requirements before they can be approved. Requiring conformity SIP revisions for selected pilot areas also ensures that the rights and responsibilities of state and local agencies and the public are made clear. For example, a conformity SIP specifies what agencies make conformity determinations as well as who distributes information to the public prior to a conformity determination.

The final rule also addresses a commenter's suggestion that a selected pilot program's alternative conformity procedures must be approved as a SIP revision in order to be fully enforceable under the Clean Air Act. EPA believes that the pilot area's final conformity procedures would not necessarily have to be contained in a SIP revision to be enforceable. EPA believes that Clean Air Act section 113(a)(3) would have allowed pilot conformity procedures in a project agreement to be enforceable by EPA under the federal conformity rule until they were included in a SIP, as was proposed. Nevertheless, EPA believes that the final rule's requirement for conformity SIPs addresses the original comment by removing the potential ambiguity about enforceability and clarifying that pilot procedures will be enforceable both by EPA under section 113 and by citizen suit under section 304, as applicable.

Requiring conformity SIP revisions for selected pilot areas will also address the procedural inequities that would have occurred under the proposal. The proposal would have allowed selected pilot areas that had not yet submitted any conformity SIP to immediately participate in the pilot program, whereas selected areas with approved conformity SIPs would have had to amend their existing conformity SIPs

prior to participating in the pilot program. Under the final rule, the procedures for gaining EPA and DOT approval are now the same regardless of whether an area has a previously approved conformity SIP; all areas participating in the pilot program will need to submit a conformity SIP revision and have it approved by EPA before they can participate in the pilot program.

Today's final rule also addresses concerns that the proposal violated specific Clean Air Act requirements for conformity SIPs. One commenter believed that EPA could not propose to exempt selected pilot areas from submitting the conformity SIP revisions (required by § 51.390 of the conformity rule) during the three years of the pilot program. According to this commenter, EPA also has an obligation to take final action on previously submitted conformity SIPs within 12 months of submission (Clean Air Act section 110(k)(2)), and pilot areas cannot withdraw these required conformity SIPs in order to participate in the pilot program, as was proposed. Furthermore, the commenter believed that the 18-month SIP failure sanctions clock should be started if a state withdraws a previously submitted conformity SIP in order to participate in the pilot program. In light of the comments submitted, EPA agrees that Clean Air Act section 176(c)(4)(C) cannot be waived or modified, and EPA is addressing all of these comments in the final rule by requiring conformity SIP revisions for both alternate pilot procedures and the August 15, 1997 rule amendments.

By eliminating all of the above concerns through provisions for notice-and-comment approval of each alternative pilot procedure, EPA believes that future legal challenges to either individual pilot sites or the overall pilot program will be minimized. In addition, because the SIP process is an established process that requires interagency consultation and public participation, using the SIP process to approve pilot procedures will minimize potential confusion. State and local agencies and the general public are already familiar with their roles in the SIP process, whereas the proposal would have created an ad hoc process for the pilot program that could have introduced confusion regarding the roles and responsibilities of state and local agencies and the general public. At the same time, EPA also believes that the final rule imposes minimal additional administrative burdens on selected pilot areas, as described in more detail below.

### *C. Implications for Applicants and Participants*

As a practical matter, the final rule does not impose significant additional burden on selected pilot areas when compared to the proposal. The proposal's application and selection processes have not changed; only the project finalization stage of the pilot program has changed in the final rule. Thus, changes from the proposal will only affect the areas that EPA and DOT actually select for the conformity pilot program.

In the project finalization stage, EPA, DOT, and each selected pilot area will still negotiate the details of the pilot area's alternative conformity procedures, as was proposed. However, the final alternative conformity procedures must be submitted to EPA as a conformity SIP revision prior to implementation, for the reasons described above. EPA had originally proposed that pilot areas submit project agreements, not conformity SIPs. Under the final rule, EPA, DOT, and each pilot area will agree about the content of each conformity SIP prior to its submission, including what the alternative conformity procedures will be and what aspects of the federal conformity rule will be addressed by these alternative procedures.

As with any SIP submission, selected pilot areas will need to comply with the SIP completeness criteria contained in 40 CFR part 51, Appendix V. In addition to other documentation, pilot areas must include with their conformity SIP submission: a formal letter of submittal from the Governor or his/her designee and evidence that a state public hearing was held and sufficient public notice for the hearing occurred. EPA believes that the public input requirements are still similar under the proposal and today's final rule. The pilot proposal would have required a 30-day local comment period on final project agreements, whereas the final rule requires that a public hearing be held, as is always required in the SIP process. Since EPA approval through notice-and-comment rulemaking is now required for all selected pilot areas, the time period before areas will be able to implement their pilot programs may be lengthened. However, EPA believes that this will only have a short-term impact on the implementation schedule of each pilot program. In general, EPA intends to use a SIP processing technique known as parallel processing to approve conformity SIP revisions in order to reduce the length of time necessary before EPA SIP approval, as described more fully below. Finally, EPA notes

that the final rule change does not impact all potential pilot areas since formal notice-and-comment rulemaking would have been required under the proposal in any case for pilot areas that already have approved conformity SIP revisions.

EPA is committed to expediting the review and approval of conformity SIP revisions for the pilot program. To accomplish this, EPA intends to parallel process conformity SIPs for the pilot program where possible. Under parallel processing, states would submit their proposed conformity SIP to EPA, and the state and EPA would then request public comment on the proposed conformity SIP at the same time. If no adverse comments are received at either the state or federal levels, EPA would then finalize approval as soon as possible after formal state adoption and submittal occurs, as long as no substantive changes have occurred and the conformity SIP is still approvable. If there are adverse comments or changes in the state procedures, EPA may reconsider the proposed approval or issue a supplemental proposal at the federal level based on response to comment or revised state requirements prior to approving the conformity SIP. States need to request parallel processing when submitting to EPA the proposed conformity SIP revision for each pilot program. They must also include a schedule for the state's final adoption or issuance of the SIP.

### *D. Responses to Other Comments*

#### 1. Endorsement of Pilot Applications

One commenter stated that EPA should maintain the proposal's requirement that pilot applications be endorsed by all affected state and local air and transportation agencies. EPA agrees and is retaining this requirement.

#### 2. Purpose of the Pilot Program

One commenter believed that the current conformity rule already provides for flexibility in modeling, consultation, and coordination of ISTEA and conformity schedules, and EPA did not adequately justify in the proposal why additional conformity flexibility is necessary under a pilot program. Others commented that the pilot program would be a significant step in EPA providing states and cities greater flexibility in meeting conformity requirements.

Although the August 15, 1997 conformity rule amendments streamline and simplify the conformity process, EPA believes that there may be additional opportunities that are unique to local processes. During EPA and

DOT's original stakeholder process, many conformity stakeholders expressed their desire for further flexibility in implementing the conformity rule.

#### 3. Selection Criteria

A commenter suggested that any state that has not yet submitted a conformity SIP should automatically be excluded from consideration for participation in the pilot program. This commenter believed that his/her viewpoint was supported by one of the proposal's selection criteria that stated that EPA must consider "whether the area has adequately demonstrated its intent to comply with Clean Air Act objectives" (61 FR 35997). The commenter believed that even with the delay in the promulgation of the original conformity rule, conformity SIPs should have been submitted by November, 1994, and therefore, EPA should not select any area that has not yet complied with this requirement.

EPA does not believe that compliance with the intent of the Clean Air Act should be solely measured by whether an area has submitted a conformity SIP. There are many ways that an area can comply with the intent of the Clean Air Act, including whether an area has submitted the appropriate control strategy SIPs. Furthermore, EPA believes that the degree to which an area is complying with the federal transportation conformity rule (e.g., modeling or consultation requirements) is more relevant than whether it has submitted a conformity SIP. In addition, EPA is aware that many areas delayed submitting conformity SIPs to save local resources because EPA was in the process of revising the federal conformity rule, which would necessitate revisions to any adopted state conformity requirements. Therefore, EPA will not automatically eliminate an applicant from possible participation in the pilot program if an area has not submitted past conformity SIPs.

#### 4. National Consistency of Pilot Procedures

A commenter stated that the pilot program contradicts Congress' desire for uniform procedures between federal agencies and among MPOs and states when making conformity determinations; Congress did not authorize major exemptions from EPA regulations such as those proposed under the pilot program. EPA does not believe that Congress intended complete national uniformity for all conformity requirements because it specifically required local conformity SIPs, which

allow areas to tailor aspects of their conformity processes. EPA believes that this final rule does not inhibit national consistency because the final rule requires all pilot procedures to fulfill the requirements of section 176(c) of the Clean Air Act, as all areas subject to the federal conformity rule are required to do.

### III. Conformity SIP Revisions for Selected Pilot Areas

#### A. Content of Conformity SIPs in Pilot Areas

The conformity SIP revisions for selected pilot areas must contain substitute regulatory language for those sections and/or paragraphs of the current transportation conformity rule that would be replaced by the pilot area's alternative conformity procedures. In order for EPA to review the conformity SIP revision, the sections of the current rule that are being proposed to be replaced as well as the new pilot sections must be clearly identified.

EPA will accept conformity SIP revisions in any fully enforceable form, including state laws or memorandums of understanding (MOUs), 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 state pilot conformity procedures.

Selected pilot areas must also include language incorporating § 93.129 in their conformity SIPs, in addition to those sections/paragraphs of the federal rule that will be addressed by each pilot area's alternative conformity procedures. EPA cannot exempt pilot areas from the otherwise applicable federal conformity requirements without pilot areas including this section in their conformity SIPs, since § 93.129 grants EPA the authority to implement individual pilot programs. Only selected pilot areas will be required to incorporate § 93.129 in their conformity SIPs.

#### B. Existing Requirements for Conformity SIP Revisions

Section 176(c)(4)(C) of the Clean Air Act requires that all states with areas subject to conformity must submit a SIP revision that establishes state conformity procedures. Conformity SIP revisions address how DOT, MPOs, and other state and local agencies will assess the conformity of transportation plans, programs, and projects to the SIP; conformity SIPs also define the conformity requirements for recipients of federal funds. Section 51.390 of the

conformity rule outlines what needs to be addressed in the conformity SIP, including how interagency consultation and public participation will occur. In addition, § 51.390 requires that SIP revisions incorporating amendments to the conformity rule be submitted within one year of the publication of those actions. Aside from conformity SIP revisions for selected pilot areas, the federal conformity rule presently only requires that states submit SIP revisions within one year of the publication of the August 15, 1997 rule amendments, because these amendments supersede all past conformity rulemakings.

As part of the pilot program, selected pilot areas that currently have an EPA-approved conformity SIP revision will only need to revise those sections/paragraphs of the approved conformity SIP that are being addressed in the area's pilot procedures. Separately, the federal conformity rule will still require pilot areas with currently approved conformity SIPs to revise the other sections of their approved conformity SIP according to the August 15, 1997 conformity rule amendments.

If a selected pilot area has previously submitted a conformity SIP for the original 1993 rule or subsequent rule amendments and EPA has yet to approve it, then the pilot area would need to indicate in its new pilot SIP revision which sections/paragraphs of the previously submitted conformity SIP are being modified. EPA continue to require that the pilot area update its conformity SIP submission according to the August 15, 1997 rule amendments (62 FR 43780) within one year of the publication of the amendments, for the conformity rule sections not addressed by the pilot program. Selected pilot areas that have previously submitted a conformity SIP revision which EPA has not yet approved would not need to withdraw such a revision in order to participate in the pilot program. This would have been required under the proposal. Instead, they may merely update it through SIP submissions to meet the pilot program and the amended federal rule.

EPA believes that it is appropriate to approve conformity SIPs for the pilot program that address only a portion of the federal conformity requirements, even if an area doesn't yet have an approved conformity SIP revision for the recent rule amendments. The remaining sections/paragraphs that are not addressed by an area's alternative pilot procedures must ultimately be addressed by another conformity SIP in a timely fashion. While an area prepares this additional conformity SIP revision, the federal conformity rule will

continue to apply for the provisions not covered by the pilot area's conformity SIP, thus providing continuity in conformity implementation.

Since the alternative procedures will only apply in pilot areas for up to three years, EPA will insert a three-year sunset date provision in its approval of each pilot area's conformity SIP at the time of EPA SIP approval. After this three-year sunset date is reached, those sections/paragraphs of the approved conformity SIP that are alternatives to the federal conformity rule would no longer be federally approved. The federal conformity rule or other relevant previously approved conformity SIP provisions would instead apply for those sections/paragraphs until another conformity SIP revision for the area consistent with the federal rule is approved.

### IV. Application and Selection Process: General Overview

#### A. Application Process

Under the final rule, the application process for the pilot program will be the same as in the proposal. Applications will not need to be submitted as conformity SIP revisions; a SIP submission will only be necessary if an area is selected by EPA and DOT to participate in the pilot program. All areas subject to the requirements of the transportation conformity regulation are eligible to apply to the pilot program.

As stated in the proposal and this final rule, either an MPO, a local air quality agency, a state air quality agency, or a state department of transportation may submit an application, acting as the 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 are eligible to participate in the area's conformity 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 pilot proposal.

As generally stated in the proposal, the following information will enable EPA and DOT to adequately consider an application: (1) a description of the alternative conformity methods and/or procedures to be used in meeting conformity requirements; (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 how alternative conformity methods and/or procedures will fulfill the conformity requirements of and achieve results equivalent to or better than section 176(c) of the Clean Air Act; (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 (e.g., public, community groups) have been or will be consulted. In today's action, EPA has clarified the first and third application elements so that interested areas understand what should be addressed in pilot applications. This final rule does not create any new application elements for pilot applicants.

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. If EPA and DOT selected an area for the pilot program, further details of each pilot proposal would be expanded during the consultation stage of the selection process and would be refined in the conformity SIP revision. The application length and the extent to which the application addresses the information requested will depend upon the proposal's complexity.

Areas can submit pilot applications at any time. Before an application is developed, EPA and DOT encourage any interested areas to send a non-binding expression of interest letter to EPA highlighting the area's initial interest, and if possible, describing the area's basic idea for a pilot application. However, an expression of interest letter is not necessarily required before an area submits a pilot application. Please send expressions of interest letters and/or applications to the contact listed in the **FOR FURTHER INFORMATION CONTACT** section of today's action.

EPA will maintain a list of areas which have expressed interest or applied to the pilot program on the EPA conformity web site. All complete

letters and applications will be placed in the EPA docket for this rulemaking. For more information on how to access the conformity web site or docket, please see the **ADDRESSES** section of this final rule.

#### *B. Selection Criteria*

The final rule does not change the proposal's selection criteria by which EPA and DOT will judge pilot applications. Applications will be assessed according to the following criteria: (1) whether the proposed flexibilities fulfill all of 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 conformity process, including, but not limited to, improved modeling and interagency/public consultation and better coordination of ISTEA and Clean Air Act requirements; (3) the degree of key stakeholder and public support in the geographic area affected 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.

EPA and DOT will attempt to select a group of participants that is diverse in terms of geographic distribution, pollutants, nonattainment or maintenance classifications/designations, and rural and urban development, since both federal agencies believe that the pilot program should provide an opportunity to test innovative conformity approaches in a broad range of circumstances.

#### *C. Selection Process*

The proposal described a three-stage selection process which would involve application review, applicant consultation, and project finalization. Under this final rule, the application review and applicant consultation stages of the selection process in the proposal remain the same; only the proposed project agreement finalization stage is changed from the proposal, as described in section II.

##### 1. Application Stage

Under this final rule, when an application is submitted, EPA and DOT will review the application and decide whether it should proceed to the consultation stage. EPA and DOT will

notify agencies whether or not they have been selected to proceed.

##### 2. 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. EPA and DOT will then 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 and proceed to the finalization stage.

##### 3. Project Finalization Stage

As described in section II., an area selected to advance to the project finalization stage will submit its alternative conformity procedures as a conformity SIP revision, and this revision must be formally approved before a pilot area can implement its conformity pilot program.

#### **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 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.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is not a "significant regulatory action" because this action does not have any of the impacts described above or raise novel legal or

policy issues arising out of legal mandates, the President's priorities, and the principles set forth in the Executive Order. Therefore, this action was not subject to OMB review under the Executive Order.

#### B. Paperwork Reduction Act

This final rule 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 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 rule will not have a significant impact on a substantial number of small entities.

#### D. Submission to Congress and the Comptroller General

Under 5 U.S.C. 801(a)(1)(A), as added by the Small Business Regulatory

Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to the publication of the rule in today's **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

#### E. 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.

#### F. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by May 17, 1999.

Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review, nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2) of the Administrative Procedures Act).

#### G. Children's Health Protection

This final rule is not subject to E.O. 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it does not involve decisions on environmental health risks or safety risks that may disproportionately affect children.

#### H. National Technology Transfer and 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. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

#### I. Executive Order 12875: Enhancing Intergovernmental Partnerships

Under Executive Order 12875, EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments or EPA consults with those governments. If EPA complies by consulting, Executive Order 12875 requires EPA to provide to the Office of Management and Budget a description of the extent of EPA's prior consultation with representatives of affected State, local and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local and tribal governments "to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates."

Today's rule does not create a mandate on State, local, or tribal governments. The rule does not impose any enforceable duties on these entities. Accordingly, the requirements of section 1(a) of Executive Order 12875 does not apply to this rule.

#### J. Executive Order 13084: Consultation and Coordination with Indian Tribal Governments

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 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."

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. The final rule offers an opportunity for areas to voluntarily apply into the conformity pilot program; it is not a mandatory program. In addition, EPA and DOT are offering seed money for each area that is selected to be in the pilot program. Accordingly, the requirements of

section 3(b) of Executive Order 13084 do not apply to this rule.

#### 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: March 10, 1999.

**Carol M. Browner,**  
*Administrator.*

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

#### PART 93—[AMENDED]

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

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

2. Subpart A is amended by adding § 93.129 to read as follows:

#### § 93.129 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 as an implementation plan revision in accordance with § 51.390 of this chapter. For the duration of the pilot program, areas selected to participate in the pilot program must comply with the conformity requirements of the pilot area's implementation plan revision for § 51.390 of this chapter and all other requirements in 40 CFR parts 51 and 93 that are not covered by the pilot area's implementation plan revision for § 51.390 of this chapter. The alternative conformity requirements in conjunction with any applicable state and/or federal 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. After the three-year duration of the pilot program has expired, areas will again be subject to all of the requirements of this subpart and 40 CFR part 51, subpart T, and/or to the requirements of any implementation plan revision that was previously approved by EPA in accordance with § 51.390 of this chapter.

[FR Doc. 99-6654 Filed 3-17-99; 8:45 am]

BILLING CODE 6560-50-U