

ORAL ARGUMENT NOT YET SCHEDULED

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 10-1105

NATURAL RESOURCES DEFENSE COUNCIL, Inc., et al.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

**ON PETITION FOR REVIEW OF A FINAL RULE ISSUED BY
THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

FINAL BRIEF FOR RESPONDENT

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Final Brief: May 11, 2011

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| | | |
|---------------------------------|---|-------------|
| NATURAL RESOURCES DEFENSE |) | |
| COUNCIL, INC., SIERRA CLUB, and |) | |
| EAST YARD COMMUNITIES FOR |) | |
| ENVIRONMENTAL JUSTICE, |) | |
| |) | |
| Petitioners, |) | |
| |) | |
| v. |) | No. 10-1105 |
| |) | |
| UNITED STATES ENVIRONMENTAL |) | |
| PROTECTION AGENCY, |) | |
| |) | |
| Respondent. |) | |

**RESPONDENT’S CERTIFICATE AS TO PARTIES,
RULINGS, AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel of record for Respondent United States Environmental Protection Agency (“EPA”) submits this certificate as to parties, rulings and related cases.

A. Parties and Amici:

(i) Parties, intervenors, and amici who appeared below. Under Circuit Rule 28(a)(1)(A), the requirement to identify parties, intervenors, and amici who appeared below is inapplicable because the petitions seek review of informal agency action.

(ii) Persons who are parties, intervenors, and amici in this Court.

The Petitioners are the Natural Resources Defense Council, Inc., the Sierra Club, and East Yard Communities For Environmental Justice. Respondent is the United States Environmental Protection Agency. There are no intervenors or amici in this case.

B. Rulings Under Review:

In its petition for review, Petitioners challenge portions of EPA's rule titled "Transportation Conformity Rule PM2.5 and PM10 Amendments," 75 Fed. Reg. 14,260 (Mar. 24, 2010).

C. Related Cases:

The portions of the rule under review in this case involves EPA's response to the Court's remand in Environmental Defense, Inc. v. EPA, 509 F.3d 553 (D.C. Cir. 2007), which reviewed that same regulatory provision. Two of the petitioners in this prior case, the Natural Resources Defense Counsel, Inc., and Sierra Club, are also petitioners in the instant case. The action challenged in that prior case was "PM2.5 and PM10 Hot-Spot Analyses in Project-Level Transportation Conformity Determinations for the New PM2.5 and Existing PM10 National Ambient Air Quality Standards; Final Rule," 71 Fed. Reg. 12,468 (March 10, 2006).

Consistent with this explanation, no other cases challenging EPA's rule at 75 Fed. Reg. 14,260 (Mar. 24, 2010) are currently pending in this or in any other court

of which counsel is aware.

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GLOSSARY

| | |
|-------------------------------|---|
| CAA | Clean Air Act, 42 U.S.C. §§ 7401-7671q |
| CO | carbon monoxide |
| DOT | United States Department of Transportation |
| EPA | United States Environmental Protection Agency |
| FIP | Federal Implementation Plan |
| NAAQS | National Ambient Air Quality Standards |
| PM ₁₀ | particulate matter with a diameter of less than 10 micrometers |
| PM _{2.5} | particulate matter with a diameter of less than 2.5 micrometers |
| SIP | State Implementation Plan |
| TIP or Transportation Program | Transportation Improvement Program |

JURISDICTION

Jurisdiction exists under 42 U.S.C. § 7607(b); the petition was timely filed.

STATUTE AND REGULATIONS

Provided in the addendum hereto.

STATEMENT OF ISSUES

On remand from Environmental Defense, Inc. v. EPA, 509 F.3d 553 (D.C. Cir. 2007), the Environmental Protection Agency (“EPA”) clarified its interpretation that the project-level “hot-spot” conformity regulations at 40 C.F.R. § 93.116(a) implement the requirement in Clean Air Act Section 176(c)(1)(B)(iii), 42 U.S.C. § 7506(c)(1)(B)(iii), that a new transportation project not delay timely attainment or required interim emissions reductions in the local area.

1. Whether EPA reasonably explained why a hot-spot analysis demonstrating that a new project will not cause or contribute to new violations or increase the frequency or severity of existing violations of a relevant National Ambient Air Quality Standard (“NAAQS”) in a local area also demonstrates that the project will not under Subsection (B)(iii) delay timely attainment with that NAAQS or any required interim emissions reductions in the local area?

2. Whether EPA’s interpretation – that conformity under Subsection (B)(iii) does not require that a new transportation project or mitigation adopted for such a project generate reductions to offset emissions from other sources needed to cure nonattainment of the NAAQS – constitutes a reasonable construction of the

Act?

3. Whether the Court lacks jurisdiction over arguments effectively challenging other preexisting conformity regulations, EPA's prior rules defining the Particulate Matter NAAQS, and EPA guidance, or that are based on cases pending in other Courts?

STATEMENT OF THE CASE

I. INTRODUCTION

Under the Clean Air Act, a State Implementation Plan ("SIP") implements, maintains and enforces the NAAQS in areas designated "nonattainment" for various pollutants, including fine particulate matter ("PM_{2.5}") and coarse particulate matter ("PM₁₀"). Section 176(c) of the Act provides that, before any transportation plan, program or project located in a "nonattainment" or "maintenance" area can receive federal approval or funding, that transportation activity must be found to "conform" with the applicable SIP. 42 U.S.C. § 7506(c). EPA's existing transportation conformity regulations, first promulgated in 1993, integrate transportation and air quality planning by establishing a complex inter-agency process that involves estimating air pollutant emissions from planned transportation activities. In this manner, Section 176(c) ensures that new transportation plans, programs and projects do not interfere with SIPs designed to expeditiously attain and maintain the NAAQS. The hot-spot regulation at 40

C.F.R. § 93.116(a), which was also first promulgated in 1993, includes additional criteria that a project sponsor and the United States Department of Transportation (“DOT”) must apply to establish that a new transportation project meets the requirements of CAA § 176(c)(1)(B) in a local area to “conform” with a SIP for PM.

Petitioners challenged this longstanding regulation in 2006 when EPA modified certain applicability criteria for PM₁₀ and added the new PM_{2.5} NAAQS to the Section 93.116(a) hot-spot requirements. Environmental Defense, Inc. v. EPA, 509 F.3d 553 (D.C. Cir. 2007) (“EDF IV”). In that case, Petitioners claimed that EPA failed to give effect to the CAA § 176(c)(1)(B)(iii) requirement that, to conform with a SIP, a new transportation project may not delay timely attainment.

In its March 24, 2010 conformity rule, EPA fully responded to this Court’s remand directing EPA to explain whether CAA § 176(c)(1)(B)(iii) applies to local areas for purposes of the required hot-spot analysis for new transportation projects. In that Rule, EPA modified the text of 40 C.F.R. § 93.116(a) to clarify its longstanding position that Subsection (B)(iii) does in fact apply to local areas, and further determined that if the required build/no-build comparison demonstrates a new transportation project will not result in new or worsened NAAQS violations in the local area, in compliance with Subsections (B)(i) and (ii), that same analysis also demonstrates that the new project will not delay timely attainment in that area.

EPA therefore concluded that no additional decisional criteria were needed in Section 93.116(a) to satisfy Subsection (B)(iii), and fully explained the basis for its decision in the preamble. 75 Fed.Reg. 14,260, 14,274-82 and 14,285 (Mar. 24, 2010) (JA 247, 261-69 & 272).

In this case, Petitioners once again argue that EPA's explanation is inadequate, built again upon their flawed argument that to demonstrate compliance with Subsection (B)(iii) a new transportation project (alone or together with new mitigation for that project) must achieve reductions that offset other sources of emissions necessary to cure any nonattainment, even if the project, when comprehensively compared to the circumstances in which it is not built, would improve or not worsen local air quality. Petitioners' interpretation would represent a radical departure from Congress' intent, and this and other courts have repeatedly addressed – and rejected – this same basic argument. Because EPA reasonably explained in the Rule how Subsection (B)(iii) applies, and reasonably rejected Petitioners' flawed interpretation of that Section, the petition for review should be denied.

II. STATUTORY BACKGROUND

The issues raised on remand from EDF IV arise within a complex statutory and regulatory framework, which are set out below.

A. Overview

The CAA establishes a joint state and federal program to control the Nation's air pollution. Section 109, 42 U.S.C. § 7409, requires EPA to establish NAAQS for certain pollutants to protect public health and welfare. Among those pollutants with NAAQS are carbon monoxide ("CO"), particulate matter with a diameter of 10 micrometers or less ("PM₁₀") promulgated in 1989, and particulate matter for fine particles ("PM_{2.5}") first promulgated in 1997. See 40 C.F.R. Part 50. EPA promulgated a revised 24-hour PM_{2.5} Standard in 2006 to provide increased protection of public health and welfare. 71 Fed.Reg. 61,144 (Oct. 17, 2006). The PM_{2.5} standards are expressed as an annual average concentration of 15.0 micrograms/cubic meter ("µg/m³") and a 24-hour average concentration of 65 µg/m³ (1997 NAAQS) and 35 µg/m³ (2006 NAAQS). These standards are further defined by their statistical form and three years of data. See American Farm Bureau Fed'n v. EPA, 559 F.3d 512, 516-18 (D.C. Cir. 2009) (reviewing the 2006 revised NAAQS).^{1/}

In general, EPA designates each area within a State as either "nonattainment" if the area "does not meet . . . the [NAAQS] for the pollutant," id. § 7407(d)(1)(A)(i), or "attainment" if the area meets the NAAQS. Id. §

¹ Specifically, an area attains the 24-hour PM_{2.5} standard when, for each monitor in the area, the average of the 98th percentile value of 24-hour concentrations for three consecutive years is less than or equal to the level of the NAAQS (35 µg/m³). 71 Fed.Reg. 61,144, 61,224 (2006); 40 C.F.R. § 50.13, Pt. 50, App. N § 4.2(a).

7407(d)(1)(A)(ii). In addition, when a “nonattainment” area is subsequently found to have met the NAAQS, and submits an approvable SIP to maintain attainment, it is redesignated as a “maintenance” area. Id. § 7407(d)(3)(E).

States undertake the means to implement, attain and enforce the NAAQS through a SIP. Id. §§ 7410(a)(1), 7502(a)(2), 7505a. The conformity requirements of Section 176(c) integrate existing transportation activity decision-making by municipal, State and Federal transportation planners, to ensure that their transportation decisions conform to the State’s SIP.

B. SIPs Establish How NAAQS Will Be Attained and Maintained

In a SIP the State specifies the emission limitations and other measures necessary to meet any applicable milestones and attain and maintain the NAAQS for each pollutant in each nonattainment area. Id. §§ 7410(a)(2)(A)-(K), 7502(a)(2) & (c). To achieve this, SIPs must include an inventory of all present and future emissions sources, modeling demonstrating future emissions levels will attain (and thereafter maintain) the NAAQS by the area’s attainment date, and the enforceable controls to reach those NAAQS no later than the area’s attainment date. Id. §§ 7410(a)(2), 7502(c)(1); see, e.g., BCCA Appeal Group v. EPA, 355 F.3d 817, 822, 830-36 (5th Cir. 2003). Each SIP allocates total allowable emissions among stationary sources, 40 C.F.R. § 52.01(a), on-road mobile sources, id. § 93.101, and other categories. The allowable emissions allocated to “highway and

transit vehicle use” in a SIP is known as the “motor vehicle emissions budget” (hereinafter “budget”). Id. These budgets, which are used in the conformity process, reflect the amount of emissions from motor vehicles that can occur while still meeting the pollution reduction objectives of the SIP. BCCA, 355 F.3d at 842-43.

The CAA reserves for the States the discretion to select through the SIP process the different levels of emission reductions from stationary, mobile, or other sources they deem appropriate as well as the particular mix of controls from each sector to attain or maintain the NAAQS. Environmental Defense v. EPA, 467 F.3d 1329, 1338-39 (D.C. Cir. 2006) (“EDF III”); see Train v. NRDC, 421 U.S. 60, 79 (1975). The Act imposes “sanctions” on States that fail to develop and submit to EPA either an approvable SIP that demonstrates attainment, or, if nonattainment continues after an area’s attainment date, an approvable revised SIP that includes additional measures to achieve attainment. 42 U.S.C. §§ 7509(b)(1) (restricting certain federal highway funds), 7509(b)(2) (more stringent emission “offsets” for permitting certain sources). If EPA disapproves a State’s initial or revised attainment SIP, within two years EPA must promulgate a federal implementation plan (“FIP”) that serves the same purpose. Id. § 7410(c).

C. SIP Provisions Ensuring Attainment After the Attainment Date has Passed

The statute specifies the remedy that applies if an area fails to attain the NAAQS by its attainment date, or if a NAAQS violation occurs after it attains. This includes required contingency measures in SIPs if an area does not attain by its attainment date, 42 U.S.C. § 7502(c)(9), and to “promptly correct any violation” in areas that previously had attained. Id. § 7505a(d). After an attainment date passes, EPA must expeditiously determine whether or not an area has attained, id. § 7509(c)(1), and if it has not, States must develop and submit revised SIPs that include the additional required measures that will demonstrate attainment by a new date established by EPA. Id. §§ 7509 (c)(2), (d). Failures by States to submit required, approvable SIP revisions are governed by the same “sanctions” and potential for a FIP that govern initial SIP submissions. Id. §§ 7410(c), 7509(b).

For certain NAAQS, the Act supplements these provisions with more specific provisions, including those that apply after the attainment date. For example, for PM₁₀, certain areas that do not reach attainment by their attainment dates are “bumped up” to a higher classification, with a new, extended attainment date, id. § 7513, and the requirement to revise their SIPs to adopt additional control measures. Id. § 7513a. “Serious” PM₁₀ nonattainment areas that fail to attain by their attainment dates must revise their SIPs to provide for additional annual reductions of not less than five percent until they attain. Id. § 7513a(d).

D. Federal Transportation Act Requirements

The Federal-Aid Highway Act establishes comprehensive programs to provide federal funding and financial assistance to States for regional and local highway projects. In larger urban areas, metropolitan planning organizations, 23 U.S.C. §§ 134(d), 134-135, must prepare a Regional Transportation Plan (“transportation plan”), id. § 134(i), and a Transportation Improvement Program (“transportation program” or “TIP”). Id. § 134(j). A transportation plan, updated every four years, comprises a long-term plan of at least 20 years that identifies regional transportation needs and develops an integrated approach to meeting those needs. Id. § 134(i). A transportation program, also updated every four years, is a short-term program taken from the transportation plan that identifies the particular projects to be carried out in the first four years of that transportation plan. Id. § 134(j). In a nonattainment or maintenance area, metropolitan planners, followed by the Federal Highway and the Federal Transit Administrations (collectively “DOT”), review transportation activities to determine if they conform to an area’s SIP.

E. Basic Conformity and Conformity for Transportation Plans, Programs, and Projects Under the CAA

Section 176(c) of the CAA, 42 U.S.C. § 7506(c), enacted in 1990, contains both basic conformity requirements that restrict any federal project or federal support of any activity that does not conform to an approved SIP, CAA §

176(c)(1), and specific requirements that also apply to federal funding or support for transportation plans, programs, and projects. 42 U.S.C. § 7506(c)(2).

1. Section 176(c)(1) – Basic Conformity

The basic conformity provisions in Section 176(c)(1) provide that no federal agency shall “engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to [an approved SIP]” Each federal agency head is responsible for assuring conformity of its decisions and that the conformity determination is based on the most recent emissions estimates. *Id.* Section 176(c)(1) applies to both non-transportation and transportation activities.

Section 176(c)(1) next explains what it means for an activity to conform:

Conformity to [a SIP] means –

- (A) conformity to [a SIP’s] purpose of eliminating or reducing the severity and number of violations of the [NAAQS] and achieving expeditious attainment of such standards; and
- (B) that such activities will not –
 - (i) cause or contribute to any new violation of any standard in any area;
 - (ii) increase the frequency or severity of any existing violation of any standard in any area; or
 - (iii) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.

id. at § 7506(c)(1)(A)-(B). In EDF IV, 509 F.3d at 559-60 & n.4, this Court held that while Subsection (A) applies to all projects, unlike Subsection (B) it does not

require additional criteria for the project-level, hot-spot portion of the conformity analysis in the local area.

2. Transportation Conformity Under Section 176(c)(2) and Required Regulations

Section 176(c)(2) sets out particular conformity requirements for transportation plans, programs and projects to ensure they conform with budgets in the applicable SIP. To accomplish this, it must be demonstrated that projected emissions from a transportation plan and program are “consistent with” the budgets and required emissions reductions in the SIP. Id. § 7506(c)(2)(A). In turn, projected emissions from a new transportation project must, among other things, be included in a conforming transportation plan and program. Id. § 7506(c)(2)(C). In addition, Subsection (c)(2)(A) incorporates the basic conformity requirements in Subsection (c)(1)(B), making them applicable to transportation plans and programs. All these criteria must be satisfied before DOT may fund or approve a project in a transportation plan and program in a nonattainment or maintenance area.

Congress also directed EPA, with the concurrence of DOT, to promulgate “criteria and procedures for demonstrating and assuring conformity in the case of transportation plans, programs, and projects.” 42 U.S.C. § 7506(c)(4)(B); id. § 7506(c)(4)(D) (minimum requirements).

II. REGULATORY BACKGROUND

A. EPA's 1993 Transportation Conformity Regulations and EDF I

EPA first promulgated transportation conformity regulations in 1993, 58 Fed.Reg. 62,188 (Nov. 24, 1993). These regulations established the basic criteria for determining whether a transportation plan, program or project conforms with a SIP, including where appropriate a project analysis to assess localized “hot-spot” conditions as part of a project’s overall conformity determination. These regulations ensure that emissions from each new transportation project fall within the limits of the SIP’s budget. See 40 C.F.R. §§ 93.118(a)-(d), 93.122. The analysis of emissions from all projects in a transportation plan and program, which are then compared to the budget in the SIP, is commonly called the regional emissions analysis.²

1. 1993 Regulations for Project-Level Hot-Spot Determinations and the Build/No-Build Comparison for Making such Determinations

EPA concluded in 1993 that for the two pollutants for which hot-spot requirements applied at the time – PM₁₀ and CO – an additional localized “hot-spot” analysis is also required for a project to be found to conform with an applicable SIP. Thus, EPA promulgated 40 C.F.R. § 93.116, which required that

² A regional emissions analysis is also required for projects not contained in a conforming transportation plan or program. Id. §§ 93.118(a), (d).

transportation projects funded, accepted or approved by DOT

must not cause or contribute to any new localized CO or PM₁₀ violations or increase the frequency or severity of any existing CO or PM₁₀ violations in CO and PM₁₀ nonattainment and maintenance areas. . . . This criterion is satisfied . . . if it is demonstrated that no new local violations will be created and the severity or number of existing violations will not be increased as a result of the project.

58 Fed.Reg. at 62,241-42. This requirement supplements the other conformity requirements that apply before a project can be found to conform with a SIP. See 58 Fed.Reg. 3768, 3777-80 (Jan. 11, 1993).

EPA also explained that these regulations would be carried out through a comprehensive analysis of the project, comparing build and no-build scenarios. Id. at 62,212/2. Specifically, in separate 1993 provisions, which were recodified at 40 C.F.R. § 93.123 in 1997, 62 Fed.Reg. 43,780, 43,815 (Aug. 15, 1997), EPA specified requirements for evaluating the local effects of, and making project-level hot-spot determinations for, planned transportation projects in view of current and projected background conditions – that is, the build/no-build comparison. Though updated at times, they were not reopened or modified by EPA’s 2010 rule on remand.^{3/} Section 93.123(b) provides that a required hot-spot analyses for new

³ In 2006, EPA identified projects for which such hot-spot analyses would be required, which petitioners in EDF IV did not challenge. Nor did those petitioners raise any substantive challenge to the criteria in Section 93.123(c) discussed below. See EDF IV, 509 F.3d at 561-62 (dismissing procedural challenge to Section 93.123(b)(3)-(4)).

transportation projects shall be based upon certain qualitative considerations until EPA announces that quantitative analysis requirements are in effect.⁴ 40 C.F.R. §§ 93.123(b)(2), (4); see EDF IV, 509 F.3d at 561-62. The general requirements of the hot-spot build/no-build comparison are set forth in 40 C.F.R. § 93.123(c), and include the following requirements:

- (1) Estimated pollutant concentrations must be based on the total emissions burden which may result from the implementation of the project, summed together with future background concentrations. The total concentration must be estimated and analyzed at appropriate receptor locations in the area substantially affected by the project.
- (2) Hot-spot analyses must include the entire project, and may be performed only after the major design features which will significantly impact concentrations have been identified. * * *
- (3) Hot-spot analysis assumptions must be consistent with those in the regional emissions analysis for those inputs which are required for both analyses.
- (4) CO, PM10, or PM2.5 mitigation or control measures shall be assumed in the hot-spot analysis only where there are written commitments from the project sponsor and/or operator to implement such measures, as required by § 93.125(a). * * *

The referenced “mitigation or control measures” in subpart (4) refer to any new and additional measures the “project sponsor” of the transportation project may adopt to mitigate for any additional emissions that the project might cause based

⁴ EPA released guidance for conducting quantitative hot-spot analyses on December 20, 2010. See 75 Fed.Reg. 79,370. In that notice, EPA announced that the requirement to conduct quantitative hot-spot analyses for PM nonattainment and maintenance areas shall apply beginning on December 20, 2012.

upon the build/no-build scenario. Id. § 93.125(a).

EPA described how this build/no-build analysis would work in its 1993 rulemaking. 58 Fed.Reg. at 62,212/2 (“EPA intends that the hot-spot analysis compare concentrations with and without the project based on modeling of conditions in the analysis year. The hot-spot analysis is intended to assess possible violations due to the project in combination with changes in background levels over time.”). Thus the no-build scenario assesses current and expected emissions in the absence of the new transportation project, including existing conditions and future trends that could affect air quality concentrations, such as traffic trends and expected new non-transportation stationary sources, and the impact of pre-existing or planned measures whether or not in the SIP, based upon more recent information. EPA also described this process in the preamble to the Rule challenged here. E.g., 75 Fed.Reg. at 14,280, 14,277/2-3 (JA 267, 264). See generally Audubon Naturalist Society v. DOT, 524 F.Supp.2d 642, 694 (D. Md. 2007) (upholding DOT’s use of Section 93.123(c) in making a hot-spot determination under Section 93.116(a)).

The build scenario characterizes expected pollutant concentrations if the project goes forward, including indirect and indirect impacts. This step incorporates emissions that will result from the project itself and adds them to the emissions projected in the no-build scenario. See 58 Fed.Reg. at 62,212/2. “Such

a demonstration would examine the total impact of the project's new emissions in the context of the future transportation system, any expected growth in other emissions sources, and any existing or new control measures that are expected to impact the local project area." 75 Fed.Reg. at 14,278/3 (JA 265); *id.* at 14,280/1 ("EPA's rule requires that in the future year(s) where emissions are expected to be the highest, the concentrations of the pollutant that result from the project's emissions in combination with background emissions from other sources are compared to the NAAQS.") (JA 267). In this manner, the build/no-build test isolates the individual new project in context, to assess its impact in the local area in comparison to the NAAQS and whether it would make air quality worse.

2. The Court's Decision in EDF I

EPA's 1993 conformity regulations were upheld in Environmental Defense Fund v. EPA, 82 F.3d 451 ("EDF I"), amended by, 92 F.3d 1209 (D.C. Cir. 1996). No party in that case challenged EPA's hot-spot regulation at 40 C.F.R. § 93.116 for localized PM₁₀ or CO analyses. Among the challenges raised, the Court rejected the environmental petitioners' argument that Section 176(c)(3) requires that transportation plans and programs themselves must reduce emissions as a necessary requirement for a conformity determination. The Court concluded that, to conform with a SIP, transportation plans and programs need not reduce emissions so long as they comport with the budget in the SIP. The Court explained that petitioners'

contrary argument that transportation activities must compel emission reductions “would seem to impinge on the prerogative of states to determine how and where to comply with the Act’s emissions reductions requirements.” EDF I, 82 F.3d at 460.

B. EPA’s 2004 Interim Test Conformity Rules

In 2004, EPA promulgated conformity rules that apply to transportation plan and program conformity determinations in PM_{2.5} areas, including provisions for how conformity is demonstrated when areas do not yet have approved budgets for PM_{2.5}. 69 Fed. Reg 40,004 (July 1, 2004). In Environmental Defense v. EPA, 467 F.3d 1329 (D.C. Cir. 2006) (“EDF III”), the Court rejected the environmental petitioners’ arguments that these regulations were invalid because they did not require that transportation plans and programs reduce emissions. The Court reviewed the provisions of Section 176(c)(1) and concluded, as it did in EDF I, that the Act does not require transportation plans and programs to reduce emissions in order to conform. EDF III, 467 F.3d at 1338.

C. EPA’s 2006 Rule For Localized Hot-Spot Analyses for PM_{2.5} and EDF IV

In its 2006 Rule, EPA added PM_{2.5} to the existing hot-spot rule in 40 C.F.R. § 93.116, to address localized concerns with new projects in applicable PM_{2.5} areas. 71 Fed.Reg. 12,468, 12,470-71 (March 10, 2006) (JA 4-5). EPA retained the criteria in Section 93.116(a), and identified the types of projects to which this requirement applies, such as new or expanded highway projects or bus terminals.

40 C.F.R. § 93.123(b)(1); 71 Fed.Reg. at 12,490-98 (JA 24-32).

Addressing petitioners challenge to Section 93.116(a), the Court in EDF IV upheld EPA's construction that Subsection 176(c)(1)(A) does not require new projects to achieve emission reductions, but concluded that this provision does not appear to add any additional criteria pertaining to the local area for the required project-level hot-spot analysis. EDF IV, 509 F.3d at 559-60 & n.4. The Court was uncertain whether a required hot-spot conformity analysis that satisfies Subsections (B)(i) and (ii), that is, an analysis showing that a new transportation project would not make air quality worse, would also satisfy the Subsection (B)(iii) criterion that the project not delay with timely attainment. Id. at 560 (positing a hypothetical). The Court also found no rational basis by which the SIP process alone could implement the requirements of Subsection (B)(iii). Id. at 561. Fundamentally, however, the Court was uncertain whether EPA viewed Subsection (B)(iii) as applying in local areas. Id. at 561. Accordingly, the Court remanded the rule "to EPA either to interpret CAA § 176(c)(1)(B)(iii) in harmony with (B)(i) and (B)(ii) or to explain why it need not do so; we otherwise deny the petition." Id. at 562. The Court rejected the only other challenge, which was a procedural challenge involving 40 C.F.R. § 93.123(b). 509 F.3d at 561-62.

D. EPA's 2010 Rule in Response to the Court's Remand

In its rulemaking, EPA responded to the narrow issue raised by the Court by

its remand. 75 Fed.Reg. at 14,274-82 (final rule) (JA 261-69); 74 Fed.Reg. 23,024, 23,037-43 (May 15, 2009) (proposal) (JA 60-66). EPA explained that it always construed Subsection (B)(iii) to apply to local areas, 75 Fed.Reg. at 14,276/1 (JA 263), and added language to the text of 40 C.F.R. § 93.116(a) to make this clear. EPA also rejected the legal position underlying all of Petitioners' arguments that Section 93.116(a) is inadequate. Reviewing the extensive case law supporting its position, EPA explained its longstanding construction that Sections 176(c)(1)(B) and (A) do not require that, to conform, a new transportation project (either alone or with new mitigation adopted for the project) must achieve reductions that offset emissions from other sources that prevent attainment. 75 Fed. Reg. at 14,276-77.

EPA also explained that no additional decisional criteria in Section 93.116(a) were necessary to demonstrate compliance with Subsection (B)(iii), because satisfying subsection (B)(i) and (B)(ii), through a showing under the build/no-build analysis that the new project will not make air quality worse, also satisfies the requirements of Subsection (B)(iii) in practice. 75 Fed.Reg. at 14,278, 14,2780-81/1 (JA 265, 267-68). EPA explained in detail the basis for this conclusion and how this test operates to ensure that the (B)(iii) criterion are met. Id. As modified, the relevant portion of Section 93.116(a) provides as follows:

(a) * * * The FHWA/FTA project must not cause or contribute to any new localized CO, PM10, and/or PM2.5 violations, increase the frequency or severity of any existing CO, PM10, and/or PM2.5 violations, or delay timely attainment of any NAAQS or any

required interim emission reductions or other milestones in CO, PM10, and PM2.5 nonattainment and maintenance areas. * * * This criterion is satisfied for all other FHWA/FTA projects in CO, PM10 and PM2.5 nonattainment and maintenance areas if it is demonstrated that during the time frame of the transportation plan no new local violations will be created and the severity or number of existing violations will not be increased as a result of the project, and the project has been included in a regional emissions analysis that meets applicable §§ 93.118 and/or 93.119 requirements. The demonstration must be performed according to the consultation requirements of §93.105(c)(1)(i) and the methodology requirements of § 93.123.

EPA also addressed concerns raised by the Court's hypothetical, in which the Court believed a new project might counterbalance preexisting mitigation, thereby delaying timely attainment in violation of Subsection (B)(iii), while still being judged not to increase emissions. EDF IV, 509 F.3d at 560. Specifically, EPA explained that a finding that a new project would not make air quality worse under the Agency's longstanding build/no-build test "would examine the total impact of the project's new emissions in the context of the future transportation system, any expected growth in other emissions sources, and any existing or new control measures that are expected to impact the local project area." 75 Fed.Reg. at 14,278/3 (emphasis added) (JA 265). Thus, the effects of a new project are in fact comprehensively examined as part of the build scenario, to evaluate whether air quality would be made worse and all Subsection (c)(1)(B) criteria are met.

STANDARD OF REVIEW

Review in this case is governed by the CAA, which requires that the Court determine whether EPA's action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 42 U.S.C. § 7607(d)(9). This standard presumes the validity of agency actions. American Trucking Ass'n v. EPA, 283 F.3d 355, 362 (D.C. Cir. 2002). EPA's findings must be upheld if the Agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Milk Indus. Found. v. Glickman, 132 F.3d 1467, 1476 (D.C. Cir. 1998) (citations and internal quotation marks omitted). While this standard subjects agency actions to careful scrutiny, the agency's determinations must be upheld if they "conform to 'certain minimal standards of rationality.'" Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 520-21 (D.C. Cir. 1983) (citations omitted).

Challenges to EPA's interpretation of the CAA are governed by the two-prong test of Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984). Under this standard, the Court employs the traditional rules of statutory construction to discern whether Congress' intent is clear. Id. at 842-43 & n.9. If Congress has been unclear or left a gap for the agency to fill, the agency has authority to resolve the ambiguities, and the agency's interpretation should be upheld if it is reasonable. id.

at 843-44. An agency's interpretation need not represent the "best interpretation of the statute," only a "reasonable one." Smiley v. Citibank, 517 U.S. 735, 744-45 (1996).

In construing administrative regulations, the courts give "controlling weight" to the agency's interpretation "unless it is plainly erroneous or inconsistent with the regulation." United States v. Larionoff, 431 U.S. 864, 872 (1977) (citation omitted). See Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994).

SUMMARY OF ARGUMENT

In its rulemaking on remand, EPA raised and reasonably resolved the two principal issues raised by the Court's remand in EDF IV, by explaining that Section 176(c)(1)(B)(iii) does apply to hot-spot analyses and how that provision operates in practice. Though Subsection (B)(iii) applies, EPA reasonably concluded that it was not necessary to establish additional decisional criteria in Section 93.116(a) for a project-level hot-spot conformity determination to satisfy this Subsection, because, in practice, it will be met by an affirmative demonstration under the criteria previously established in Section 93.116(a). Thus, timely attainment will not be delayed so long as "it is demonstrated that during the time frame of the Transportation Plan no new local violations will be created and the severity or number of violations will not be increased as a result of the project" 75

Fed.Reg. at 14,285/2 (text of regulation) (JA 272). EPA's previously established build/no-build comparison required for hot-spot analyses demonstrates why this holds true in practice. EPA explained that where the build analysis (which includes the new project) demonstrates, compared to the no-build analysis, that no new local violations of the NAAQS would result and existing violations would not get worse (in either severity or frequency), timely attainment would also not be delayed as a result of the project. *Id.* at 14,276/1-2, 14,278, 14,2780-81/1 (JA 263, 265, 267-68).

Further, where nonattainment beyond an attainment date or violations are already predicted without the new project, if the predicted emissions under the build scenario increased over those predicted in the no-build scenario, thus making the local air quality worse, "then the project would delay timely attainment, since worsening air quality above the NAAQS would impede the ability to attain in the local area." *Id.* at 14,278/3 (JA 265). But if in that situation "the project itself improves or does not change air quality, it does not delay timely attainment and it can conform." *Id.* Because all expected direct and indirect emission increases that would result from a transportation project are included in the build scenario, and the build/no-build comparison already properly accounts for preexisting mitigation measures, the type of project that concerned the Court in its hypothetical in *EDF IV*, 509 F.3d at 560, could not occur. Such a project would not satisfy the project-level hot-spot test for conformity. EPA is not aware of any circumstance in which a new

project would result in no new local NAAQS violations or worsened existing NAAQS violations, yet would somehow delay timely attainment in that area beyond that in the no-build scenario, and Petitioners have not presented an actual contrary example.

Contrary to Petitioners' claim, EPA has not substituted the regional emissions analysis for an assessment of localized impacts. Rather, the requirement that the local project be contained in a conforming regional analysis is a necessary prerequisite – but not sufficient for – conformity under the hot-spot analysis. Thus Petitioners' arguments built upon their flawed assumption carry no weight.

Underlying Petitioners' claim that Section 93.116(a) fails to effectuate Subsection (B)(iii) is their mistaken interpretation that to satisfy that provision a transportation project must (by itself or through new mitigation adopted for that project) reduce emissions to offset emissions from other sources that may prevent attainment of the NAAQS. By this, Petitioners improperly construe (B)(iii) as a construction ban on new transportation projects, as leverage to compel any needed reductions from other sources to cure nonattainment. This would radically change existing law and conflict with Congress' intent. By requiring only that the project not "delay" timely attainment, Congress did not intend that to conform the new project must "achieve" timely attainment by "reducing" emissions. Rather, the term "delay" necessarily presupposes some other circumstances that otherwise would

achieve timely attainment of the NAAQS, which in turn a new transportation project may not delay. In contrast to Subsection (c)(3)(B)(iii), where Congress intended individual projects to achieve reductions to conform, it said so in the text.

Even if Subsection (c)(1)(B)(iii) were ambiguous, EPA reasonably concluded that where a new transportation project will improve or at least not make air quality worse when compared to the no-build scenario, the Act's hot-spot conformity requirements should not be construed to block that project, as a penalty to compel other reductions that may be needed to cure nonattainment. Rather, Congress, in numerous other provisions through the SIP process, established the appropriate mechanisms to cure continued nonattainment and violations that would occur regardless of whether the new transportation project is built. Requiring hot-spot conformity to address such preexisting problems would supplant the role Congress reserved for the SIP to attain the NAAQS, and where the attainment date has passed, for those SIPs to be revised to include additional measures necessary to reach attainment.

This Court has repeatedly rejected the same basic arguments raised here by Petitioners, concluding that conformity does not require emissions reductions to offset emissions from other sources needed to cure nonattainment. Requiring that new transportation projects compel emission reductions would intrude upon the discretion reserved for States in selecting in their new or revised SIPs the

appropriate mix of controls and emission reductions between stationary, mobile, and other sources.

Finally, EPA's rule on remand did not open the floodgates for Petitioners to challenge other elements of EPA's preexisting conformity or NAAQS rules. Thus, the Court lacks jurisdiction over Petitioners' arguments that effectively challenge such preexisting regulations.

ARGUMENT

EPA fully addressed the two issues raised by the Court's remand in EDF IV regarding whether and how Subsection (B)(iii) applies to hot-spot analyses. As demonstrated in Section I below, EPA explained that this provision does apply and reasonably concluded that under 40 C.F.R. § 93.116(a) the same analysis that demonstrates satisfaction of the criteria in Subsections (B)(i) and (ii) of CAA § 176(c)(1) also ensures in practice that the criterion in Subsection (B)(iii) is met.

In Section II below we explain that Petitioners' arguments that Section 93.116(a) is inadequate are premised on the flawed construction that Subsection (B)(iii) compels new transportation projects to reduce emissions. Petitioners' attempt to secure "additional" emissions reductions through Subsection (B)(iii) constitutes an unjustified attempt to re-litigate basic legal arguments concerning the Act's transportation conformity provisions that this Court has expressly rejected in prior cases. As explained, EPA's interpretation is reasonable and should be upheld.

I. EPA Reasonably Responded to the Court’s Remand

A. EPA Construes “Any Area” in Subsection (B)(iii) to Include the Local Area for Purposes of the Hot-Spot Analysis.

In EDF IV, 509 F.3d at 561, the “fundamental problem” identified by the Court was that, given EPA’s construction that “any area” in Subsections (B)(i) and B(ii) includes “a local area . . . [,] it is arbitrary and capricious not to define the term similarly in Subsection (B)(iii) or not to provide an explanation that satisfactorily addresses the purpose and function of the condition.” The Court concluded that EPA failed to explain adequately whether and how Subsection (B)(iii) applies under 40 C.F.R. § 93.116(a) to the hot-spot analysis for new transportation projects. Id. EPA did not provide a lengthy explanation of this issue in its 2006 rulemaking, because it focused on the sole specific comment raised by the petitioners during that rulemaking, which was that to meet Sections 176(c)(1)(A) and (c)(1)(B)(iii), EPA must modify 40 C.F.R. § 93.116(a) to require that a new transportation project reduce emissions to offset emissions from other sources that cause NAAQS violations, even if the new project would improve local air quality.⁵ The Court concluded that EPA’s response on that issue, “that individual projects are not required to reduce emissions,” did not address whether Subsection (B)(iii) applies to the hot-spot analyses in the first instance. 509 F.3d at 561.

⁵ See 71 Fed.Reg. at 12,482/2 (JA 16); Petitioners’ Comment, § IV (JA 109-110 of the Joint Appendix) in EDF IV, 509 F.3d 553.

On remand, EPA explained that it “has always intended the term ‘any area’ in all three statutory provisions of section 176(c)(1)(B) to include the local area affected by the emissions produced by a new project,” 75 Fed.Reg. at 14,276/1 (JA 263), and quoted from its 2006 rulemaking in which EPA explained that ““a regional analysis for an area’s entire planned transportation system is not sufficient to ensure that individual projects meet the requirements of section 176(c)(1)(B) where projects could have a localized air quality impact.”” *Id.* at 14,276/1 (quoting 71 Fed.Reg. at 12,483/2). EPA further clarified its interpretation by adding to the second sentence of 40 C.F.R. § 93.116(a) the requirement that transportation projects must not “delay timely attainment of any NAAQS or any required interim emission reductions or other milestones in [the relevant NAAQS] nonattainment and maintenance areas.” EPA thus reasonably explained that it construes Subsection (B)(iii) to apply to local areas.

B. EPA Reasonably Explained that the Same Analysis Demonstrating that the Requirements of Subsections (B)(i) and (ii) are Met Also Establishes in Practice that the Requirements in Subsection (B)(iii) Are Met.

On remand, EPA also considered whether any additional criteria for an affirmative determination under Section 93.116(a) are necessary to ensure Subsection (B)(iii) is met. Consistent with its longstanding interpretation first promulgated in 1993, EPA concluded that it was not necessary to establish additional decisional criteria for a hot-spot determination to satisfy this subsection,

because, in practice, (B)(iii) will be met by an affirmative demonstration under the criteria previously established in Section 93.116(a); that is, timely attainment will not be delayed so long as “it is demonstrated that during the time frame of the Transportation Plan no new local violations will be created and the severity or number of violations will not be increased as a result of the project” 75 Fed.Reg. at 14,285/2 (text of regulation) (JA 272); *id.* at 14,276/1-2, 14,278, 14,2780-81 (preamble) (JA 263, 265, 267-68).⁶

1. EPA Fully Explained How Using the Previously Established Build/No-Build Analysis in Section 93.116(a) Reasonably Implements EPA’s Interpretation.

Petitioners contend that the criteria in the fourth sentence of Section 93.116(a) for making conformity determinations are insufficient, because they do not also include the text of Subsection (B)(iii), and, more specifically, because they do not compel reductions in nonattainment areas to reach attainment. EPA, however, reasonably explained that if the build analysis (which includes the new project) demonstrates, compared to the no-build analysis, that no new local violations of the NAAQS would result and existing violations would not get worse (in either severity or frequency), timely attainment would also not be delayed as a

⁶ To further clarify its interpretation, the Agency also included the requirement in Section 93.116(a) that “the project has been included in a regional emissions analysis.” As discussed *infra* 38-40, this regional emissions analysis requirement is a necessary prerequisite; it is not itself sufficient to ensure that new projects satisfy the Section 176(c)(1)(B) criteria.

result of the project. 75 Fed.Reg. at 14,278/2-3 (JA 265). For example, in situations where local NAAQS violations are predicted to occur under both the no-build scenario and the build scenario, “but the project itself improves or does not change air quality, it does not delay timely attainment and it can conform.” *Id.* at 14,278/3. In other words, if the project in that situation is not predicted to make air quality worse in the local area, EPA reasonably concluded that it cannot delay timely attainment in that area beyond that which would occur without the project.

In contrast, if the predicted emissions under the build scenario increased over those in the no-build scenario, thus making the predicted local violation worse (or creating a new violation), “then the project would delay timely attainment, since worsening air quality above the NAAQS would impede the ability to attain in the local project area.” *Id.*

2. The Court’s Prior Concerns Are Reasonably Addressed by the Analysis for Making Determinations Under the Section 93.116(a) Criteria.

Petitioners argue – incorrectly – that this Court in EDF IV previously rejected EPA’s explanation of how a determination under Section 93.116(a) satisfies the requirements of Subsection (B)(iii). In its 2007 decision, this Court was not persuaded that EPA’s hot-spot regulations adequately address all circumstances where Subsection (B)(iii) applies, positing a hypothetical in which a transportation project might be found to conform even though attainment might be delayed. The

Court explained its understanding that:

[A]n individual project's emissions could counterbalance mitigation measures already in place, thereby delaying attainment of emissions standards and violating the requirement of (B)(iii) without either increasing or decreasing emissions. EPA's position thus does not seem to cover all circumstances where (B)(iii) is applicable.

EDF IV, 509 F.3d at 560.

On remand, however, EPA reasonably explained how the interplay among existing regulations do, in fact, properly account for any such mitigation measures, to assure compliance with Subsection (B)(iii) even in situations of this sort. Specifically, EPA explained that a determination under Section 93.116(a) would establish that timely attainment would not be delayed because it “would examine the total impact of the project's new emissions in the context of the future transportation system, any expected growth in other emissions sources, and any existing or new control measures that are expected to impact the local project area.” 75 Fed.Reg. at 14,278/3 (emphasis added) (JA 265). In this manner, mitigation measures already in place (referred to here as existing control measures) are taken into account, see also supra 14-16 and infra 32-35, and only if the “hot-spot analysis demonstrated that the proposed project would improve or not impact air quality, then timely attainment would also not be delayed from what would have occurred without the project.” 75 Fed.Reg. at 14,278/3. If, however, the demonstration showed that air quality would worsen above the NAAQS, for example, if the

project's emissions would counterbalance reductions from existing mitigation measures, it would not meet this requirement. Id.

For these reasons, a scenario like that which concerned the Court in EDF IV simply will not occur. Pursuant to the above-described requirements, the type of project referred to in that hypothetical would not meet the hot-spot test for an affirmative conformity determination, absent the project sponsor agreeing to some new, additional mitigation measures to address the project's emissions to ensure that measures already in place are not so counterbalanced.

3. EPA Reasonably Explained How the Criteria in Section 93.116(a) Satisfy Subsection (B)(iii) Requirements Where NAAQS Violations Are Already Expected to Occur After Attainment.

Petitioners focus their arguments on circumstances in which an area has failed, or is predicted to fail, to attain the NAAQS by its attainment date, such that even without the new transportation project NAAQS violations in a local area are expected after that date. E.g., Pet.Br. 28-29, 41-42. Contrary to Petitioners' suggestion, the Section 93.116(a) conformity test properly accounts for any failed control strategies, unanticipated emission reductions, or unanticipated emissions that may already contribute to violations after the attainment date, to assess whether these would occur as a result of the new project.

As an initial matter, EPA's preexisting rules, including the required build/no-build comparison, for performing the hot-spot analysis are not subject to challenge

in this case, and EPA did not in its rulemaking on remand re-open those portions of its prior rules for comment or proposed change. 75 Fed.Reg. at 14,280/1 (JA 267); 74 Fed.Reg. at 23,038/2 (JA 61); see supra 13-14 & n.3; infra 55-57. In any event, as the Agency explained, a “hot-spot analysis must be based on the latest data and models under 40 CFR 93.109(b), 93.111 and 93.123, and therefore any growth in other emissions sources or the impact of new or existing emissions controls (including those in any required SIP) would always be considered in a hot-spot analysis prior to approving a project.” 75 Fed.Reg. at 14,278 n.44 (JA 265); see, e.g., 75 Fed.Reg. at 14,280 (explaining how the build/no-build analysis incorporates the most recent information) (JA 267). Further, all expected direct and indirect emission increases that result from a transportation project must be included in the build analysis, to evaluate whether they, as part of the project, would increase emissions worsening air quality in the local area over the no-build scenario. See, e.g., 75 Fed.Reg. at 14,280/3 (“if a highway project will facilitate additional diesel ships or locomotives, these additional non-road emissions must be included as part of the background concentrations in the hot-spot analysis”)⁷; see 40 C.F.R. § 93.110 (requiring use of the latest planning assumptions); supra 13-16 (describing build/no-build analysis). Thus, if new information discloses that previously unanticipated

⁷ In this example, the additional non-road emissions that result from the project would be included as background emissions only in the build scenario, since they are caused by the project, but not in the no-build scenario.

sources would result from the new transportation project – including non-transportation sources – thereby projecting local NAAQS violations beyond an area’s attainment date, the hot-spot analysis for the new project must take this into account in the build scenario. Where new or worsened violations are projected from the project in the build scenario, the project could not proceed.

Moreover, where violations already are expected beyond the attainment date, the project will not conform if any increased emissions from the build scenario would contribute to new or worsened violations. In such a case, under Section 93.116(a) a project will conform only if, under the build scenario, the new project would improve the local air quality or not make it worse, thereby ensuring that the criteria in Subsection (B)(iii) are met. See 75 Fed.Reg. at 14,278 (JA 265).

As EPA explained in the preamble, commenters (and Petitioners in their brief) incorrectly describe circumstances where a transportation project will not increase emissions in an area as ones in which that project is “maintaining” a violation, see, e.g., 75 Fed.Reg. at 14,281/1 (JA 268), or “perpetuat[ing]” a violation. Pet.Br. 32-33, 48. Indeed, under Petitioners’ reasoning even where a new project would make air quality better over that estimated by the no-build scenario, if a violation is still expected to occur, the project should be viewed to cause or contribute to the violation and thus to delay timely attainment. See Pet.Br. 28, 32-33, 48. However, beyond Petitioners’ flawed interpretation of what

Subsection (B)(iii) requires, there is no logic to such thinking. EPA explained that where the project makes air quality better, the “build/no-build analysis would show that the project is helping to reduce concentrations, and improve air quality by reducing a future violation,” 75 Fed.Reg. at 14,280/2 (JA 267), and thus the project would neither cause nor contribute to a new or worsened violation nor delay timely attainment. Id. It was also reasonable for EPA to analyze whether a project will delay timely attainment by evaluating its impacts on NAAQS violations since attainment of the NAAQS depends on whether there are violations of the standard. In sum, even where a violation is already expected in the no-build scenario, if the project under the build scenario will not increase emissions, the project does not cause or contribute to a new violation or make an existing violation worse, and likewise does not delay timely attainment. Id. at 14,278 (JA 265).

EPA’s explanation thus illustrates that Petitioners’ real challenge to Section 93.116(a) is premised on their argument that, even though a new project will not make local air quality worse, and may in fact improve air quality, EPA may only satisfy Subsection (B)(iii) by requiring that a new transportation project compel sufficient reductions to fully offset emissions from other sources to eliminate any NAAQS violations expected to continue after the attainment date. As discussed in Section II below, EPA’s contrary, longstanding interpretation is eminently reasonable and should be upheld. Petitioners’ disagreement on this legal issue

provides no basis to argue that Section 93.116(a) is inadequate absent additional criteria.

4. EPA's Decision Not to Further Define or Add New Decisional Criteria for Subsection (B)(iii) Does Not Nullify that Provision.

For the same reasons, Section 93.116(a) does not nullify Subsection (B)(iii) simply because EPA concluded that demonstrating, under the build/no-build analysis, that a new project will not result in new or worsened violations also demonstrates as a practical matter that timely attainment of the NAAQS will not be delayed. Indeed, Petitioners have not posited any actual examples where no new local NAAQS violations or worsened existing NAAQS violations would occur as a result of a new transportation project under the build scenario, yet timely attainment would be delayed in that area beyond that in the no-build scenario, and EPA is not aware of any circumstances in which that would be the case.

Moreover, in 1990 Congress enacted the three provisions in Section 176(c)(1)(B), together with the other conformity requirements, and directed EPA to promulgate regulatory criteria and procedures to implement these provisions for transportation activities, 42 U.S.C. §§ 7506(c)(4)(B), (D). Further, Subsections (c)(1)(A) and (B) apply to all federally funded or approved projects, not only transportation projects. As Congress first adopted these provisions in 1990, it cannot be charged to have anticipated the specific build/no-build analytical

approach EPA would later require for the hot-spot conformity analysis, and it could not have had a specific view as to whether that analysis would be robust enough to satisfy the requirements of Subsections (B)(i) and (B)(ii) as well as (B)(iii). Yet, this is ultimately what Petitioners' nullification argument hinges on – an assumption that Congress unambiguously decided in 1990 that this yet-to-be-adopted regulatory approach for transportation projects would not be sufficient under the general conformity requirements in Section 176(c)(1)(B).

Moreover, through Section 93.116(a) and the Agency's other regulations, EPA plainly has given practical meaning to the Subsection (B)(iii) text that, for a new transportation project to conform to the SIP, it cannot delay timely attainment in the local area. For example, as explained above and in the preamble, if violations are already predicted to occur beyond an area's attainment date, to conform under Subsection (B)(iii) the project cannot make air quality worse. See 75 Fed.Reg. at 14,278, 14280-81 (JA 265, 267-68). In such circumstances, this is in practice what Subsection (B)(iii) means. However, because the test in Section 93.116(a) using EPA's previously established build/no-build analysis already fully effectuates this requirement, EPA reasonably declined on remand to establish additional regulatory criteria or definitions as Petitioners urge. Given that existing criteria are already adequate, and that they are applied by the various State departments of transportation and numerous U.S. DOT field offices, EPA reasonably proceeded

cautiously by not adopting any additional, unnecessary definitions or modifications to Section 93.116(a).

C. Requiring that a Project Be Included in a Regional Analysis Is Necessary, But Not Sufficient, to Satisfying the Hot-Spot Requirement; Petitioners' Straw Arguments to the Contrary Are Inapposite

Petitioners argue that “it is inconsistent with the Act to substitute the regional emissions analysis for an assessment of localized impacts.” Pet.Br. 36. This significantly mischaracterizes EPA’s position and regulations, and based upon this mistaken characterization Petitioners argue at length that Section 93.116(a) is inconsistent with the Act because it fails to satisfy Subsection (B)(iii). Pet.Br. 36-38, 46, 51-54. In actual fact, it is clear that EPA viewed the inclusion of a local project in a regional analysis as a necessary prerequisite – but not sufficient for – a hot-spot analysis.

On remand, EPA clarified its preexisting interpretation that – among the other required criteria – a hot-spot analysis also requires that a transportation project be “included in a regional emissions analysis that meets applicable §§ 93.118 and/or 93.119 requirements.” 75 Fed.Reg. at 14,285/2 (quoting Section 93.116(a)) (JA 272). This already is a requirement for conformity under the Act, supra 11 (requiring projects come from conforming transportation plans and programs), and EPA’s preexisting regulations. See 40 C.F.R. § 93.109(b) Table 1, 93.115(a), 93.118(a), 93.119 & 93.122(a)(1). EPA added this language to Section 93.116(a) to

emphasize this requirement that emissions expected from a new transportation project must be contained in the regional emissions analysis whose emissions in turn cannot be greater than the allowable emissions from the transportation sector in the approved SIP budget. See 75 Fed.Reg. at 14,275/2-3 (JA 262). This requirement in Section 93.116(a) thus serves as a clarifying prerequisite; it is not sufficient for a new project to demonstrate conformity under Subsection (B)(iii). This is clear from the text of Section 93.116(a), demonstrated above in this brief, and explained in the preamble. 75 Fed.Reg. at 14,278/1 (“in addition to demonstrating that the project is consistent with the regional emissions analysis”) (JA 265); id. at 14,278/2-3 (“2. Requirement for No Delay in Timely Attainment of NAAQS”).

Mistakenly assuming the contrary, Petitioners argue broadly that fundamentally different tests are required under Sections 176(c)(1) and 176(c)(2) and that EPA inappropriately equates the two. Pet.Br. 37-40. Even were the Court to accept Petitioners’ broad brush descriptions of and distinctions between these two sections – and we note, there are numerous errors in Petitioners’ description – these arguments are irrelevant, since they challenge a straw position of Petitioners’ own making. In sum, rather than only ensure the project will not result in increased emissions above permissible regional emissions, by focusing on any new or worsened local violations that would result from the build scenario, Section 93.116(a) clearly “does require a comparison of localized pollutant concentrations

to the NAAQS,” 75 Fed.Reg. at 14,281/1 (JA 268).

II. EPA’s Interpretation, That Subsection (B)(iii) Does Not Require a New Transportation Project to Generate Emission Reductions to Offset Emissions From Other Sources, Is Reasonable and Fully Supported by the Case Law.

Underlying Petitioners’ claim that Section 93.116(a) fails to effectuate Subsection (B)(iii) is their mistaken interpretation of what that Subsection requires. This Subsection does not require that, to conform, a transportation project must – either by itself or through mitigation specifically adopted for that project – generate reductions that offset emissions from other sources that may prevent an area from attaining the NAAQS. This is true regardless of whether local NAAQS violations are already predicted to occur under the no-build scenario (i.e., without the new project) after an area’s attainment date has passed. In effect, Petitioners seek a construction ban on any new transportation project in areas where NAAQS violations already are expected to occur after the attainment date, unless transportation planners adopt additional measures to offset emissions from other sources responsible for the violations. In Petitioners’ view, even if a new transportation project in the build scenario improves air quality, if it does not achieve enough reductions to offset all other sources that cause violations, the project could not proceed. This would represent a radical change of existing law and EPA’s consistent interpretation since the 1990 Amendments were passed, and is contrary to Congress’ intent. In order to prevail on this issue, Petitioners would

have to show that the statute unambiguously compels their favored outcome, and this surely is not the case. Instead, EPA's interpretation is supported by the statute's text and context as well as existing case law. But even were the Act ambiguous, EPA's interpretation is reasonable and should be upheld as a permissible construction under Step Two of Chevron.

A. The Plain Text of Subsection (B)(iii) Supports EPA's Interpretation.

Subsection (B)(iii) provides in relevant part that "Conformity to an implementation plan [i.e, a SIP or FIP] means" that a new transportation project subject to the Act's conformity requirements "(B) . . . will not – (iii) delay timely attainment of any standard . . . in any area." 42 U.S.C. § 7506(c)(1)(B)(iii) (emphasis added). By requiring only that the project not "delay" timely attainment, Congress plainly did not intend that to conform the new project must "achieve" timely attainment by "reducing" emissions. Rather, the term "delay" necessarily presupposes some other circumstances that otherwise would achieve timely attainment of the NAAQS, which in turn a new transportation project may not delay. In this regard, the term "delay" only requires that a new project not interfere with, i.e., by not delaying, timely attainment that would otherwise be achieved. See 75 Fed.Reg. at 14,277/1 (JA 264). This conclusion is further supported by the text identifying an "implementation plan" (a SIP or FIP) – which contains the comprehensive emission inventories, modeling, and enforceable emissions controls

for nonattainment areas to attain the NAAQS by their attainment date, as well as motor vehicle emissions budgets that are consistent with these inventories and controls, see supra 6-8; infra 46-49 – as the provision to which conformity must be demonstrated. Petitioners’ interpretation runs afoul of the Subsection (B)(iii) text, therefore, first by replacing the concept of “delay” a project might cause with an affirmative obligation that the project instead “achieve” something, and second by replacing the basic concept of “conformity with a SIP” with the idea “reductions” must be achieved by the new transportation project (either alone or with new mitigation the project sponsor adopts for the project) to reach timely attainment, rather than only not delay it.

Nothing in the text or context of Subsection (B)(iii) admits an exception or contrary interpretation in situations where a no-build scenario already predicts NAAQS violations after an area’s attainment date has passed. In that situation, the statutory text still only requires that individual projects not “delay” timely attainment to conform to the SIP, rather than achieve reductions otherwise necessary to eliminate violations and attain the NAAQS. As previously explained, in such a situation the Section 93.116(a) criteria requires in practice that the new project not make air quality worse. Supra 29-35. This is fully consistent with EPA’s interpretation that under Subsection (B)(iii), a new transportation project may not interfere with the other efforts in the no-build scenario to reach timely

attainment.

Moreover, that Congress did not, by the text in Subsection (B)(iii), intend to require individual transportation projects to achieve reductions to conform is further confirmed by the text Congress did enact for the sole circumstance in which it requires individual projects to achieve reductions. Specifically, Section 176(c)(3)(B)(ii) requires individual projects in certain carbon monoxide nonattainment areas to “eliminate or reduce the severity and number of violations of the carbon monoxide standards in the area substantially affected by the project.” 42 U.S.C. § 7506(c)(3)(B)(ii). Thus, had Congress intended Section 176(c)(1)(B)(iii) to require reductions, it would have employed entirely different language, mandating reductions to achieve, instead of not delaying, timely attainment. EPA thus explained that Congress’ decision “not [to] establish such a requirement for any project in [PM nonattainment] areas under section 176(c)(3)(B)(ii)” fully supports EPA’s interpretation that no such requirement applies under Subsection (c)(1)(B)(iii). 75 Fed.Reg. at 14,276/2-3 (JA 263).

Finally, Petitioners allege, incorrectly, that EPA's “original (1993) understanding” when it first promulgated the conformity regulations was that the criteria in Sections 176(c)(1)(A) and (c)(1)(B)(iii) require emission reductions sufficient to ensure that the NAAQS are met by the statutory attainment date. Pet.Br. 9-10 & 47 (and quoting 58 Fed.Reg. at 62,191). To the contrary, EPA’s

statement refers only to regulations implementing the novel requirements in Section 176(c)(3)(B)(ii) for carbon monoxide discussed above.⁸

B. The Legislative History Neither Supports Petitioners' Interpretation Nor Conflicts With EPA's Reasonable Construction.

Contrary to Petitioners' claims, the legislative history does not support their argument that Subsection (B)(iii) requires that new transportation projects generate reductions to offset emissions from other sources necessary to reach attainment. First, though Petitioners quote from a document they call the 1990 "Conference Report," Pet.Br. 48-50, that document is not the conference report at all, but rather an insert placed in the Congressional Record by a single Senator during floor debate. 136 Cong. Rec. S16,969 (daily ed. Oct. 27, 1990) (remarks of Senator Baucus); see EDF I, 82 F.3d at 460 n.11 (correcting this same mischaracterization by petitioners). Further, the Joint Explanatory Statement of the Conference Committee for the 1990 CAA Amendments (H.R. Conf. Rep. No. 101-952, at 335-50 (1990)), does not discuss Section 176(c), let alone provide any support for Petitioners' theory.

Second, in context Petitioners' isolated quote from the Senator's remarks

⁸ As adopted in 1993, 40 C.F.R. § 93.121(a) required projects to "eliminate or reduce the severity and number of localized CO violations . . ." 58 Fed.Reg. at 62,243 (emphasis added) . No such requirement was adopted in 1993 for PM₁₀ areas, where projects were only subject to the Section 93.116(a) requirement that they not cause or contribute to new local violations or worsen existing local violations. Supra 12-13.

(Pet.Br. 48) does not even support their theory. The preceding (unquoted) sentence states that a transportation plan must demonstrate vehicular use consistent with “emission reductions . . . in the applicable implementation plan [i.e, the SIP or FIP],” 136 Cong. Rec. at S16,973, thereby clarifying that, in the context of a transportation plan, under Subsection (B)(iii), “the comparison should be with the emission reductions required” by the SIP (either by its interim milestones or attainment date). Id. Thus, this statement explains only that SIPs reduce emissions, and that a transportation plan must conform to a SIP. It provides no support for Petitioners’ view that if an area does not attain by its attainment date, hot-spot conformity under Subsection (B)(iii) should be construed to require individual transportation projects to generate any extra reductions necessary to offset emissions from other sources for the area to demonstrate it will attain.

Nor would such a construction make any sense. If a new project will not make air quality worse when compared to the no-build scenario, EPA reasonably concluded that the Act’s hot-spot conformity requirements should not be construed to block that project, as a penalty or inducement, to compel other reductions. Moreover, Petitioners’ construction would improperly place the responsibility for achieving any such needed additional reductions on the transportation sector, rather than with the appropriate State and Federal air quality planners charged under the Act to make decisions regarding which sectors and which particular sources should

further reduce their emissions. EDF III, 467 F.3d at 1338-39; see 75 Fed.Reg. at 14,276/2-3 (JA 263). As discussed below, EPA reasonably construes other provisions of the Act to serve this role. Accordingly, EPA's interpretation of the requirements in Subsection (B)(iii) is reasonable and should be upheld, and Petitioners' challenge to 40 C.F.R. § 93.116(a) built upon their mistaken reading of the Act should be rejected.

C. The Structure of the Act and the SIP Process Fully Supports EPA's Interpretation.

Petitioners' argument that Subsection (B)(iii) requires reductions whenever the no-build scenario already predicts violations, even where the new project is not expected to create new violations or worsen the existing violations, also conflates the overarching requirement that SIPs "implement[], maintain[], and enforce[]" the NAAQS, 42 U.S.C. § 7410(a)(1), with the fundamentally different requirements in Subsection (B)(iii). At the outset, we emphasize that EPA does not, as Petitioners contend, rely on the SIP process to either displace or satisfy the requirements of Subsection (B)(iii) in local areas. Rather, as already explained, Section 93.116(a) utilizing the build/no-build analysis ensures Subsection (B)(iii) is met, and a regional emissions analysis is necessary, but is not by itself sufficient, to satisfy Section 93.116(a).

The SIP process does, however, establish the appropriate mechanism to address any predicted violations under the no-build scenario that are expected to

continue regardless of whether the new project is built. By contrast, Petitioners' argument that Subsection (B)(iii) compels reductions to cure such existing problems is inconsistent with the Act. Specifically, for a PM_{2.5} or PM₁₀ nonattainment area, the SIP must include, among other things, all appropriate control measures and demonstrate how the area will attain the standard "as expeditiously as practicable" but no later than the area's attainment date, 42 U.S.C. §§ 7502(a)(2)(A), 7502(c). Similarly, nonattainment areas that subsequently attain the NAAQS must adopt SIPs that contain any additional measures necessary to maintain the NAAQS in order to be redesignated to attainment status. Id. § 7505a.

Moreover, Congress already has prescribed the specific remedies for nonattainment areas that do not attain by their attainment date. First, nonattainment (and maintenance) SIPs must include contingency provisions to address such circumstances, and these measures must "take effect in any such case without further action by the State or [EPA.]" Id. § 7502(c)(9). Similarly, maintenance SIPs required for nonattainment areas subsequently redesignated to attainment must include contingency provisions "to assure that the State will promptly correct any violation of the standard which occurs after" the area attained. 42 U.S.C. § 7505a(d).

Second, after an area's attainment dates passes, EPA must determine whether the area attained, id. § 7509(c)(1), and if it has not, States must submit revised SIPs

that include the additional required measures that will demonstrate attainment by a new date established by EPA. Id. §§ 7509 (c)(2), (d). The Act prescribes the particular transportation funding and off-set “sanctions” that apply, and potential for a FIP, if States fail to submit approvable, revised SIPs. Id. §§ 7509(b), 7410(c). Further, even before a nonattainment date has passed, EPA may “find[] that [a SIP] . . . is substantially inadequate to attain or maintain the relevant [NAAQS],” thereby requiring “the State to revise the [SIP] as necessary to correct such inadequacies,” id. § 7410(k)(5), subject to the referenced potential sanctions and FIP if it does not.

Finally, for certain NAAQS, such as PM₁₀, Congress added additional provisions establishing requirements for areas that fail to reach attainment by their attainment dates. For example, such PM₁₀ areas are “bumped up” to a higher classification, with a new, extended attainment date, 42 U.S.C. § 7513, together with corresponding requirements that such areas revise their SIPs to adopt additional control measures. Id. § 7513a. Further, “serious” PM₁₀ nonattainment areas that fail to attain by their attainment dates must revise their SIPs to provide for additional annual reductions of not less than five percent until they attain. Id. § 7513a(d).⁹

⁹ Implementing the 2007 PM_{2.5} NAAQS, EPA concluded that the additional provisions in 42 U.S.C. §§ 7513-7513a do not apply to PM_{2.5}, but that other statutory requirements apply if an area fails to attain. 72 Fed.Reg. 20,586 (Apr. 25, 2007). Challenges to that rule in this Court are being held in abeyance while EPA considers administrative petitions requesting EPA to reconsider that rule. Nat’l Cattlemen’s Beef Ass’n v. EPA (No. 07-1227 and consolidated cases).

This fully supports EPA's interpretation that Congress intended that this SIP process address any nonattainment and violations after an area's attainment date projected under the no-build scenario, regardless of whether any new project is built, rather than Petitioners' interpretation that a transportation construction ban under Subsection (B)(iii) should apply to compel new measures that offset emissions from other sources unrelated to the project.

This Court in its 2007 decision did not, as Petitioners contend, dismiss these provisions of the Act as irrelevant. Rather, the Court concluded only that EPA failed to create a rational link between the SIP process to implement the (B)(iii) requirement. EDF IV, 509 F.3d at 561. This lack of a linkage, however, does not reflect EPA's position. EPA is not arguing that a SIP standing alone implements (B)(iii), but rather only that the Act's SIP provisions discussed above, not conformity under Subsection (B)(iii), establishes the appropriate mechanism to address sources of emissions that may otherwise cause or worsen violations (i.e., in the no-build scenario) after an area's attainment date has passed and thereby delay attainment. EPA thus does not argue that the SIP process applies in lieu of the forward-looking project-level hot-spot analysis described above to meet Subsection (B)(iii), and Petitioners' arguments built upon that flawed assumption are little more than a red herring.

D. The Case Law Fully Supports EPA's Interpretation.

On no less than five occasions, this and other courts have rejected the same or similar arguments as those raised by Petitioners here, concluding that conformity under the various subsections of Section 176(c) does not require emissions reductions to offset emissions from other sources that may cause or worsen NAAQS violations beyond an area's attainment date. For example, in EDF III, this Court considered and rejected the same basic argument Petitioners raise here. 467 F.3d at 1338. Reviewing CAA Section 176(c)(1), the Court explained that “[a]lthough the Act states that SIPs must reduce violations, and therefore emissions, see 42 U.S.C. § 7506(c)(1)(A), it is notably silent on whether transportation plans themselves, which are but one part of the SIP, must reduce emissions.” 567 F.3d at 1338 (emphasis in original). The Court recognized the discretion the CAA preserves for States to establish the appropriate mix of controls on transportation and other sources to attain the NAAQS, explaining that “a SIP could lower total overall emissions by reducing stationary source emissions while leaving mobile source emissions unchanged.” Id. It concluded “that conformity to a SIP can be demonstrated by using the build/no-build test, even if individual transportation plans do not actively reduce emissions,” id., and that “[a]bsent language in the Act requiring transportation plans to actively reduce mobile source emissions, we uphold EPA's reasonable interpretation of the Act under Chevron” that they need

not. Id.

The Court in EDF III also explained that it reached this same conclusion in an earlier case, EDF I, in which the same basic argument had been previously raised by petitioners in their challenge to EPA's 1993 conformity regulations. The Court in EDF III stated that in EDF I "[w]e agreed with EPA 'that plans and [programs] may contribute to emissions reductions by avoiding or reducing increases in emissions over the years,' . . . because . . . the statute . . . 'd[id] not require that the emissions come entirely from mobile sources.'" EDF III, 467 F.3d at 1338-39 (quoting EDF I, 82 F.3d at 459-60). Ruling otherwise would "'impinge on the prerogative of States . . .'" Id. Most recently, in its 2007 decision reviewing EPA's hot-spot regulation at Section 93.116(a), this Court reaffirmed that Section 176(c)(1)(A) does not require reductions for a project to conform. EDF IV, 509 F.3d at 559-560 & n.4.

Finally, the district court in Sierra Club v. Atlanta Regional Comm'n, 255 F. Supp. 2d 1319, 1339-42 (N.D. Ga. 2002), aff'd, 54 Fed.Appx. 491 (11th Cir. 2003), rejected similar arguments based upon Subsection (B)(iii), concluding that this provision does not effectively impose a construction ban by preventing affirmative conformity findings simply because an area may have already passed its attainment date without attaining. Rather, after extensively reviewing the relevant provisions, the court concluded that "plaintiffs are urging this court to impose this drastic

remedy based upon a selective reading of a statute that was intended to give states more flexibility in meeting emissions goals.” Id. at 1342.

Petitioners’ efforts to distinguish the teachings of these cases are unavailing. Petitioners rely on dicta in this Court’s 1999 decision addressing requirements under Section 176(c)(2)(C), 42 U.S.C. § 7506(c)(2)(C), for conformity determinations in the absence of a currently conforming transportation plan and program. EDF v. EPA, 167 F.3d 641 (D.C. Cir. 1999) (“EDF II”). For example, Petitioners (at 38) quote a sentence in EDF II that states, in dicta, that if a particular interpretation were accepted, “there would be no assurance that projects approved under section 7506(c)(2)(C) would help eliminate, reduce, or prevent violations of [the NAAQS], as required by section 7506(c)(1).” Id. at 646-47. Petitioners, however, fail to mention that in a prior challenge to other conformity regulations they previously asserted this same argument, which this Court rejected in EDF III. Addressing this issue, the EDF III Court explained that EDF II does not mean that the Act requires emissions reductions, but rather that the “approach [in EDF II] is best understood in the context of our previous holding in EDF I that contributing to reductions can reasonably mean avoiding increases in emissions over the years.” EDF III, 467 F.3d at 1339 (emphasis in original) (citing EDF I, 82 F.3d at 460).

Likewise, Petitioners rely on EDF II for their general view of the differences between Sections 176(c)(1) and (c)(2), arguing that each provision establishes a

separate test for conformity, and that a regional emissions analysis applies only in the latter. Pet.Br. 45. This simplistic generalization is inaccurate, and irrelevant, since as explained EPA does not argue that the regional emissions analysis is sufficient to satisfy or displace Subsection (B)(iii). Supra 38-40. To conform, a project must be consistent with the transportation budget and under the hot-spot analysis requirement must also satisfy the build/no-build analysis in the local area.

Petitioners also fail to distinguish EDF III, 467 F.3d at 1338-39, where the Court held that neither the text of Subsection (c)(1)(A) nor its larger context require emissions reductions. Petitioners reason that, “unlike EDF III, Petitioners’ claim here is focused on a statutory provision that applies on its face to emissions expected after the milestone and attainment deadlines, and is not directly related to plans and [programs] that” must be frequently updated. Pet.Br. 40. However, hot-spot requirements are not limited to circumstances where milestones or attainment dates in an area’s SIP have passed, and nothing in Subsection (B)(iii) supports Petitioners’ apparent claim to the contrary. Additionally, contrary to Petitioners’ claim, the Court in EDF III clearly reaffirmed its prior holding in EDF I, and did not limit its reasoning to the time period before the attainment date. 467 F.3d at 1338-39.

Moreover, the relevant text of Subsections (c)(1)(A) (“achieving expeditious attainment of NAAQS”) and (b)(1)(A) (“not delay timely attainment”) are on their

face similar and overlap, and no difference in their text would support Petitioners' interpretation. See 75 Fed.Reg. at 14,277 (JA 264). As explained supra 41-42, nothing in the phrase "not delay" suggests or requires that an individual transportation project achieve reductions that offset other sources.

Finally, transportation plans and programs comprise State and Federal longer- and near-term planning documents to ensure conformity with a SIP, and an individual transportation project must be included in a conforming transportation plan and program. Supra 11 & 38. Especially given this, and the Court's decisions that neither transportation plans nor programs must generate emission reductions, it would make no sense to conclude for a hot-spot analysis that an individual project cannot conform unless enough reductions are first generated to offset other sources for an area to reach attainment. This would disrupt the carefully crafted process Congress established linking transportation and Clean Air Act planning.

In sum, this Court's decisions firmly support EPA's interpretation of Subsection (B)(iii).

E. Requiring Commitments For Mitigation to Offset A New Transportation Project's Own Emissions Does Not Support Petitioners' Argument.

Petitioners seek to refute EPA's interpretation, claiming that 40 C.F.R. § 93.125(c), which Congress in 2005 specifically required to be included in SIPs, 42 U.S.C. § 7506(c)(4)(E), Pub.L. No. 109-59, § 6011(f)(4), establishes a mechanism

by which mitigation for an individual transportation project may be adopted to offset emissions from other sources that may prevent attainment. Pet.Br. 57-58. Petitioners' reliance on this provision, however, is misplaced. Section 93.125(c) simply requires State conformity procedures to include the requirement that commitments, to undertake any controls or mitigation measures developed for a project to offset that project's emissions, are obtained prior to a project-level conformity determination. This provision does not require or suggest that it is reasonable to require additional mitigation for the project to generate additional reductions sufficient to offset emissions from other unrelated sources to prevent violations. As discussed above, Petitioners' interpretation that conformity in effect operates as a construction ban, as leverage to compel States to adopt any additional, needed reductions from other sources, would inappropriately render the SIP process subservient to conformity review and contradict Congress' intent and EPA's reasonable construction of the Act. Thus, if anything, Congress' enactment of 42 U.S.C. § 7506(c)(4)(E) in 2005 supports EPA's interpretation.

III. The Court Lacks Jurisdiction Over Arguments Effectively Challenging Preexisting Conformity Regulations, the Agency's Prior Rules Defining the PM NAAQS and their Monitoring, and EPA Guidance, or that Are Based on Cases Pending in Other Courts.

Many of Petitioners' characterizations of EPA's hot-spot conformity rule for PM₁₀ and PM_{2.5} in 93.116(a) are based upon Petitioners' misrepresentations of and disagreements with other preexisting regulations, EPA guidance or pending cases in

other courts that are not properly before this Court. As explained above, the issues raised by the Court's remand of 93.116(a) in EDF IV, 509 F.3d. at 562, and the provisions proposed for comment and modified in the final rule on remand, are limited in nature. E.g., 74 Fed.Reg. at 23,038/2 (JA 61); supra 11-13, n.3 and 26-28. EPA's rule did not open the floodgates for Petitioners to challenge other elements of EPA's longstanding rules in its conformity program. Section 307(b)(1), 42 U.S.C. § 7607(b)(1), precludes such collateral challenges, by expressly requiring challenges to EPA final rules or other final actions that are "nationally applicable" to be filed only in the U.S. Court of Appeals for the D.C. Circuit within 60 days after notice of their promulgation or issuance was published in the Federal Register. Indeed, this Court has previously rejected as improper an attempt by many of the same petitioners here to mount a belated challenge to EPA's 1997 conformity rule. EDF III, 467 F.3d at 1333 ("The 2004 Rule made only minor changes to the 1997 regulation, which petitioners do not challenge. Instead, they seek review of the 1997 regulation itself, which they cannot now do.").

For example, Petitioners contend that EPA "has construed monitoring requirements to avoid" monitoring near highways that Petitioners argue is necessary to develop emissions budgets for a regional emissions analysis. Pet.Br. 54-55. Here, Petitioners' arguments are again premised on their flawed assumption that EPA displaced a hot-spot analysis using the build/no-build assessment with the

regional emissions analysis, and are thus inapposite (supra 36-40). Beyond this, Petitioners' argument also amounts to a challenge to EPA's monitoring regulations for PM_{2.5}. EPA established these regulations, however, in its separate 1997 and 2006 monitoring rules,¹⁰ and neither those rules nor any SIP guidance relating to those rules may be challenged in this case. Moreover, these longstanding regulations already establish proper mechanisms that allow monitors that represent air quality in highly localized areas (called, for example, Microscale and Middlescale Monitors) to be considered when appropriate, 40 C.F.R. § 58.30(a)(2), and this Court lacks jurisdiction to entertain challenges averring that those regulations are inadequate. If Petitioners find fault with those regulations, their appropriate remedy is to administratively request EPA to modify them, see 5 U.S.C. § 553(e), rather than challenge them directly here. See Shipbuilders Council v. U.S., 868 F.2d 452, 456 n.3 (D.C. Cir. 1989). Finally, this Court is plainly not the right forum for Petitioners to raise any challenges they may have to EPA's recent conformity guidance, which post-dates EPA's regulation challenged here.

Petitioners also assert alleged facts and arguments that are raised in a different challenge now pending in the U.S. Court of Appeals for the Ninth Circuit. Pet.Br. 55-56 (referring to NRDC v. EPA, Case No. 08-72288 (9th Cir.)). There,

¹⁰ 71 Fed.Reg. 61,236 (Oct. 17, 2006); 62 Fed.Reg. 38,764 (July 18, 1997).

petitioners challenge EPA's finding under regulations not at issue here that transportation budgets in the proposed PM_{2.5} and ozone SIP in the South Coast non-attainment area are adequate for certain conformity purposes.¹¹ This Court, however, lacks jurisdiction over the challenges in that case, and any disagreements Petitioners may have with the challenged action there serve no basis for Petitioners' challenge to the matters EPA resolved in this rulemaking.

Similarly, in the background section of their brief, Petitioners set out alleged facts and disagreements with a conformity determination in yet another pending case. Pet.Br. 12-15. In that federal district court case, plaintiffs (which include some of the Petitioners here) challenge, among other things, a conformity finding for State Road 47 in California. NRDC v. DOT, No. 2:09-cv-08055-CAS (C.D. Cal.). Petitioners' reliance on that pending case is also inappropriate. First, as Petitioners admit, Pet.Br. 12 n.10, the facts they allege are largely based on information not in the administrative record, and thus may not be raised as a basis for their challenge here and should be stricken, 42 U.S.C. § 7607(d)(7), and then Petitioners provide no citations for their allegations. Petitioners cannot evade the Act's record review requirement by their request that the information be assumed true as a hypothetical. Second, as this Court lacks jurisdiction over the challenge to

¹¹ The regulations at issue in that case, 40 C.F.R. § 93.118(e), were promulgated in 1997, 62 Fed.Reg. 43,780 (Aug. 15, 1997), and therefore clearly not before the Court in this case.

the State Road 47 conformity determination case, it is also inappropriate for Petitioners to seek here an advisory opinion for that pending matter. Third, the inclusion of this material in the background portion of its brief cannot serve to raise an issue or present argument in the case. City of Nephi v. FERC, 147 F.3d 929, 933 n.9 (D.C. Cir. 1998). Neither EPA nor the Court should be expected to decipher or opine on such cryptic statements and assertions.^{12/}

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

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Dated: May 11, 2011

¹² Even were the Court to consider these assertions, we note the illogic and confusion in Petitioners' description inappropriately juxtaposing percentages of increases with percentages of total values. Pet.Br. 14-15.

CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because this brief contains 13,921 words, excluding signature block, Joint Appendix citations, and the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Wordperfect 12 in Times New Roman 14 point type.

/S/ David J. Kaplan

Dated: May 11, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of May, 2011, I caused the following brief and accompanying addendum to be filed and thus served through the Court's CM/ECF system on all counsel of record that have, as required, registered through with system. I further certify that on May 11, 2011, I caused an electronic copy of the foregoing to be sent by email to the following counsel:

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**STATUTORY & REGULATORY
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ministrator is authorized to pay, for two years, up to 100 per centum of the air quality planning program costs of any commission established under section 7506a of this title (relating to control of interstate air pollution) or section 7511c of this title (relating to control of interstate ozone pollution) or any agency designated by the Governors of the affected States, which agency shall be capable of recommending to the Governors plans for implementation of national primary and secondary ambient air quality standards and shall include representation from the States and appropriate political subdivisions within the air quality control region. After the initial two-year period the Administrator is authorized to make grants to such agency or such commission in an amount up to three-fifths of the air quality implementation program costs of such agency or commission.

(July 14, 1955, ch. 360, title I, § 106, as added Pub. L. 90-148, § 2, Nov. 21, 1967, 81 Stat. 490; amended Pub. L. 91-604, § 3(c), Dec. 31, 1970, 84 Stat. 1677; Pub. L. 101-549, title I, § 102(f)(2), title VIII, § 802(f), Nov. 15, 1990, 104 Stat. 2420, 2688.)

CODIFICATION

Section was formerly classified to section 1857c-1 of this title.

PRIOR PROVISIONS

A prior section 106 of act July 14, 1955, was renumbered section 117 by Pub. L. 91-604 and is classified to section 7417 of this title.

AMENDMENTS

1990—Pub. L. 101-549, § 102(f)(2)(A), inserted "or of implementing section 7506a of this title (relating to control of interstate air pollution) or section 7511c of this title (relating to control of interstate ozone pollution)" after "section 7407 of this title".

Pub. L. 101-549, § 102(f)(2)(B), which directed insertion of "any commission established under section 7506a of this title (relating to control of interstate air pollution) or section 7511c of this title (relating to control of interstate ozone pollution) or" after "program costs of", was executed by making the insertion after that phrase the first place it appeared to reflect the probable intent of Congress.

Pub. L. 101-549, § 102(f)(2)(C), which directed insertion of "or such commission" after "such agency" in last sentence, was executed by making insertion after "such agency" the first place it appeared in the last sentence to reflect the probable intent of Congress.

Pub. L. 101-549, §§ 102(f)(2)(D), 802(f), substituted "three-fifths of the air quality implementation program costs of such agency or commission" for "three-fourths of the air quality planning program costs of such agency".

1970—Pub. L. 91-604 struck out designation "(a)", substituted provisions authorizing Federal grants for the purpose of developing implementation plans and provisions requiring the designated State agency to be capable of recommending plans for implementation of national primary and secondary ambient air quality standards, for provisions authorizing Federal grants for the purpose of expediting the establishment of air quality standards and provisions requiring the designated State agency to be capable of recommending standards of air quality and plans for implementation thereof, respectively, and struck out subsec. (b) which authorized establishment of air quality planning commissions.

§ 7407. Air quality control regions

(a) Responsibility of each State for air quality; submission of implementation plan

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

(b) Designated regions

For purposes of developing and carrying out implementation plans under section 7410 of this title—

(1) an air quality control region designated under this section before December 31, 1970, or a region designated after such date under subsection (c) of this section, shall be an air quality control region; and

(2) the portion of such State which is not part of any such designated region shall be an air quality control region, but such portion may be subdivided by the State into two or more air quality control regions with the approval of the Administrator.

(c) Authority of Administrator to designate regions; notification of Governors of affected States

The Administrator shall, within 90 days after December 31, 1970, after consultation with appropriate State and local authorities, designate as an air quality control region any interstate area or major intrastate area which he deems necessary or appropriate for the attainment and maintenance of ambient air quality standards. The Administrator shall immediately notify the Governors of the affected States of any designation made under this subsection.

(d) Designations

(1) Designations generally

(A) Submission by Governors of initial designations following promulgation of new or revised standards

By such date as the Administrator may reasonably require, but not later than 1 year after promulgation of a new or revised national ambient air quality standard for any pollutant under section 7409 of this title, the Governor of each State shall (and at any other time the Governor of a State deems appropriate the Governor may) submit to the Administrator a list of all areas (or portions thereof) in the State, designating as—

(i) nonattainment, any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for the pollutant,

(ii) attainment, any area (other than an area identified in clause (i)) that meets the national primary or secondary ambient air quality standard for the pollutant, or

(iii) unclassifiable, any area that cannot be classified on the basis of available information as meeting or not meeting the na-

tional primary or secondary ambient air quality standard for the pollutant.

The Administrator may not require the Governor to submit the required list sooner than 120 days after promulgating a new or revised national ambient air quality standard.

(B) Promulgation by EPA of designations

(i) Upon promulgation or revision of a national ambient air quality standard, the Administrator shall promulgate the designations of all areas (or portions thereof) submitted under subparagraph (A) as expeditiously as practicable, but in no case later than 2 years from the date of promulgation of the new or revised national ambient air quality standard. Such period may be extended for up to one year in the event the Administrator has insufficient information to promulgate the designations.

(ii) In making the promulgations required under clause (i), the Administrator may make such modifications as the Administrator deems necessary to the designations of the areas (or portions thereof) submitted under subparagraph (A) (including to the boundaries of such areas or portions thereof). Whenever the Administrator intends to make a modification, the Administrator shall notify the State and provide such State with an opportunity to demonstrate why any proposed modification is inappropriate. The Administrator shall give such notification no later than 120 days before the date the Administrator promulgates the designation, including any modification thereto. If the Governor fails to submit the list in whole or in part, as required under subparagraph (A), the Administrator shall promulgate the designation that the Administrator deems appropriate for any area (or portion thereof) not designated by the State.

(iii) If the Governor of any State, on the Governor's own motion, under subparagraph (A), submits a list of areas (or portions thereof) in the State designated as non-attainment, attainment, or unclassifiable, the Administrator shall act on such designations in accordance with the procedures under paragraph (3) (relating to redesignation).

(iv) A designation for an area (or portion thereof) made pursuant to this subsection shall remain in effect until the area (or portion thereof) is redesignated pursuant to paragraph (3) or (4).

(C) Designations by operation of law

(i) Any area designated with respect to any air pollutant under the provisions of paragraph (1)(A), (B), or (C) of this subsection (as in effect immediately before November 15, 1990) is designated, by operation of law, as a nonattainment area for such pollutant within the meaning of subparagraph (A)(i).

(ii) Any area designated with respect to any air pollutant under the provisions of paragraph (1)(E) (as in effect immediately before November 15, 1990) is designated by operation of law, as an attainment area for such pollutant within the meaning of subparagraph (A)(ii).

(iii) Any area designated with respect to any air pollutant under the provisions of paragraph (1)(D) (as in effect immediately before November 15, 1990) is designated, by operation of law, as an unclassifiable area for such pollutant within the meaning of subparagraph (A)(iii).

(2) Publication of designations and redesignations

(A) The Administrator shall publish a notice in the Federal Register promulgating any designation under paragraph (1) or (5), or announcing any designation under paragraph (4), or promulgating any redesignation under paragraph (3).

(B) Promulgation or announcement of a designation under paragraph (1), (4) or (5) shall not be subject to the provisions of sections 553 through 557 of title 5 (relating to notice and comment), except nothing herein shall be construed as precluding such public notice and comment whenever possible.

(3) Redesignation

(A) Subject to the requirements of subparagraph (E), and on the basis of air quality data, planning and control considerations, or any other air quality-related considerations the Administrator deems appropriate, the Administrator may at any time notify the Governor of any State that available information indicates that the designation of any area or portion of an area within the State or interstate area should be revised. In issuing such notification, which shall be public, to the Governor, the Administrator shall provide such information as the Administrator may have available explaining the basis for the notice.

(B) No later than 120 days after receiving a notification under subparagraph (A), the Governor shall submit to the Administrator such redesignation, if any, of the appropriate area (or areas) or portion thereof within the State or interstate area, as the Governor considers appropriate.

(C) No later than 120 days after the date described in subparagraph (B) (or paragraph (1)(B)(iii)), the Administrator shall promulgate the redesignation, if any, of the area or portion thereof, submitted by the Governor in accordance with subparagraph (B), making such modifications as the Administrator may deem necessary, in the same manner and under the same procedure as is applicable under clause (ii) of paragraph (1)(B), except that the phrase "60 days" shall be substituted for the phrase "120 days" in that clause. If the Governor does not submit, in accordance with subparagraph (B), a redesignation for an area (or portion thereof) identified by the Administrator under subparagraph (A), the Administrator shall promulgate such redesignation, if any, that the Administrator deems appropriate.

(D) The Governor of any State may, on the Governor's own motion, submit to the Administrator a revised designation of any area or portion thereof within the State. Within 18 months of receipt of a complete State redesignation submittal, the Administrator shall approve or deny such redesignation. The submis-

sion of a redesignation by a Governor shall not affect the effectiveness or enforceability of the applicable implementation plan for the State.

(E) The Administrator may not promulgate a redesignation of a nonattainment area (or portion thereof) to attainment unless—

(i) the Administrator determines that the area has attained the national ambient air quality standard;

(ii) the Administrator has fully approved the applicable implementation plan for the area under section 7410(k) of this title;

(iii) the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable implementation plan and applicable Federal air pollutant control regulations and other permanent and enforceable reductions;

(iv) the Administrator has fully approved a maintenance plan for the area as meeting the requirements of section 7505a of this title; and

(v) the State containing such area has met all requirements applicable to the area under section 7410 of this title and part D of this subchapter.

(F) The Administrator shall not promulgate any redesignation of any area (or portion thereof) from nonattainment to unclassifiable.

(4) Nonattainment designations for ozone, carbon monoxide and particulate matter (PM-10)

(A) Ozone and carbon monoxide

(i) Within 120 days after November 15, 1990, each Governor of each State shall submit to the Administrator a list that designates, affirms or reaffirms the designation of, or redesignates (as the case may be), all areas (or portions thereof) of the Governor's State as attainment, nonattainment, or unclassifiable with respect to the national ambient air quality standards for ozone and carbon monoxide.

(ii) No later than 120 days after the date the Governor is required to submit the list of areas (or portions thereof) required under clause (i) of this subparagraph, the Administrator shall promulgate such designations, making such modifications as the Administrator may deem necessary, in the same manner, and under the same procedure, as is applicable under clause (ii) of paragraph (1)(B), except that the phrase "60 days" shall be substituted for the phrase "120 days" in that clause. If the Governor does not submit, in accordance with clause (i) of this subparagraph, a designation for an area (or portion thereof), the Administrator shall promulgate the designation that the Administrator deems appropriate.

(iii) No nonattainment area may be redesignated as an attainment area under this subparagraph.

(iv) Notwithstanding paragraph (1)(C)(ii) of this subsection, if an ozone or carbon monoxide nonattainment area located within a metropolitan statistical area or consolidated metropolitan statistical area (as established

by the Bureau of the Census) is classified under part D of this subchapter as a Serious, Severe, or Extreme Area, the boundaries of such area are hereby revised (on the date 45 days after such classification) by operation of law to include the entire metropolitan statistical area or consolidated metropolitan statistical area, as the case may be, unless within such 45-day period the Governor (in consultation with State and local air pollution control agencies) notifies the Administrator that additional time is necessary to evaluate the application of clause (v). Whenever a Governor has submitted such a notice to the Administrator, such boundary revision shall occur on the later of the date 8 months after such classification or 14 months after November 15, 1990, unless the Governor makes the finding referred to in clause (v), and the Administrator concurs in such finding, within such period. Except as otherwise provided in this paragraph, a boundary revision under this clause or clause (v) shall apply for purposes of any State implementation plan revision required to be submitted after November 15, 1990.

(v) Whenever the Governor of a State has submitted a notice under clause (iv), the Governor, in consultation with State and local air pollution control agencies, shall undertake a study to evaluate whether the entire metropolitan statistical area or consolidated metropolitan statistical area should be included within the nonattainment area. Whenever a Governor finds and demonstrates to the satisfaction of the Administrator, and the Administrator concurs in such finding, that with respect to a portion of a metropolitan statistical area or consolidated metropolitan statistical area, sources in the portion do not contribute significantly to violation of the national ambient air quality standard, the Administrator shall approve the Governor's request to exclude such portion from the nonattainment area. In making such finding, the Governor and the Administrator shall consider factors such as population density, traffic congestion, commercial development, industrial development, meteorological conditions, and pollution transport.

(B) PM-10 designations

By operation of law, until redesignation by the Administrator pursuant to paragraph (3)—

(i) each area identified in 52 Federal Register 29383 (Aug. 7, 1987) as a Group I area (except to the extent that such identification was modified by the Administrator before November 15, 1990) is designated nonattainment for PM-10;

(ii) any area containing a site for which air quality monitoring data show a violation of the national ambient air quality standard for PM-10 before January 1, 1989 (as determined under part 50, appendix K of title 40 of the Code of Federal Regulations) is hereby designated nonattainment for PM-10; and

(iii) each area not described in clause (i) or (ii) is hereby designated unclassifiable for PM-10.

Any designation for particulate matter (measured in terms of total suspended particulates) that the Administrator promulgated pursuant to this subsection (as in effect immediately before November 15, 1990) shall remain in effect for purposes of implementing the maximum allowable increases in concentrations of particulate matter (measured in terms of total suspended particulates) pursuant to section 7473(b) of this title, until the Administrator determines that such designation is no longer necessary for that purpose.

(5) Designations for lead

The Administrator may, in the Administrator's discretion at any time the Administrator deems appropriate, require a State to designate areas (or portions thereof) with respect to the national ambient air quality standard for lead in effect as of November 15, 1990, in accordance with the procedures under subparagraphs (A) and (B) of paragraph (1), except that in applying subparagraph (B)(i) of paragraph (1) the phrase "2 years from the date of promulgation of the new or revised national ambient air quality standard" shall be replaced by the phrase "1 year from the date the Administrator notifies the State of the requirement to designate areas with respect to the standard for lead".

(6) Designations

(A) Submission

Notwithstanding any other provision of law, not later than February 15, 2004, the Governor of each State shall submit designations referred to in paragraph (1) for the July 1997 PM_{2.5} national ambient air quality standards for each area within the State, based on air quality monitoring data collected in accordance with any applicable Federal reference methods for the relevant areas.

(B) Promulgation

Notwithstanding any other provision of law, not later than December 31, 2004, the Administrator shall, consistent with paragraph (1), promulgate the designations referred to in subparagraph (A) for each area of each State for the July 1997 PM_{2.5} national ambient air quality standards.

(7) Implementation plan for regional haze

(A) In general

Notwithstanding any other provision of law, not later than 3 years after the date on which the Administrator promulgates the designations referred to in paragraph (6)(B) for a State, the State shall submit, for the entire State, the State implementation plan revisions to meet the requirements promulgated by the Administrator under section 7492(e)(1) of this title (referred to in this paragraph as "regional haze requirements").

(B) No preclusion of other provisions

Nothing in this paragraph precludes the implementation of the agreements and rec-

ommendations stemming from the Grand Canyon Visibility Transport Commission Report dated June 1996, including the submission of State implementation plan revisions by the States of Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon, Utah, or Wyoming by December 31, 2003, for implementation of regional haze requirements applicable to those States.

(e) Redesignation of air quality control regions

(1) Except as otherwise provided in paragraph (2), the Governor of each State is authorized, with the approval of the Administrator, to redesignate from time to time the air quality control regions within such State for purposes of efficient and effective air quality management. Upon such redesignation, the list under subsection (d) of this section shall be modified accordingly.

(2) In the case of an air quality control region in a State, or part of such region, which the Administrator finds may significantly affect air pollution concentrations in another State, the Governor of the State in which such region, or part of a region, is located may redesignate from time to time the boundaries of so much of such air quality control region as is located within such State only with the approval of the Administrator and with the consent of all Governors of all States which the Administrator determines may be significantly affected.

(3) No compliance date extension granted under section 7413(d)(5)¹ of this title (relating to coal conversion) shall cease to be effective by reason of the regional limitation provided in section 7413(d)(5)¹ of this title if the violation of such limitation is due solely to a redesignation of a region under this subsection.

(July 14, 1955, ch. 360, title I, § 107, as added Pub. L. 91-604, § 4(a), Dec. 31, 1970, 84 Stat. 1678; amended Pub. L. 95-95, title I, § 103, Aug. 7, 1977, 91 Stat. 687; Pub. L. 101-549, title I, § 101(a), Nov. 15, 1990, 104 Stat. 2399; Pub. L. 108-199, div. G, title IV, § 425(a), Jan. 23, 2004, 118 Stat. 417.)

REFERENCES IN TEXT

Section 7413 of this title, referred to in subsec. (e)(3), was amended generally by Pub. L. 101-549, title VII, § 701, Nov. 15, 1990, 104 Stat. 2672, and, as so amended, subsec. (d) of section 7413 no longer relates to final compliance orders.

CODIFICATION

Section was formerly classified to section 1857c-2 of this title.

PRIOR PROVISIONS

A prior section 107 of act July 14, 1955, as added Nov. 21, 1967, Pub. L. 90-148, § 2, 81 Stat. 490, related to air quality control regions and was classified to section 1857c-2 of this title, prior to repeal by Pub. L. 91-604.

Another prior section 107 of act July 14, 1955, as added Dec. 17, 1963, Pub. L. 88-206, § 1, 77 Stat. 399, was renumbered section 111 by Pub. L. 90-148 and is classified to section 7411 of this title.

AMENDMENTS

2004—Subsec. (d)(6), (7). Pub. L. 108-199 added pars. (6) and (7).

1990—Subsec. (d). Pub. L. 101-549 amended subsec. (d) generally, substituting present provisions for provi-

¹ See References in Text note below.

(A) the relative effectiveness of such processes, procedures, and methods;

(B) the potential effect of such processes, procedures, and methods on transportation systems and the provision of transportation services; and

(C) the environmental, energy, and economic impact of such processes, procedures, and methods.

(g) Assessment of risks to ecosystems

The Administrator may assess the risks to ecosystems from exposure to criteria air pollutants (as identified by the Administrator in the Administrator's sole discretion).

(h) RACT/BACT/LAER clearinghouse

The Administrator shall make information regarding emission control technology available to the States and to the general public through a central database. Such information shall include all control technology information received pursuant to State plan provisions requiring permits for sources, including operating permits for existing sources.

(July 14, 1955, ch. 360, title I, §108, as added Pub. L. 91-604, §4(a), Dec. 31, 1970, 84 Stat. 1678; amended Pub. L. 95-95, title I, §§104, 105, title IV, §401(a), Aug. 7, 1977, 91 Stat. 689, 790; Pub. L. 101-549, title I, §§108(a)-(c), (o), 111, Nov. 15, 1990, 104 Stat. 2465, 2466, 2469, 2470; Pub. L. 105-362, title XV, §1501(b), Nov. 10, 1998, 112 Stat. 3294.)

CODIFICATION

November 15, 1990, referred to in subsec. (e), was in the original "enactment of the Clean Air Act Amendments of 1989", and was translated as meaning the date of the enactment of Pub. L. 101-549, popularly known as the Clean Air Act Amendments of 1990, to reflect the probable intent of Congress.

Section was formerly classified to section 1857c-3 of this title.

PRIOR PROVISIONS

A prior section 108 of act July 14, 1955, was renumbered section 115 by Pub. L. 91-604 and is classified to section 7415 of this title.

AMENDMENTS

1998—Subsec. (f)(3), (4). Pub. L. 105-362 struck out par. (3), which required reports by the Secretary of Transportation and the Administrator to be submitted to Congress by Jan. 1, 1993, and every 3 years thereafter, reviewing and analyzing existing State and local air quality related transportation programs, evaluating achievement of goals, and recommending changes to existing programs, and par. (4), which required that in each report after the first report the Secretary of Transportation include a description of the actions taken to implement the changes recommended in the preceding report.

1990—Subsec. (e). Pub. L. 101-549, §108(a), inserted first sentence and struck out former first sentence which read as follows: "The Administrator shall, after consultation with the Secretary of Transportation and the Secretary of Housing and Urban Development and State and local officials and within 180 days after August 7, 1977, and from time to time thereafter, publish guidelines on the basic program elements for the planning process assisted under section 7505 of this title."

Subsec. (f)(1). Pub. L. 101-549, §108(b), in introductory provisions, substituted present provisions for provisions relating to Federal agencies, States, and air pollution control agencies within either 6 months or one year after Aug. 7, 1977.

Subsec. (f)(1)(A). Pub. L. 101-549, §108(b), substituted present provisions for provisions relating to information prepared in cooperation with Secretary of Transportation, regarding processes, procedures, and methods to reduce certain pollutants.

Subsec. (f)(3), (4). Pub. L. 101-549, §111, added pars. (3) and (4).

Subsec. (g). Pub. L. 101-549, §108(o), added subsec. (g).

Subsec. (h). Pub. L. 101-549, §108(c), added subsec. (h).
1977—Subsec. (a)(1)(A). Pub. L. 95-95, §401(a), substituted "emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare" for "which in his judgment has an adverse effect on public health or welfare".

Subsec. (b)(1). Pub. L. 95-95, §104(a), substituted "cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology" for "technology and costs of emission control".

Subsec. (c). Pub. L. 95-95, §104(b), inserted provision directing the Administrator, not later than six months after Aug. 7, 1977, to revise and reissue criteria relating to concentrations of NO₂ over such period (not more than three hours) as he deems appropriate, with the criteria to include a discussion of nitric and nitrous acids, nitrites, nitrates, nitrosamines, and other carcinogenic and potentially carcinogenic derivatives of oxides of nitrogen.

Subsecs. (e), (f). Pub. L. 95-95, §105, added subsecs. (e) and (f).

EFFECTIVE DATE OF 1977 AMENDMENT

Amendment by Pub. L. 95-95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95-95, set out as a note under section 7401 of this title.

MODIFICATION OR RESCISSION OF RULES, REGULATIONS, ORDERS, DETERMINATIONS, CONTRACTS, CERTIFICATIONS, AUTHORIZATIONS, DELEGATIONS, AND OTHER ACTIONS

All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to act July 14, 1955, the Clean Air Act, as in effect immediately prior to the date of enactment of Pub. L. 95-95 [Aug. 7, 1977] to continue in full force and effect until modified or rescinded in accordance with act July 14, 1955, as amended by Pub. L. 95-95 [this chapter], see section 406(b) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

§ 7409. National primary and secondary ambient air quality standards

(a) Promulgation

(1) The Administrator—

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31,

1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b) Protection of public health and welfare

(1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

(c) National primary ambient air quality standard for nitrogen dioxide

The Administrator shall, not later than one year after August 7, 1977, promulgate a national primary ambient air quality standard for NO₂ concentrations over a period of not more than 3 hours unless, based on the criteria issued under section 7408(c) of this title, he finds that there is no significant evidence that such a standard for such a period is requisite to protect public health.

(d) Review and revision of criteria and standards; independent scientific review committee; appointment; advisory functions

(1) Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 7408 of this title and the national ambient air quality standards promulgated under this section and shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 7408 of this title and subsection (b) of this section. The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.

(2)(A) The Administrator shall appoint an independent scientific review committee composed of seven members including at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies.

(B) Not later than January 1, 1980, and at five-year intervals thereafter, the committee referred to in subparagraph (A) shall complete a review of the criteria published under section 7408 of this title and the national primary and secondary ambient air quality standards promulgated under this section and shall recommend to the Administrator any new national

ambient air quality standards and revisions of existing criteria and standards as may be appropriate under section 7408 of this title and subsection (b) of this section.

(C) Such committee shall also (i) advise the Administrator of areas in which additional knowledge is required to appraise the adequacy and basis of existing, new, or revised national ambient air quality standards, (ii) describe the research efforts necessary to provide the required information, (iii) advise the Administrator on the relative contribution to air pollution concentrations of natural as well as anthropogenic activity, and (iv) advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards.

(July 14, 1955, ch. 360, title I, §109, as added Pub. L. 91-604, §4(a), Dec. 31, 1970, 84 Stat. 1679; amended Pub. L. 95-95, title I, §106, Aug. 7, 1977, 91 Stat. 691.)

CODIFICATION

Section was formerly classified to section 1857c-4 of this title.

PRIOR PROVISIONS

A prior section 109 of act July 14, 1955, was renumbered section 116 by Pub. L. 91-604 and is classified to section 7416 of this title.

AMENDMENTS

1977—Subsec. (c). Pub. L. 95-95, §106(b), added subsec. (c).

Subsec. (d). Pub. L. 95-95, §106(a), added subsec. (d).

EFFECTIVE DATE OF 1977 AMENDMENT

Amendment by Pub. L. 95-95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95-95, set out as a note under section 7401 of this title.

MODIFICATION OR RESCISSION OF RULES, REGULATIONS, ORDERS, DETERMINATIONS, CONTRACTS, CERTIFICATIONS, AUTHORIZATIONS, DELEGATIONS, AND OTHER ACTIONS

All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to act July 14, 1955, the Clean Air Act, as in effect immediately prior to the date of enactment of Pub. L. 95-95 [Aug. 7, 1977] to continue in full force and effect until modified or rescinded in accordance with act July 14, 1955, as amended by Pub. L. 95-95 [this chapter], see section 406(b) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

TERMINATION OF ADVISORY COMMITTEES

Advisory committees established after Jan. 5, 1973, to terminate not later than the expiration of the 2-year period beginning on the date of their establishment, unless, in the case of a committee established by the President or an officer of the Federal Government, such committee is renewed by appropriate action prior to the expiration of such 2-year period, or in the case of a committee established by the Congress, its duration is otherwise provided for by law. See section 14 of Pub. L. 92-463, Oct. 6, 1972, 86 Stat. 776, set out in the Appendix to Title 5, Government Organization and Employees.

ROLE OF SECONDARY STANDARDS

Pub. L. 101-549, title VIII, §817, Nov. 15, 1990, 104 Stat. 2697, provided that:

"(a) REPORT.—The Administrator shall request the National Academy of Sciences to prepare a report to the Congress on the role of national secondary ambient air quality standards in protecting welfare and the environment. The report shall:

"(1) include information on the effects on welfare and the environment which are caused by ambient concentrations of pollutants listed pursuant to section 108 [42 U.S.C. 7408] and other pollutants which may be listed;

"(2) estimate welfare and environmental costs incurred as a result of such effects;

"(3) examine the role of secondary standards and the State implementation planning process in preventing such effects;

"(4) determine ambient concentrations of each such pollutant which would be adequate to protect welfare and the environment from such effects;

"(5) estimate the costs and other impacts of meeting secondary standards; and

"(6) consider other means consistent with the goals and objectives of the Clean Air Act [42 U.S.C. 7401 et seq.] which may be more effective than secondary standards in preventing or mitigating such effects.

"(b) SUBMISSION TO CONGRESS; COMMENTS; AUTHORIZATION.—(1) The report shall be transmitted to the Congress not later than 3 years after the date of enactment of the Clean Air Act Amendments of 1990 (Nov. 15, 1990).

"(2) At least 90 days before issuing a report the Administrator shall provide an opportunity for public comment on the proposed report. The Administrator shall include in the final report a summary of the comments received on the proposed report.

"(3) There are authorized to be appropriated such sums as are necessary to carry out this section."

§ 7410. State implementation plans for national primary and secondary ambient air quality standards

(a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems

(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) Each implementation plan submitted by a State under this chapter shall be adopted by the State after reasonable notice and public hearing. Each such plan shall—

(A) include enforceable emission limitations and other control measures, means, or tech-

niques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter;

(B) provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to—

(i) monitor, compile, and analyze data on ambient air quality, and

(ii) upon request, make such data available to the Administrator;

(C) include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D of this subchapter;

(D) contain adequate provisions—

(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will—

(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard, or

(II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility,

(ii) insuring compliance with the applicable requirements of sections 7426 and 7415 of this title (relating to interstate and international pollution abatement);

(E) provide (i) necessary assurances that the State (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the State or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof), (ii) requirements that the State comply with the requirements respecting State boards under section 7428 of this title, and (iii) necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the State has responsibility for ensuring adequate implementation of such plan provision;

(F) require, as may be prescribed by the Administrator—

(i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources,

(ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and

(iii) correlation of such reports by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection;

(G) provide for authority comparable to that in section 7603 of this title and adequate contingency plans to implement such authority;

(H) provide for revision of such plan—

(i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and

(ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the national ambient air quality standard which it implements or to otherwise comply with any additional requirements established under this chapter;

(I) in the case of a plan or plan revision for an area designated as a nonattainment area, meet the applicable requirements of part D of this subchapter (relating to nonattainment areas);

(J) meet the applicable requirements of section 7421 of this title (relating to consultation), section 7427 of this title (relating to public notification), and part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection);

(K) provide for—

(i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and

(ii) the submission, upon request, of data related to such air quality modeling to the Administrator;

(L) require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this chapter, a fee sufficient to cover—

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action),

until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under subchapter V of this chapter; and

(M) provide for consultation and participation by local political subdivisions affected by the plan.

(3)(A) Repealed. Pub. L. 101-549, title I, §101(d)(1), Nov. 15, 1990, 104 Stat. 2409.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C. 791 et seq.], review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(C) Neither the State, in the case of a plan (or portion thereof) approved under this subsection, nor the Administrator, in the case of a plan (or portion thereof) promulgated under subsection (c) of this section, shall be required to revise an applicable implementation plan because one or more exemptions under section 7418 of this title (relating to Federal facilities), enforcement orders under section 7413(d)¹ of this title, suspensions under subsection (f) or (g) of this section (relating to temporary energy or economic authority), orders under section 7419 of this title (relating to primary nonferrous smelters), or extensions of compliance in decrees entered under section 7413(e)¹ of this title (relating to iron- and steel-producing operations) have been granted, if such plan would have met the requirements of this section if no such exemptions, orders, or extensions had been granted.

(4) Repealed. Pub. L. 101-549, title I, §101(d)(2), Nov. 15, 1990, 104 Stat. 2409.

(5)(A)(i) Any State may include in a State implementation plan, but the Administrator may not require as a condition of approval of such plan under this section, any indirect source review program. The Administrator may approve and enforce, as part of an applicable implementation plan, an indirect source review program which the State chooses to adopt and submit as part of its plan.

(ii) Except as provided in subparagraph (B), no plan promulgated by the Administrator shall include any indirect source review program for any air quality control region, or portion thereof.

(iii) Any State may revise an applicable implementation plan approved under this subsection to suspend or revoke any such program included in such plan, provided that such plan meets the requirements of this section.

(B) The Administrator shall have the authority to promulgate, implement and enforce regulations under subsection (c) of this section re-

¹ See References in Text note below.

specting indirect source review programs which apply only to federally assisted highways, airports, and other major federally assisted indirect sources and federally owned or operated indirect sources.

(C) For purposes of this paragraph, the term "indirect source" means a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution. Such term includes parking lots, parking garages, and other facilities subject to any measure for management of parking supply (within the meaning of subsection (c)(2)(D)(ii) of this section), including regulation of existing off-street parking but such term does not include new or existing on-street parking. Direct emissions sources or facilities at, within, or associated with, any indirect source shall not be deemed indirect sources for the purpose of this paragraph.

(D) For purposes of this paragraph the term "indirect source review program" means the facility-by-facility review of indirect sources of air pollution, including such measures as are necessary to assure, or assist in assuring, that a new or modified indirect source will not attract mobile sources of air pollution, the emissions from which would cause or contribute to air pollution concentrations—

(i) exceeding any national primary ambient air quality standard for a mobile source-related air pollutant after the primary standard attainment date, or

(ii) preventing maintenance of any such standard after such date.

(E) For purposes of this paragraph and paragraph (2)(B), the term "transportation control measure" does not include any measure which is an "indirect source review program".

(6) No State plan shall be treated as meeting the requirements of this section unless such plan provides that in the case of any source which uses a supplemental, or intermittent control system for purposes of meeting the requirements of an order under section 7413(d)¹ of this title or section 7419 of this title (relating to primary nonferrous smelter orders), the owner or operator of such source may not temporarily reduce the pay of any employee by reason of the use of such supplemental or intermittent or other dispersion dependent control system.

(b) Extension of period for submission of plans

The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

(c) Preparation and publication by Administrator of proposed regulations setting forth implementation plan; transportation regulations study and report; parking surcharge; suspension authority; plan implementation

(1) The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator—

(A) finds that a State has failed to make a required submission or finds that the plan or

plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section, or

(B) disapproves a State implementation plan submission in whole or in part,

unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

(2)(A) Repealed. Pub. L. 101-549, title I, §101(d)(3)(A), Nov. 15, 1990, 104 Stat. 2409.

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void upon June 22, 1974. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) Repealed. Pub. L. 101-549, title I, §101(d)(3)(B), Nov. 15, 1990, 104 Stat. 2409.

(D) For purposes of this paragraph—

(i) The term "parking surcharge regulation" means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term "management of parking supply" shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term "preferential bus/carpool lane" shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after June 22, 1974, by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

(3) Upon application of the chief executive officer of any general purpose unit of local government, if the Administrator determines that such unit has adequate authority under State or local law, the Administrator may delegate to such unit the authority to implement and enforce within the jurisdiction of such unit any part of a plan promulgated under this subsection. Nothing in this paragraph shall prevent the Administrator from implementing or enforcing any applicable provision of a plan promulgated under this subsection.

(4) Repealed. Pub. L. 101-549, title I, §101(d)(3)(C), Nov. 15, 1990, 104 Stat. 2409.

(5)(A) Any measure in an applicable implementation plan which requires a toll or other charge for the use of a bridge located entirely within one city shall be eliminated from such plan by the Administrator upon application by the Governor of the State, which application shall include a certification by the Governor that he will revise such plan in accordance with subparagraph (B).

(B) In the case of any applicable implementation plan with respect to which a measure has been eliminated under subparagraph (A), such plan shall, not later than one year after August 7, 1977, be revised to include comprehensive measures to:

(i) establish, expand, or improve public transportation measures to meet basic transportation needs, as expeditiously as is practicable; and

(ii) implement transportation control measures necessary to attain and maintain national ambient air quality standards,

and such revised plan shall, for the purpose of implementing such comprehensive public transportation measures, include requirements to use (insofar as is necessary) Federal grants, State or local funds, or any combination of such grants and funds as may be consistent with the terms of the legislation providing such grants and funds. Such measures shall, as a substitute for the tolls or charges eliminated under subparagraph (A), provide for emissions reductions equivalent to the reductions which may reasonably be expected to be achieved through the use of the tolls or charges eliminated.

(C) Any revision of an implementation plan for purposes of meeting the requirements of subparagraph (B) shall be submitted in coordination with any plan revision required under part D of this subchapter.

(d), (e) Repealed. Pub. L. 101-549, title I, § 101(d)(4), (5), Nov. 15, 1990, 104 Stat. 2409

(f) National or regional energy emergencies; determination by President

(1) Upon application by the owner or operator of a fuel burning stationary source, and after notice and opportunity for public hearing, the Governor of the State in which such source is located may petition the President to determine that a national or regional energy emergency exists of such severity that—

(A) a temporary suspension of any part of the applicable implementation plan or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets) may be necessary, and

(B) other means of responding to the energy emergency may be inadequate.

Such determination shall not be delegable by the President to any other person. If the President determines that a national or regional energy emergency of such severity exists, a temporary emergency suspension of any part of an applicable implementation plan or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets) adopted by the State may be issued by the Governor of any State covered by the President's determination under the condition specified in paragraph (2) and may take effect immediately.

(2) A temporary emergency suspension under this subsection shall be issued to a source only if the Governor of such State finds that—

(A) there exists in the vicinity of such source a temporary energy emergency involving high levels of unemployment or loss of necessary energy supplies for residential dwellings; and

(B) such unemployment or loss can be totally or partially alleviated by such emergency suspension.

Not more than one such suspension may be issued for any source on the basis of the same set of circumstances or on the basis of the same emergency.

(3) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator, if any. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of paragraph (2).

(4) This subsection shall not apply in the case of a plan provision or requirement promulgated by the Administrator under subsection (c) of this section, but in any such case the President may grant a temporary emergency suspension for a four month period of any such provision or requirement if he makes the determinations and findings specified in paragraphs (1) and (2).

(5) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 1857c-10² of this title, as in effect before August 7, 1977, or section 7413(d)² of this title, upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

(g) Governor's authority to issue temporary emergency suspensions

(1) In the case of any State which has adopted and submitted to the Administrator a proposed plan revision which the State determines—

(A) meets the requirements of this section, and

(B) is necessary (i) to prevent the closing for one year or more of any source of air pollution, and (ii) to prevent substantial increases in unemployment which would result from such closing, and

which the Administrator has not approved or disapproved under this section within 12 months of submission of the proposed plan revision, the Governor may issue a temporary emergency suspension of the part of the applicable implementation plan for such State which is proposed to be revised with respect to such source. The determination under subparagraph (B) may not be made with respect to a source which would close without regard to whether or not the proposed plan revision is approved.

(2) A temporary emergency suspension issued by a Governor under this subsection shall re-

² See References in Text note below.

main in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of this subsection.

(3) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 1857c-10² of this title as in effect before August 7, 1977, or under section 7413(d)² of this title upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

(h) Publication of comprehensive document for each State setting forth requirements of applicable implementation plan

(1) Not later than 5 years after November 15, 1990, and every 3 years thereafter, the Administrator shall assemble and publish a comprehensive document for each State setting forth all requirements of the applicable implementation plan for such State and shall publish notice in the Federal Register of the availability of such documents.

(2) The Administrator may promulgate such regulations as may be reasonably necessary to carry out the purpose of this subsection.

(i) Modification of requirements prohibited

Except for a primary nonferrous smelter order under section 7419 of this title, a suspension under subsection (f) or (g) of this section (relating to emergency suspensions), an exemption under section 7418 of this title (relating to certain Federal facilities), an order under section 7413(d)² of this title (relating to compliance orders), a plan promulgation under subsection (c) of this section, or a plan revision under subsection (a)(3) of this section; no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator.

(j) Technological systems of continuous emission reduction on new or modified stationary sources; compliance with performance standards

As a condition for issuance of any permit required under this subchapter, the owner or operator of each new or modified stationary source which is required to obtain such a permit must show to the satisfaction of the permitting authority that the technological system of continuous emission reduction which is to be used at such source will enable it to comply with the standards of performance which are to apply to such source and that the construction or modification and operation of such source will be in compliance with all other requirements of this chapter.

(k) Environmental Protection Agency action on plan submissions

(1) Completeness of plan submissions

(A) Completeness criteria

Within 9 months after November 15, 1990, the Administrator shall promulgate minimum criteria that any plan submission must meet before the Administrator is required to act on such submission under this subsection. The criteria shall be limited to the information necessary to enable the Administrator to determine whether the plan submission complies with the provisions of this chapter.

(B) Completeness finding

Within 60 days of the Administrator's receipt of a plan or plan revision, but no later than 6 months after the date, if any, by which a State is required to submit the plan or revision, the Administrator shall determine whether the minimum criteria established pursuant to subparagraph (A) have been met. Any plan or plan revision that a State submits to the Administrator, and that has not been determined by the Administrator (by the date 6 months after receipt of the submission) to have failed to meet the minimum criteria established pursuant to subparagraph (A), shall on that date be deemed by operation of law to meet such minimum criteria.

(C) Effect of finding of incompleteness

Where the Administrator determines that a plan submission (or part thereof) does not meet the minimum criteria established pursuant to subparagraph (A), the State shall be treated as not having made the submission (or, in the Administrator's discretion, part thereof).

(2) Deadline for action

Within 12 months of a determination by the Administrator (or a determination deemed by operation of law) under paragraph (1) that a State has submitted a plan or plan revision (or, in the Administrator's discretion, part thereof) that meets the minimum criteria established pursuant to paragraph (1), if applicable (or, if those criteria are not applicable, within 12 months of submission of the plan or revision), the Administrator shall act on the submission in accordance with paragraph (3).

(3) Full and partial approval and disapproval

In the case of any submittal on which the Administrator is required to act under paragraph (2), the Administrator shall approve such submittal as a whole if it meets all of the applicable requirements of this chapter. If a portion of the plan revision meets all the applicable requirements of this chapter, the Administrator may approve the plan revision in part and disapprove the plan revision in part. The plan revision shall not be treated as meeting the requirements of this chapter until the Administrator approves the entire plan revision as complying with the applicable requirements of this chapter.

(4) Conditional approval

The Administrator may approve a plan revision based on a commitment of the State to

adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. Any such conditional approval shall be treated as a disapproval if the State fails to comply with such commitment.

(5) Calls for plan revisions

Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport described in section 7506a of this title or section 7511c of this title, or to otherwise comply with any requirement of this chapter, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions. Such findings and notice shall be public. Any finding under this paragraph shall, to the extent the Administrator deems appropriate, subject the State to the requirements of this chapter to which the State was subject when it developed and submitted the plan for which such finding was made, except that the Administrator may adjust any dates applicable under such requirements as appropriate (except that the Administrator may not adjust any attainment date prescribed under part D of this subchapter, unless such date has elapsed).

(6) Corrections

Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.

(l) Plan revisions

Each revision to an implementation plan submitted by a State under this chapter shall be adopted by such State after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 7501 of this title), or any other applicable requirement of this chapter.

(m) Sanctions

The Administrator may apply any of the sanctions listed in section 7509(b) of this title at any time (or at any time after) the Administrator makes a finding, disapproval, or determination under paragraphs (1) through (4), respectively, of section 7509(a) of this title in relation to any plan or plan item (as that term is defined by the Administrator) required under this chapter,

with respect to any portion of the State the Administrator determines reasonable and appropriate, for the purpose of ensuring that the requirements of this chapter relating to such plan or plan item are met. The Administrator shall, by rule, establish criteria for exercising his authority under the previous sentence with respect to any deficiency referred to in section 7509(a) of this title to ensure that, during the 24-month period following the finding, disapproval, or determination referred to in section 7509(a) of this title, such sanctions are not applied on a state-wide basis where one or more political subdivisions covered by the applicable implementation plan are principally responsible for such deficiency.

(n) Savings clauses

(1) Existing plan provisions

Any provision of any applicable implementation plan that was approved or promulgated by the Administrator pursuant to this section as in effect before November 15, 1990, shall remain in effect as part of such applicable implementation plan, except to the extent that a revision to such provision is approved or promulgated by the Administrator pursuant to this chapter.

(2) Attainment dates

For any area not designated nonattainment, any plan or plan revision submitted or required to be submitted by a State—

(A) in response to the promulgation or revision of a national primary ambient air quality standard in effect on November 15, 1990, or

(B) in response to a finding of substantial inadequacy under subsection (a)(2) of this section (as in effect immediately before November 15, 1990),

shall provide for attainment of the national primary ambient air quality standards within 3 years of November 15, 1990, or within 5 years of issuance of such finding of substantial inadequacy, whichever is later.

(3) Retention of construction moratorium in certain areas

In the case of an area to which, immediately before November 15, 1990, the prohibition on construction or modification of major stationary sources prescribed in subsection (a)(2)(I) of this section (as in effect immediately before November 15, 1990) applied by virtue of a finding of the Administrator that the State containing such area had not submitted an implementation plan meeting the requirements of section 7502(b)(6) of this title (relating to establishment of a permit program) (as in effect immediately before November 15, 1990) or 7502(a)(1) of this title (to the extent such requirements relate to provision for attainment of the primary national ambient air quality standard for sulfur oxides by December 31, 1982) as in effect immediately before November 15, 1990, no major stationary source of the relevant air pollutant or pollutants shall be constructed or modified in such area until the Administrator finds that the plan for such area meets the applicable requirements of section

7502(c)(5) of this title (relating to permit programs) or subpart 5 of part D of this subchapter (relating to attainment of the primary national ambient air quality standard for sulfur dioxide), respectively.

(o) Indian tribes

If an Indian tribe submits an implementation plan to the Administrator pursuant to section 7601(d) of this title, the plan shall be reviewed in accordance with the provisions for review set forth in this section for State plans, except as otherwise provided by regulation promulgated pursuant to section 7601(d)(2) of this title. When such plan becomes effective in accordance with the regulations promulgated under section 7601(d) of this title, the plan shall become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation.

(p) Reports

Any State shall submit, according to such schedule as the Administrator may prescribe, such reports as the Administrator may require relating to emission reductions, vehicle miles traveled, congestion levels, and any other information the Administrator may deem necessary to assess the development's effectiveness, need for revision, or implementation of any plan or plan revision required under this chapter.

(July 14, 1955, ch. 360, title I, § 110, as added Pub. L. 91-604, § 4(a), Dec. 31, 1970, 84 Stat. 1680; amended Pub. L. 93-319, § 4, June 22, 1974, 88 Stat. 256; Pub. L. 95-95, title I, §§ 107, 108, Aug. 7, 1977, 91 Stat. 691, 693; Pub. L. 95-190, § 14(a)(1)-(6), Nov. 16, 1977, 91 Stat. 1399; Pub. L. 97-23, § 3, July 17, 1981, 95 Stat. 142; Pub. L. 101-549, title I, §§ 101(b)-(d), 102(h), 107(c), 108(d), title IV, § 412, Nov. 15, 1990, 104 Stat. 2404-2408, 2422, 2464, 2466, 2634.)

REFERENCES IN TEXT

The Energy Supply and Environmental Coordination Act of 1974, referred to in subsec. (a)(3)(B), is Pub. L. 93-319, June 22, 1974, 88 Stat. 246, as amended, which is classified principally to chapter 16C (§ 791 et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see Short Title note set out under section 791 of Title 15 and Tables.

Section 7413 of this title, referred to in subsecs. (a)(3)(C), (6), (f)(5), (g)(3), and (i), was amended generally by Pub. L. 101-549, title VII, § 701, Nov. 15, 1990, 104 Stat. 2672, and, as so amended, subsecs. (d) and (e) of section 7413 no longer relates to final compliance orders and steel industry compliance extension, respectively.

Section 1857c-10 of this title, as in effect before August 7, 1977, referred to in subsecs. (f)(5) and (g)(3), was in the original "section 119, as in effect before the date of the enactment of this paragraph", meaning section 119 of act July 14, 1955, ch. 360, title I, as added June 22, 1974, Pub. L. 93-319, § 3, 88 Stat. 248, (which was classified to section 1857c-10 of this title) as in effect prior to the enactment of subsecs. (f)(5) and (g)(3) of this section by Pub. L. 95-95, § 107, Aug. 7, 1977, 91 Stat. 691, effective Aug. 7, 1977. Section 112(b)(1) of Pub. L. 95-95 repealed section 119 of act July 14, 1955, ch. 360, title I, as added by Pub. L. 93-319, and provided that all references to

² So in original. Probably should be followed by a comma.

such section 119 in any subsequent enactment which supersedes Pub. L. 93-319 shall be construed to refer to section 113(d) of the Clean Air Act and to paragraph (5) thereof in particular which is classified to section 7413(d)(5) of this title. Section 7413 of this title was subsequently amended generally by Pub. L. 101-549, title VII, § 701, Nov. 15, 1990, 104 Stat. 2672, see note above. Section 117(b) of Pub. L. 95-95 added a new section 119 of act July 14, 1955, which is classified to section 7419 of this title.

CODIFICATION

Section was formerly classified to section 1857c-5 of this title.

PRIOR PROVISIONS

A prior section 110 of act July 14, 1955, was renumbered section 117 by Pub. L. 91-604 and is classified to section 7417 of this title.

AMENDMENTS

1990—Subsec. (a)(1). Pub. L. 101-549, § 101(d)(8), substituted "3 years (or such shorter period as the Administrator may prescribe)" for "nine months" in two places.

Subsec. (a)(2). Pub. L. 101-549, § 101(b), amended par. (2) generally, substituting present provisions for provisions setting the time within which the Administrator was to approve or disapprove a plan or portion thereof and listing the conditions under which the plan or portion thereof was to be approved after reasonable notice and hearing.

Subsec. (a)(3)(A). Pub. L. 101-549, § 101(d)(1), struck out subpar. (A) which directed Administrator to approve any revision of an implementation plan if it met certain requirements and had been adopted by the State after reasonable notice and public hearings.

Subsec. (a)(3)(D). Pub. L. 101-549, § 101(d)(1), struck out subpar. (D) which directed that certain implementation plans be revised to include comprehensive measures and requirements.

Subsec. (a)(4). Pub. L. 101-549, § 101(d)(2), struck out par. (4) which set forth requirements for review procedure.

Subsec. (c)(1). Pub. L. 101-549, § 102(h), amended par. (1) generally, substituting present provisions for provisions relating to preparation and publication of regulations setting forth an implementation plan, after opportunity for a hearing, upon failure of a State to make required submission or revision.

Subsec. (c)(2)(A). Pub. L. 101-549, § 101(d)(3)(A), struck out subpar. (A) which required a study and report on necessity of parking surcharge, management of parking supply, and preferential bus/carpool lane regulations to achieve and maintain national primary ambient air quality standards.

Subsec. (c)(2)(C). Pub. L. 101-549, § 101(d)(3)(B), struck out subpar. (C) which authorized suspension of certain regulations and requirements relating to management of parking supply.

Subsec. (c)(4). Pub. L. 101-549, § 101(d)(3)(C), struck out par. (4) which permitted Governors to temporarily suspend measures in implementation plans relating to retrofits, gas rationing, and reduction of on-street parking.

Subsec. (c)(5)(B). Pub. L. 101-549, § 101(d)(3)(D), struck out "(including the written evidence required by part D)," after "include comprehensive measures".

Subsec. (d). Pub. L. 101-549, § 101(d)(4), struck out subsec. (d) which defined an applicable implementation plan for purposes of this chapter.

Subsec. (e). Pub. L. 101-549, § 101(d)(5), struck out subsec. (e) which permitted an extension of time for attainment of a national primary ambient air quality standard.

Subsec. (f)(1). Pub. L. 101-549, § 412, inserted "or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets)" in subpar. (A) and in last sentence.

section shall address at least the following measures:

(A) the establishment of clean air corridors, in which additional restrictions on increases in emissions may be appropriate to protect visibility in affected class I areas;

(B) the imposition of the requirements of part D of this subchapter affecting the construction of new major stationary sources or major modifications to existing sources in such clean air corridors specifically including the alternative siting analysis provisions of section 7503(a)(5) of this title; and

(C) the promulgation of regulations under section 7491 of this title to address long range strategies for addressing regional haze which impairs visibility in affected class I areas.

(e) Duties of Administrator

(1) The Administrator shall, taking into account the studies pursuant to subsection (a)(1) of this section and the reports pursuant to subsection (d)(2) of this section and any other relevant information, within eighteen months of receipt of the report referred to in subsection (d)(2) of this section, carry out the Administrator's regulatory responsibilities under section 7491 of this title, including criteria for measuring "reasonable progress" toward the national goal.

(2) Any regulations promulgated under section 7491 of this title pursuant to this subsection shall require affected States to revise within 12 months their implementation plans under section 7410 of this title to contain such emission limits, schedules of compliance, and other measures as may be necessary to carry out regulations promulgated pursuant to this subsection.

(f) Grand Canyon visibility transport commission

The Administrator pursuant to subsection (c)(1) of this section shall, within 12 months, establish a visibility transport commission for the region affecting the visibility of the Grand Canyon National Park.

(July 14, 1955, ch. 360, title I, §169B, as added Pub. L. 101-549, title VIII, §816, Nov. 15, 1990, 104 Stat. 2695.)

REFERENCES IN TEXT

The Clean Air Act Amendments of 1990, referred to in subsec. (b), probably means Pub. L. 101-549, Nov. 15, 1990, 104 Stat. 2399. For complete classification of this Act to the Code, see Short Title note set out under section 7401 of this title and Tables.

The Federal Advisory Committee Act, referred to in subsec. (c)(4), is Pub. L. 92-463, Oct. 6, 1972, 86 Stat. 770, as amended, which is set out in the Appendix to Title 5, Government Organization and Employees.

**PART D—PLAN REQUIREMENTS FOR
NONATTAINMENT AREAS**

SUBPART 1—NONATTAINMENT AREAS IN GENERAL

§ 7501. Definitions

For the purpose of this part—

(1) **REASONABLE FURTHER PROGRESS.**—The term "reasonable further progress" means such annual incremental reductions in emissions of the relevant air pollutant as are re-

quired by this part or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable national ambient air quality standard by the applicable date.

(2) **NONATTAINMENT AREA.**—The term "nonattainment area" means, for any air pollutant, an area which is designated "nonattainment" with respect to that pollutant within the meaning of section 7407(d) of this title.

(3) The term "lowest achievable emission rate" means for any source, that rate of emissions which reflects—

(A) the most stringent emission limitation which is contained in the implementation plan of any State for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable, or

(B) the most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent.

In no event shall the application of this term permit a proposed new or modified source to emit any pollutant in excess of the amount allowable under applicable new source standards of performance.

(4) The terms "modifications" and "modified" mean the same as the term "modification" as used in section 7411(a)(4) of this title.

(July 14, 1955, ch. 360, title I, §171, as added Pub. L. 95-95, title I, §129(b), Aug. 7, 1977, 91 Stat. 745; amended Pub. L. 101-549, title I, §102(a)(2), Nov. 15, 1990, 104 Stat. 2412.)

AMENDMENTS

1990—Pub. L. 101-549, §102(a)(2)(A), struck out "and section 7410(a)(2)(1) of this title" after "purpose of this part".

Pars. (1), (2), Pub. L. 101-549, §102(a)(2)(B), (C), amended pars. (1) and (2) generally. Prior to amendment, pars. (1) and (2) read as follows:

"(1) The term 'reasonable further progress' means annual incremental reductions in emissions of the applicable air pollutant (including substantial reductions in the early years following approval or promulgation of plan provisions under this part and section 7410(a)(2)(1) of this title and regular reductions thereafter) which are sufficient in the judgment of the Administrator, to provide for attainment of the applicable national ambient air quality standard by the date required in section 7502(a) of this title.

"(2) The term 'nonattainment area' means, for any air pollutant an area which is shown by monitored data or which is calculated by air quality modeling (or other methods determined by the Administrator to be reliable) to exceed any national ambient air quality standard for such pollutant. Such term includes any area identified under subparagraphs (A) through (C) of section 7407(d)(1) of this title."

EFFECTIVE DATE

Part effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

§ 7502. Nonattainment plan provisions in general

(a) Classifications and attainment dates

(1) Classifications

(A) On or after the date the Administrator promulgates the designation of an area as a

nonattainment area pursuant to section 7407(d) of this title with respect to any national ambient air quality standard (or any revised standard, including a revision of any standard in effect on November 15, 1990), the Administrator may classify the area for the purpose of applying an attainment date pursuant to paragraph (2), and for other purposes. In determining the appropriate classification, if any, for a nonattainment area, the Administrator may consider such factors as the severity of nonattainment in such area and the availability and feasibility of the pollution control measures that the Administrator believes may be necessary to provide for attainment of such standard in such area.

(B) The Administrator shall publish a notice in the Federal Register announcing each classification under subparagraph (A), except the Administrator shall provide an opportunity for at least 30 days for written comment. Such classification shall not be subject to the provisions of sections 553 through 557 of title 5 (concerning notice and comment) and shall not be subject to judicial review until the Administrator takes final action under subsection (k) or (l) of section 7410 of this title (concerning action on plan submissions) or section 7509 of this title (concerning sanctions) with respect to any plan submissions required by virtue of such classification.

(C) This paragraph shall not apply with respect to nonattainment areas for which classifications are specifically provided under other provisions of this part.

(2) Attainment dates for nonattainment areas

(A) The attainment date for an area designated nonattainment with respect to a national primary ambient air quality standard shall be the date by which attainment can be achieved as expeditiously as practicable, but no later than 5 years from the date such area was designated nonattainment under section 7407(d) of this title, except that the Administrator may extend the attainment date to the extent the Administrator determines appropriate, for a period no greater than 10 years from the date of designation as nonattainment, considering the severity of nonattainment and the availability and feasibility of pollution control measures.

(B) The attainment date for an area designated nonattainment with respect to a secondary national ambient air quality standard shall be the date by which attainment can be achieved as expeditiously as practicable after the date such area was designated nonattainment under section 7407(d) of this title.

(C) Upon application by any State, the Administrator may extend for 1 additional year (hereinafter referred to as the "Extension Year") the attainment date determined by the Administrator under subparagraph (A) or (B) if—

(i) the State has complied with all requirements and commitments pertaining to the area in the applicable implementation plan, and

(ii) in accordance with guidance published by the Administrator, no more than a mini-

mal number of exceedances of the relevant national ambient air quality standard has occurred in the area in the year preceding the Extension Year.

No more than 2 one-year extensions may be issued under this subparagraph for a single nonattainment area.

(D) This paragraph shall not apply with respect to nonattainment areas for which attainment dates are specifically provided under other provisions of this part.

(b) Schedule for plan submissions

At the time the Administrator promulgates the designation of an area as nonattainment with respect to a national ambient air quality standard under section 7407(d) of this title, the Administrator shall establish a schedule according to which the State containing such area shall submit a plan or plan revision (including the plan items) meeting the applicable requirements of subsection (c) of this section and section 7410(a)(2) of this title. Such schedule shall at a minimum, include a date or dates, extending no later than 3 years from the date of the nonattainment designation, for the submission of a plan or plan revision (including the plan items) meeting the applicable requirements of subsection (c) of this section and section 7410(a)(2) of this title.

(c) Nonattainment plan provisions

The plan provisions (including plan items) required to be submitted under this part shall comply with each of the following:

(1) In general

Such plan provisions shall provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology) and shall provide for attainment of the national primary ambient air quality standards.

(2) RFP

Such plan provisions shall require reasonable further progress.

(3) Inventory

Such plan provisions shall include a comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant or pollutants in such area, including such periodic revisions as the Administrator may determine necessary to assure that the requirements of this part are met.

(4) Identification and quantification

Such plan provisions shall expressly identify and quantify the emissions, if any, of any such pollutant or pollutants which will be allowed, in accordance with section 7503(a)(1)(B) of this title, from the construction and operation of major new or modified stationary sources in each such area. The plan shall demonstrate to the satisfaction of the Administrator that the emissions quantified for this purpose will be consistent with the achievement of reasonable further progress and will not interfere with attainment of the applicable national ambient

air quality standard by the applicable attainment date.

(5) Permits for new and modified major stationary sources

Such plan provisions shall require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area, in accordance with section 7503 of this title.

(6) Other measures

Such plan provisions shall include enforceable emission limitations, and such other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emission rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to provide for attainment of such standard in such area by the applicable attainment date specified in this part.

(7) Compliance with section 7410(a)(2)

Such plan provisions shall also meet the applicable provisions of section 7410(a)(2) of this title.

(8) Equivalent techniques

Upon application by any State, the Administrator may allow the use of equivalent modeling, emission inventory, and planning procedures, unless the Administrator determines that the proposed techniques are, in the aggregate, less effective than the methods specified by the Administrator.

(9) Contingency measures

Such plan shall provide for the implementation of specific measures to be undertaken if the area fails to make reasonable further progress, or to attain the national primary ambient air quality standard by the attainment date applicable under this part. Such measures shall be included in the plan revision as contingency measures to take effect in any such case without further action by the State or the Administrator.

(d) Plan revisions required in response to finding of plan inadequacy

Any plan revision for a nonattainment area which is required to be submitted in response to a finding by the Administrator pursuant to section 7410(k)(5) of this title (relating to calls for plan revisions) must correct the plan deficiency (or deficiencies) specified by the Administrator and meet all other applicable plan requirements of section 7410 of this title and this part. The Administrator may reasonably adjust the dates otherwise applicable under such requirements to such revision (except for attainment dates that have not yet elapsed), to the extent necessary to achieve a consistent application of such requirements. In order to facilitate submittal by the States of adequate and approvable plans consistent with the applicable requirements of this chapter, the Administrator shall, as appropriate and from time to time, issue written guidelines, interpretations, and information to the States which shall be available to the public, taking into consideration any such guidelines, interpretations, or information provided before November 15, 1990.

(e) Future modification of standard

If the Administrator relaxes a national primary ambient air quality standard after November 15, 1990, the Administrator shall, within 12 months after the relaxation, promulgate requirements applicable to all areas which have not attained that standard as of the date of such relaxation. Such requirements shall provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation.

(July 14, 1955, ch. 360, title I, § 172, as added Pub. L. 95-95, title I, § 129(b), Aug. 7, 1977, 91 Stat. 746; amended Pub. L. 95-190, § 14(a)(55), (56), Nov. 16, 1977, 91 Stat. 1402; Pub. L. 101-549, title I, § 102(b), Nov. 15, 1990, 104 Stat. 2412.)

AMENDMENTS

1990—Pub. L. 101-549 amended section generally, substituting present provisions for provisions which related to: in subsec. (a), expeditious attainment of national ambient air quality standards; in subsec. (b), requisite provisions of plan; and in subsec. (c), attainment of applicable standard not later than July 1, 1997.

1977—Subsec. (b)(4). Pub. L. 95-190, § 14(a)(55), substituted "subsection (a) of this section" for "paragraph (1)".

Subsec. (c). Pub. L. 95-190, § 14(a)(56), substituted "December 31" for "July 1".

NONATTAINMENT AREAS

Section 129(a) of Pub. L. 95-95, as amended by Pub. L. 95-190, § 14(b)(2), (3), Nov. 16, 1977, 91 Stat. 1404, provided that:

"(1) Before July 1, 1979, the interpretative regulation of the Administrator of the Environmental Protection Agency published in 41 Federal Register 55524-30, December 21, 1976, as may be modified by rule of the Administrator, shall apply except that the baseline to be used for determination of appropriate emission offsets under such regulation shall be the applicable implementation plan of the State in effect at the time of application for a permit by a proposed major stationary source (within the meaning of section 302 of the Clean Air Act) [section 7602 of this title].

"(2) Before July 1, 1979, the requirements of the regulation referred to in paragraph (1) shall be waived by the Administrator with respect to any pollutant if he determines that the State has—

"(A) an inventory of emissions of the applicable pollutant for each nonattainment area (as defined in section 171 of the Clean Air Act [section 7501 of this title]) that identifies the type, quantity, and source of such pollutant so as to provide information sufficient to demonstrate that the requirements of subparagraph (C) are being met;

"(B) an enforceable permit program which—

"(i) requires new or modified major stationary sources to meet emission limitations at least as stringent as required under the permit requirements referred to in paragraphs (2) and (3) of section 173 of the Clean Air Act [section 7503 of this title] (relating to lowest achievable emission rate and compliance by other sources) and which assures compliance with the annual reduction requirements of subparagraph (C); and

"(ii) requires existing sources to achieve such reduction in emissions in the area as may be obtained through the adoption, at a minimum of reasonably available control technology, and

"(C) a program which requires reductions in total allowable emissions in the area prior to July 1, 1979, so as to provide for the same level of emission reduction as would result from the application of the regulation referred to in paragraph (1).

The Administrator shall terminate such waiver if in his judgment the reduction in emissions actually being at-

foregoing. During such period and consistent with the preceding sentence, the issuance of a permit (including required offsets) under section 173 of such Act [this section] for the construction or modification of a source in a nonattainment area shall not be denied solely or partially by reason of the reference contained in section 171(1) of such Act [section 7501(1) of this title] to the applicable date established in section 172(a) [section 7502(a) of this title]. This subsection [probably means the first 3 sentences of this note] shall not apply to any restriction or prohibition in effect under sections 110(a)(2)(I), 173(4), 176(a), 176(b), or 316 of such Act prior to the enactment of this section [Dec. 22, 1987]. Prior to August 31, 1988, the Administrator of the Environmental Protection Agency shall evaluate air quality data and make determinations with respect to which areas throughout the nation have attained, or failed to attain, either or both of the national primary ambient air quality standards referred to in subsection (a) [probably means the first 3 sentences of this note] and shall take appropriate steps to designate those areas failing to attain either or both of such standards as nonattainment areas within the meaning of part D of title I of the Clean Air Act."

§ 7504. Planning procedures

(a) In general

For any ozone, carbon monoxide, or PM-10 nonattainment area, the State containing such area and elected officials of affected local governments shall, before the date required for submittal of the inventory described under sections 7511a(a)(1) and 7512a(a)(1) of this title, jointly review and update as necessary the planning procedures adopted pursuant to this subsection as in effect immediately before November 15, 1990, or develop new planning procedures pursuant to this subsection, as appropriate. In preparing such procedures the State and local elected officials shall determine which elements of a revised implementation plan will be developed, adopted, and implemented (through means including enforcement) by the State and which by local governments or regional agencies, or any combination of local governments, regional agencies, or the State. The implementation plan required by this part shall be prepared by an organization certified by the State, in consultation with elected officials of local governments and in accordance with the determination under the second sentence of this subsection. Such organization shall include elected officials of local governments in the affected area, and representatives of the State air quality planning agency, the State transportation planning agency, the metropolitan planning organization designated to conduct the continuing, cooperative and comprehensive transportation planning process for the area under section 134 of title 23, the organization responsible for the air quality maintenance planning process under regulations implementing this chapter, and any other organization with responsibilities for developing, submitting, or implementing the plan required by this part. Such organization may be one that carried out these functions before November 15, 1990.

(b) Coordination

The preparation of implementation plan provisions and subsequent plan revisions under the continuing transportation-air quality planning process described in section 7408(e) of this title

shall be coordinated with the continuing, cooperative and comprehensive transportation planning process required under section 134 of title 23, and such planning processes shall take into account the requirements of this part.

(c) Joint planning

In the case of a nonattainment area that is included within more than one State, the affected States may jointly, through interstate compact or otherwise, undertake and implement all or part of the planning procedures described in this section.

(July 14, 1955, ch. 360, title I, § 174, as added Pub. L. 95-95, title I, § 129(b), Aug. 7, 1977, 91 Stat. 748; amended Pub. L. 101-549, title I, § 102(d), Nov. 15, 1990, 104 Stat. 2417.)

AMENDMENTS

1990—Pub. L. 101-549 amended section generally, substituting present provisions for provisions which related to: in subsec. (a), preparation of implementation plan by designated organization; and in subsec. (b), coordination of plan preparation.

§ 7505. Environmental Protection Agency grants

(a) Plan revision development costs

The Administrator shall make grants to any organization of local elected officials with transportation or air quality maintenance planning responsibilities recognized by the State under section 7504(a) of this title for payment of the reasonable costs of developing a plan revision under this part.

(b) Uses of grant funds

The amount granted to any organization under subsection (a) of this section shall be 100 percent of any additional costs of developing a plan revision under this part for the first two fiscal years following receipt of the grant under this paragraph, and shall supplement any funds available under Federal law to such organization for transportation or air quality maintenance planning. Grants under this section shall not be used for construction.

(July 14, 1955, ch. 360, title I, § 175, as added Pub. L. 95-95, title I, § 129(b), Aug. 7, 1977, 91 Stat. 749.)

§ 7505a. Maintenance plans

(a) Plan revision

Each State which submits a request under section 7407(d) of this title for redesignation of a nonattainment area for any air pollutant as an area which has attained the national primary ambient air quality standard for that air pollutant shall also submit a revision of the applicable State implementation plan to provide for the maintenance of the national primary ambient air quality standard for such air pollutant in the area concerned for at least 10 years after the redesignation. The plan shall contain such additional measures, if any, as may be necessary to ensure such maintenance.

(b) Subsequent plan revisions

8 years after redesignation of any area as an attainment area under section 7407(d) of this title, the State shall submit to the Administrator an additional revision of the applicable

State implementation plan for maintaining the national primary ambient air quality standard for 10 years after the expiration of the 10-year period referred to in subsection (a) of this section.

(c) Nonattainment requirements applicable pending plan approval

Until such plan revision is approved and an area is redesignated as attainment for any area designated as a nonattainment area, the requirements of this part shall continue in force and effect with respect to such area.

(d) Contingency provisions

Each plan revision submitted under this section shall contain such contingency provisions as the Administrator deems necessary to assure that the State will promptly correct any violation of the standard which occurs after the redesignation of the area as an attainment area. Such provisions shall include a requirement that the State will implement all measures with respect to the control of the air pollutant concerned which were contained in the State implementation plan for the area before redesignation of the area as an attainment area. The failure of any area redesignated as an attainment area to maintain the national ambient air quality standard concerned shall not result in a requirement that the State revise its State implementation plan unless the Administrator, in the Administrator's discretion, requires the State to submit a revised State implementation plan.

(July 14, 1955, ch. 360, title I, §175A, as added Pub. L. 101-549, title I, §102(e), Nov. 15, 1990, 104 Stat. 2418.)

§ 7506. Limitations on certain Federal assistance

(a), (b) Repealed. Pub. L. 101-549, title I, §110(4), Nov. 15, 1990, 104 Stat. 2470

(c) Activities not conforming to approved or promulgated plans

(1) No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan after it has been approved or promulgated under section 7410 of this title. No metropolitan planning organization designated under section 134 of title 23, shall give its approval to any project, program, or plan which does not conform to an implementation plan approved or promulgated under section 7410 of this title. The assurance of conformity to such an implementation plan shall be an affirmative responsibility of the head of such department, agency, or instrumentality. Conformity to an implementation plan means—

(A) conformity to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards; and

(B) that such activities will not—

(i) cause or contribute to any new violation of any standard in any area;

(ii) increase the frequency or severity of any existing violation of any standard in any area; or

(iii) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.

The determination of conformity shall be based on the most recent estimates of emissions, and such estimates shall be determined from the most recent population, employment, travel and congestion estimates as determined by the metropolitan planning organization or other agency authorized to make such estimates.

(2) Any transportation plan or program developed pursuant to title 23 or chapter 53 of title 49 shall implement the transportation provisions of any applicable implementation plan approved under this chapter applicable to all or part of the area covered by such transportation plan or program. No Federal agency may approve, accept or fund any transportation plan, program or project unless such plan, program or project has been found to conform to any applicable implementation plan in effect under this chapter. In particular—

(A) no transportation plan or transportation improvement program may be adopted by a metropolitan planning organization designated under title 23 or chapter 53 of title 49, or be found to be in conformity by a metropolitan planning organization until a final determination has been made that emissions expected from implementation of such plans and programs are consistent with estimates of emissions from motor vehicles and necessary emissions reductions contained in the applicable implementation plan, and that the plan or program will conform to the requirements of paragraph (1)(B);

(B) no metropolitan planning organization or other recipient of funds under title 23 or chapter 53 of title 49 shall adopt or approve a transportation improvement program of projects until it determines that such program provides for timely implementation of transportation control measures consistent with schedules included in the applicable implementation plan;

(C) a transportation project may be adopted or approved by a metropolitan planning organization or any recipient of funds designated under title 23 or chapter 53 of title 49, or found in conformity by a metropolitan planning organization or approved, accepted, or funded by the Department of Transportation only if it meets either the requirements of subparagraph (D) or the following requirements—

(i) such a project comes from a conforming plan and program;

(ii) the design concept and scope of such project have not changed significantly since the conformity finding regarding the plan and program from which the project derived; and

(iii) the design concept and scope of such project at the time of the conformity determination for the program was adequate to determine emissions.

(D) Any project not referred to in subparagraph (C) shall be treated as conforming to the applicable implementation plan only if it is demonstrated that the projected emissions from such project, when considered together

with emissions projected for the conforming transportation plans and programs within the nonattainment area, do not cause such plans and programs to exceed the emission reduction projections and schedules assigned to such plans and programs in the applicable implementation plan.

(E) The appropriate metropolitan planning organization shall redetermine conformity of existing transportation plans and programs not later than 2 years after the date on which the Administrator—

(i) finds a motor vehicle emissions budget to be adequate in accordance with section 93.118(e)(4) of title 40, Code of Federal Regulations (as in effect on October 1, 2004);

(ii) approves an implementation plan that establishes a motor vehicle emissions budget if that budget has not yet been determined to be adequate in accordance with clause (i); or

(iii) promulgates an implementation plan that establishes or revises a motor vehicle emissions budget.

(3) Until such time as the implementation plan revision referred to in paragraph (4)(C)¹ is approved, conformity of such plans, programs, and projects will be demonstrated if—

(A) the transportation plans and programs—

(i) are consistent with the most recent estimates of mobile source emissions;

(ii) provide for the expeditious implementation of transportation control measures in the applicable implementation plan; and

(iii) with respect to ozone and carbon monoxide nonattainment areas, contribute to annual emissions reductions consistent with sections 7511a(b)(1) and 7512a(a)(7) of this title; and

(B) the transportation projects—

(i) come from a conforming transportation plan and program as defined in subparagraph (A) or for 12 months after November 15, 1990, from a transportation program found to conform within 3 years prior to November 15, 1990; and

(ii) in carbon monoxide nonattainment areas, eliminate or reduce the severity and number of violations of the carbon monoxide standards in the area substantially affected by the project.

With regard to subparagraph (B)(ii), such determination may be made as part of either the conformity determination for the transportation program or for the individual project taken as a whole during the environmental review phase of project development.

(4) CRITERIA AND PROCEDURES FOR DETERMINING CONFORMITY.—

(A) IN GENERAL.—The Administrator shall promulgate, and periodically update, criteria and procedures for determining conformity (except in the case of transportation plans, programs, and projects) of, and for keeping the Administrator informed about, the activities referred to in paragraph (1).

(B) TRANSPORTATION PLANS, PROGRAMS, AND PROJECTS.—The Administrator, with the con-

currence of the Secretary of Transportation, shall promulgate, and periodically update, criteria and procedures for demonstrating and assuring conformity in the case of transportation plans, programs, and projects.

(C) CIVIL ACTION TO COMPEL PROMULGATION.—A civil action may be brought against the Administrator and the Secretary of Transportation under section 7604 of this title to compel promulgation of such criteria and procedures and the Federal district court shall have jurisdiction to order such promulgation.

(D) The procedures and criteria shall, at a minimum—

(i) address the consultation procedures to be undertaken by metropolitan planning organizations and the Secretary of Transportation with State and local air quality agencies and State departments of transportation before such organizations and the Secretary make conformity determinations;

(ii) address the appropriate frequency for making conformity determinations, but the frequency for making conformity determinations on updated transportation plans and programs shall be every 4 years, except in a case in which—

(I) the metropolitan planning organization elects to update a transportation plan or program more frequently; or

(II) the metropolitan planning organization is required to determine conformity in accordance with paragraph (2)(E); and

(iii) address how conformity determinations will be made with respect to maintenance plans.

(E) INCLUSION OF CRITERIA AND PROCEDURES IN SIP.—Not later than 2 years after August 10, 2005, the procedures under subparagraph (A) shall include a requirement that each State include in the State implementation plan criteria and procedures for consultation required by subparagraph (D)(i), and enforcement and enforceability (pursuant to sections 93.125(c) and 93.122(a)(4)(ii) of title 40, Code of Federal Regulations) in accordance with the Administrator's criteria and procedures for consultation, enforcement and enforceability.

(F) Compliance with the rules of the Administrator for determining the conformity of transportation plans, programs, and projects funded or approved under title 23 or chapter 53 of title 49 to State or Federal implementation plans shall not be required for traffic signal synchronization projects prior to the funding, approval or implementation of such projects. The supporting regional emissions analysis for any conformity determination made with respect to a transportation plan, program, or project shall consider the effect on emissions of any such project funded, approved, or implemented prior to the conformity determination.

(5) APPLICABILITY.—This subsection shall apply only with respect to—

(A) a nonattainment area and each pollutant for which the area is designated as a nonattainment area; and

(B) an area that was designated as a nonattainment area but that was later redesignated.

¹ See References in Text note below.

nated by the Administrator as an attainment area and that is required to develop a maintenance plan under section 7505a of this title with respect to the specific pollutant for which the area was designated nonattainment.

(6) Notwithstanding paragraph 5,² this subsection shall not apply with respect to an area designated nonattainment under section 7407(d)(1) of this title until 1 year after that area is first designated nonattainment for a specific national ambient air quality standard. This paragraph only applies with respect to the national ambient air quality standard for which an area is newly designated nonattainment and does not affect the area's requirements with respect to all other national ambient air quality standards for which the area is designated nonattainment or has been redesignated from nonattainment to attainment with a maintenance plan pursuant to section 7505a¹ of this title (including any pre-existing national ambient air quality standard for a pollutant for which a new or revised standard has been issued).

(7) CONFORMITY HORIZON FOR TRANSPORTATION PLANS.—

(A) IN GENERAL.—Each conformity determination required under this section for a transportation plan under section 134(i) of title 23 or section 5303(i) of title 49 shall require a demonstration of conformity for the period ending on either the final year of the transportation plan, or at the election of the metropolitan planning organization, after consultation with the air pollution control agency and solicitation of public comments and consideration of such comments, the longest of the following periods:

(i) The first 10-year period of any such transportation plan.

(ii) The latest year in the implementation plan applicable to the area that contains a motor vehicle emission budget.

(iii) The year after the completion date of a regionally significant project if the project is included in the transportation improvement program or the project requires approval before the subsequent conformity determination.

(B) REGIONAL EMISSIONS ANALYSIS.—The conformity determination shall be accompanied by a regional emissions analysis for the last year of the transportation plan and for any year shown to exceed emission budgets by a prior analysis, if such year extends beyond the applicable period as determined under subparagraph (A).

(C) EXCEPTION.—In any case in which an area has a revision to an implementation plan under section 7505a(b) of this title and the Administrator has found the motor vehicles emissions budgets from that revision to be adequate in accordance with section 93.118(e)(4) of title 40, Code of Federal Regulations (as in effect on October 1, 2004), or has approved the revision, the demonstration of conformity at the election of the metropolitan planning organization, after consultation with the air pollution control agency and sollicita-

tion of public comments and consideration of such comments, shall be required to extend only through the last year of the implementation plan required under section 7505a(b) of this title.

(D) EFFECT OF ELECTION.—Any election by a metropolitan planning organization under this paragraph shall continue in effect until the metropolitan planning organization elects otherwise.

(E) AIR POLLUTION CONTROL AGENCY DEFINED.—In this paragraph, the term "air pollution control agency" means an air pollution control agency (as defined in section 7602(b) of this title) that is responsible for developing plans or controlling air pollution within the area covered by a transportation plan.

(8) SUBSTITUTION OF TRANSPORTATION CONTROL MEASURES.—

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

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

(ii) if the substitute control measures are implemented—

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

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

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

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

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

(II) consultation with the Administrator; and

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

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

(B) ADOPTION.—(i) Concurrence by the metropolitan planning organization, State air pol-

²So in original. Probably should be "paragraph (5)."

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

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

(iii) Within 90 days of its concurrence under subparagraph (A)(v), the State air pollution control agency shall submit the substitute or additional control measure to the Administrator for incorporation in the codification of the applicable implementation plan. Notwithstanding³ any other provision of this chapter, no additional State process shall be necessary to support such revision to the applicable plan.

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

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

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

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

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

(9) LAPSE OF CONFORMITY.—If a conformity determination required under this subsection for a transportation plan under section 134(i) of title 23 or section 5303(i) of title 49 or a transportation improvement program under section 134(j) of such title 23 or under section 5303(j) of such title 49 is not made by the applicable deadline and such failure is not corrected by additional measures to either reduce motor vehicle emissions sufficient to demonstrate compliance with the requirements of this subsection within 12 months after such deadline or other measures sufficient to correct such failures, the transportation plan shall lapse.

(10) LAPSE.—In this subsection, the term "lapse" means that the conformity determination for a transportation plan or transportation improvement program has expired, and thus there is no currently conforming transportation plan or transportation improvement program.

(d) Priority of achieving and maintaining national primary ambient air quality standards

Each department, agency, or instrumentality of the Federal Government having authority to

³So in original. Probably should be "Notwithstanding".

conduct or support any program with air-quality related transportation consequences shall give priority in the exercise of such authority, consistent with statutory requirements for allocation among States or other jurisdictions, to the implementation of those portions of plans prepared under this section to achieve and maintain the national primary ambient air-quality standard. This paragraph extends to, but is not limited to, authority exercised under chapter 53 of title 49, title 23, and the Housing and Urban Development Act.

(July 14, 1955, ch. 360, title I, § 176, as added Pub. L. 95-95, title I, § 129(b), Aug. 7, 1977, 91 Stat. 749; amended Pub. L. 95-190, § 14(a)(59), Nov. 16, 1977, 91 Stat. 1403; Pub. L. 101-549, title I, §§ 101(f), 110(4), Nov. 15, 1990, 104 Stat. 2409, 2470; Pub. L. 104-59, title III, § 305(b), Nov. 28, 1995, 109 Stat. 580; Pub. L. 104-260, § 1, Oct. 9, 1996, 110 Stat. 3175; Pub. L. 106-377, § 1(a)(1) [title III], Oct. 27, 2000, 114 Stat. 1441, 1441A-44; Pub. L. 109-59, title VI, § 6011(a)-(f), Aug. 10, 2005, 119 Stat. 1878-1881.)

REFERENCES IN TEXT

Paragraph (4) of subsec. (c), referred to in subsec. (c)(3), was amended by Pub. L. 109-59, title VI, § 6011(f), Aug. 10, 2005, 119 Stat. 1881, to redesignate subpar. (C) as (E), strike it out, and add new subpars. (C) and (E). See 2005 Amendment notes below.

Section 7505a of this title, referred to in subsec. (c)(6), was in the original "section 175(A)" and was translated as reading "section 175A", meaning section 175A of act July 14, 1955, which is classified to section 7505a of this title, to reflect the probable intent of Congress.

The Housing and Urban Development Act, referred to in subsec. (d), may be the name for a series of acts sharing the same name but enacted in different years by Pub. L. 89-117, Aug. 10, 1965, 79 Stat. 451; Pub. L. 90-448, Aug. 1, 1968, 82 Stat. 476; Pub. L. 91-152, Dec. 24, 1969, 83 Stat. 379; and Pub. L. 91-609, Dec. 31, 1970, 84 Stat. 1770, respectively. For complete classification of these Acts to the Code, see Short Title notes set out under section 1701 of Title 12, Banks and Banking, and Tables.

CODIFICATION

In subsecs. (c)(2) and (d), "chapter 53 of title 49" substituted for "the Urban Mass Transportation Act [49 App. U.S.C. 1601 et seq.]" and in subsec. (c)(4)(F) substituted for "Federal Transit Act" on authority of Pub. L. 103-272, § 6(b), July 5, 1994, 108 Stat. 1378 (the first section of which enacted subtitles II, III, and V to X of Title 49, Transportation), and of Pub. L. 102-240, title III, § 3003(b), Dec. 18, 1991, 105 Stat. 2088, which provided that references in laws to the Urban Mass Transportation Act of 1964 be deemed to be references to the Federal Transit Act.

AMENDMENTS

2005—Subsec. (c)(2)(E). Pub. L. 109-59, § 6011(a), added subpar. (E).

Subsec. (c)(4). Pub. L. 109-59, § 6011(f)(1)-(3), inserted par. (4) and subpar. (A) headings, in first sentence substituted "The Administrator shall promulgate, and periodically update," for "No later than one year after November 15, 1990, the Administrator shall promulgate", designated second sentence as subpar. (B), inserted heading, substituted "The Administrator, with the concurrence of the Secretary of Transportation, shall promulgate, and periodically update," for "No later than one year after November 15, 1990, the Administrator, with the concurrence of the Secretary of Transportation, shall promulgate", designated third sentence as subpar. (C), inserted heading, substituted "A civil action" for "A suit", and redesignated former subpars. (B) to (D) as (D) to (F), respectively.

Subsec. (c)(4)(B)(ii). Pub. L. 109-59, § 6011(b), amended cl. (ii) generally. Prior to amendment, cl. (ii) read as

constitute final agency action within the meaning of section 7607(b) of this title.

(July 14, 1955, ch. 360, title I, §176A, as added Pub. L. 101-549, title I, §102(f)(1), Nov. 15, 1990, 104 Stat. 2419.)

REFERENCES IN TEXT

The Federal Advisory Committee Act, referred to in subsec. (b)(2), is Pub. L. 92-463, Oct. 6, 1972, 86 Stat. 770, as amended, which is set out in the Appendix to Title 5, Government Organization and Employees.

§ 7507. New motor vehicle emission standards in nonattainment areas

Notwithstanding section 7543(a) of this title, any State which has plan provisions approved under this part may adopt and enforce for any model year standards relating to control of emissions from new motor vehicles or new motor vehicle engines and take such other actions as are referred to in section 7543(a) of this title respecting such vehicles if—

(1) such standards are identical to the California standards for which a waiver has been granted for such model year, and

(2) California and such State adopt such standards at least two years before commencement of such model year (as determined by regulations of the Administrator).

Nothing in this section or in subchapter II of this chapter shall be construed as authorizing any such State to prohibit or limit, directly or indirectly, the manufacture or sale of a new motor vehicle or motor vehicle engine that is certified in California as meeting California standards, or to take any action of any kind to create, or have the effect of creating, a motor vehicle or motor vehicle engine different than a motor vehicle or engine certified in California under California standards (a "third vehicle") or otherwise create such a "third vehicle".

(July 14, 1955, ch. 360, title I, §177, as added Pub. L. 95-95, title I, §129(b), Aug. 7, 1977, 91 Stat. 750; amended Pub. L. 101-549, title II, §232, Nov. 15, 1990, 104 Stat. 2529.)

AMENDMENTS

1990—Pub. L. 101-549 added sentence at end prohibiting States from limiting or prohibiting sale or manufacture of new vehicles or engines certified in California as having met California standards and from taking any actions where effect of those actions would be to create a "third vehicle".

§ 7508. Guidance documents

The Administrator shall issue guidance documents under section 7408 of this title for purposes of assisting States in implementing requirements of this part respecting the lowest achievable emission rate. Such a document shall be published not later than nine months after August 7, 1977, and shall be revised at least every two years thereafter.

(July 14, 1955, ch. 360, title I, §178, as added Pub. L. 95-95, title I, §129(b), Aug. 7, 1977, 91 Stat. 750.)

§ 7509. Sanctions and consequences of failure to attain

(a) State failure

For any implementation plan or plan revision required under this part (or required in response

to a finding of substantial inadequacy as described in section 7410(k)(5) of this title), if the Administrator—

(1) finds that a State has failed, for an area designated nonattainment under section 7407(d) of this title, to submit a plan, or to submit 1 or more of the elements (as determined by the Administrator) required by the provisions of this chapter applicable to such an area, or has failed to make a submission for such an area that satisfies the minimum criteria established in relation to any such element under section 7410(k) of this title,

(2) disapproves a submission under section 7410(k) of this title, for an area designated nonattainment under section 7407 of this title, based on the submission's failure to meet one or more of the elements required by the provisions of this chapter applicable to such an area,

(3)(A) determines that a State has failed to make any submission as may be required under this chapter, other than one described under paragraph (1) or (2), including an adequate maintenance plan, or has failed to make any submission, as may be required under this chapter, other than one described under paragraph (1) or (2), that satisfies the minimum criteria established in relation to such submission under section 7410(k)(1)(A) of this title, or

(B) disapproves in whole or in part a submission described under subparagraph (A), or

(4) finds that any requirement of an approved plan (or approved part of a plan) is not being implemented,

unless such deficiency has been corrected within 18 months after the finding, disapproval, or determination referred to in paragraphs (1), (2), (3), and (4), one of the sanctions referred to in subsection (b) of this section shall apply, as selected by the Administrator, until the Administrator determines that the State has come into compliance, except that if the Administrator finds a lack of good faith, sanctions under both paragraph (1) and paragraph (2) of subsection (b) of this section shall apply until the Administrator determines that the State has come into compliance. If the Administrator has selected one of such sanctions and the deficiency has not been corrected within 6 months thereafter, sanctions under both paragraph (1) and paragraph (2) of subsection (b) of this section shall apply until the Administrator determines that the State has come into compliance. In addition to any other sanction applicable as provided in this section, the Administrator may withhold all or part of the grants for support of air pollution planning and control programs that the Administrator may award under section 7405 of this title.

(b) Sanctions

The sanctions available to the Administrator as provided in subsection (a) of this section are as follows:

(1) Highway sanctions

(A) The Administrator may impose a prohibition, applicable to a nonattainment area, on the approval by the Secretary of Transportation of any projects or the awarding by the

Secretary of any grants, under title 23 other than projects or grants for safety where the Secretary determines, based on accident or other appropriate data submitted by the State, that the principal purpose of the project is an improvement in safety to resolve a demonstrated safety problem and likely will result in a significant reduction in, or avoidance of, accidents. Such prohibition shall become effective upon the selection by the Administrator of this sanction.

(B) In addition to safety, projects or grants that may be approved by the Secretary, notwithstanding the prohibition in subparagraph (A), are the following—

- (i) capital programs for public transit;
- (ii) construction or restriction of certain roads or lanes solely for the use of passenger buses or high occupancy vehicles;
- (iii) planning for requirements for employers to reduce employee work-trip-related vehicle emissions;
- (iv) highway ramp metering, traffic signalization, and related programs that improve traffic flow and achieve a net emission reduction;
- (v) fringe and transportation corridor parking facilities serving multiple occupancy vehicle programs or transit operations;
- (vi) programs to limit or restrict vehicle use in downtown areas or other areas of emission concentration particularly during periods of peak use, through road use charges, tolls, parking surcharges, or other pricing mechanisms, vehicle restricted zones or periods, or vehicle registration programs;
- (vii) programs for breakdown and accident scene management, nonrecurring congestion, and vehicle information systems, to reduce congestion and emissions; and
- (viii) such other transportation-related programs as the Administrator, in consultation with the Secretary of Transportation, finds would improve air quality and would not encourage single occupancy vehicle capacity.

In considering such measures, the State should seek to ensure adequate access to downtown, other commercial, and residential areas, and avoid increasing or relocating emissions and congestion rather than reducing them.

(2) Offsets

In applying the emissions offset requirements of section 7503 of this title to new or modified sources or emissions units for which a permit is required under this part, the ratio of emission reductions to increased emissions shall be at least 2 to 1.

(c) Notice of failure to attain

(1) As expeditiously as practicable after the applicable attainment date for any nonattainment area, but not later than 6 months after such date, the Administrator shall determine, based on the area's air quality as of the attainment date, whether the area attained the standard by that date.

(2) Upon making the determination under paragraph (1), the Administrator shall publish a

notice in the Federal Register containing such determination and identifying each area that the Administrator has determined to have failed to attain. The Administrator may revise or supplement such determination at any time based on more complete information or analysis concerning the area's air quality as of the attainment date.

(d) Consequences for failure to attain

(1) Within 1 year after the Administrator publishes the notice under subsection (c)(2) of this section (relating to notice of failure to attain), each State containing a nonattainment area shall submit a revision to the applicable implementation plan meeting the requirements of paragraph (2) of this subsection.

(2) The revision required under paragraph (1) shall meet the requirements of section 7410 of this title and section 7502 of this title. In addition, the revision shall include such additional measures as the Administrator may reasonably prescribe, including all measures that can be feasibly implemented in the area in light of technological achievability, costs, and any nonair quality and other air quality-related health and environmental impacts.

(3) The attainment date applicable to the revision required under paragraph (1) shall be the same as provided in the provisions of section 7502(a)(2) of this title, except that in applying such provisions the phrase "from the date of the notice under section 7509(c)(2) of this title" shall be substituted for the phrase "from the date such area was designated nonattainment under section 7407(d) of this title" and for the phrase "from the date of designation as nonattainment".

(July 14, 1955, ch. 360, title I, §179, as added Pub. L. 101-549, title I, §102(g), Nov. 15, 1990, 104 Stat. 2420.)

§ 7509a. International border areas

(a) Implementation plans and revisions

Notwithstanding any other provision of law, an implementation plan or plan revision required under this chapter shall be approved by the Administrator if—

(1) such plan or revision meets all the requirements applicable to it under the chapter other than a requirement that such plan or revision demonstrate attainment and maintenance of the relevant national ambient air quality standards by the attainment date specified under the applicable provision of this chapter, or in a regulation promulgated under such provision, and

(2) the submitting State establishes to the satisfaction of the Administrator that the implementation plan of such State would be adequate to attain and maintain the relevant national ambient air quality standards by the attainment date specified under the applicable provision of this chapter, or in a regulation promulgated under such provision, but for emissions emanating from outside of the United States.

¹ So in original. Probably should be "this".

(f) Reclassified areas

Each State containing a carbon monoxide nonattainment area reclassified under section 7512(b)(2) of this title shall meet the requirements of subsection (b) of this section, as may be applicable to the area as reclassified, according to the schedules prescribed in connection with such requirements, except that the Administrator may adjust any applicable deadlines (other than the attainment date) where such deadlines are shown to be infeasible.

(g) Failure of Serious Area to attain standard

If the Administrator determines under section 7512(b)(2) of this title that the national primary ambient air quality standard for carbon monoxide has not been attained in a Serious Area by the applicable attainment date, the State shall submit a plan revision for the area within 9 months after the date of such determination. The plan revision shall provide that a program of incentives and requirements as described in section 7511a(g)(4) of this title shall be applicable in the area, and such program, in combination with other elements of the revised plan, shall be adequate to reduce the total tonnage of emissions of carbon monoxide in the area by at least 5 percent per year in each year after approval of the plan revision and before attainment of the national primary ambient air quality standard for carbon monoxide.

(July 14, 1955, ch. 360, title I, § 187, as added Pub. L. 101-549, title I, § 104, Nov. 15, 1990, 104 Stat. 2454.)

MORATORIUM ON CERTAIN EMISSIONS TESTING REQUIREMENTS

For provisions prohibiting Administrator of Environmental Protection Agency from requiring adoption or implementation by State of test-only IM240 enhanced vehicle inspection and maintenance program as means of compliance with this section, with further provisions relating to plan disapproval and emissions reduction credits, see section 348 of Pub. L. 104-59, set out as a note under section 7511a of this title:

SUBPART 4—ADDITIONAL PROVISIONS FOR PARTICULATE MATTER NONATTAINMENT AREAS

§ 7513. Classifications and attainment dates**(a) Initial classifications**

Every area designated nonattainment for PM-10 pursuant to section 7407(d) of this title shall be classified at the time of such designation, by operation of law, as a moderate PM-10 nonattainment area (also referred to in this subpart as a "Moderate Area") at the time of such designation. At the time of publication of the notice under section 7407(d)(4) of this title (relating to area designations) for each PM-10 nonattainment area, the Administrator shall publish a notice announcing the classification of such area. The provisions of section 7502(a)(1)(B) of this title (relating to lack of notice-and-comment and judicial review) shall apply with respect to such classification.

(b) Reclassification as Serious**(1) Reclassification before attainment date**

The Administrator may reclassify as a Serious PM-10 nonattainment area (identified in

this subpart also as a "Serious Area") any area that the Administrator determines cannot practicably attain the national ambient air quality standard for PM-10 by the attainment date (as prescribed in subsection (c) of this section) for Moderate Areas. The Administrator shall reclassify appropriate areas as Serious by the following dates:

(A) For areas designated nonattainment for PM-10 under section 7407(d)(4) of this title, the Administrator shall propose to reclassify appropriate areas by June 30, 1991, and take final action by December 31, 1991.

(B) For areas subsequently designated nonattainment, the Administrator shall reclassify appropriate areas within 18 months after the required date for the State's submission of a SIP for the Moderate Area.

(2) Reclassification upon failure to attain

Within 6 months following the applicable attainment date for a PM-10 nonattainment area, the Administrator shall determine whether the area attained the standard by that date. If the Administrator finds that any Moderate Area is not in attainment after the applicable attainment date—

(A) the area shall be reclassified by operation of law as a Serious Area; and

(B) the Administrator shall publish a notice in the Federal Register no later than 6 months following the attainment date, identifying the area as having failed to attain and identifying the reclassification described under subparagraph (A).

(c) Attainment dates

Except as provided under subsection (d) of this section, the attainment dates for PM-10 nonattainment areas shall be as follows:

(1) Moderate Areas

For a Moderate Area, the attainment date shall be as expeditiously as practicable but no later than the end of the sixth calendar year after the area's designation as nonattainment, except that, for areas designated nonattainment for PM-10 under section 7407(d)(4) of this title, the attainment date shall not extend beyond December 31, 1994.

(2) Serious Areas

For a Serious Area, the attainment date shall be as expeditiously as practicable but no later than the end of the tenth calendar year beginning after the area's designation as nonattainment, except that, for areas designated nonattainment for PM-10 under section 7407(d)(4) of this title, the date shall not extend beyond December 31, 2001.

(d) Extension of attainment date for Moderate Areas

Upon application by any State, the Administrator may extend for 1 additional year (hereinafter referred to as the "Extension Year") the date specified in paragraph (c)(1) if—

(1) the State has complied with all requirements and commitments pertaining to the area in the applicable implementation plan; and

¹ So in original. Probably should be "subsection".

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(2) no more than one exceedance of the 24-hour national ambient air quality standard level for PM-10 has occurred in the area in the year preceding the Extension Year, and the annual mean concentration of PM-10 in the area for such year is less than or equal to the standard level.

No more than 2 one-year extensions may be issued under the subsection for a single nonattainment area.

(e) Extension of attainment date for Serious Areas

Upon application by any State, the Administrator may extend the attainment date for a Serious Area beyond the date specified under subsection (c) of this section, if attainment by the date established under subsection (c) of this section would be impracticable, the State has complied with all requirements and commitments pertaining to that area in the implementation plan, and the State demonstrates to the satisfaction of the Administrator that the plan for that area includes the most stringent measures that are included in the implementation plan of any State or are achieved in practice in any State, and can feasibly be implemented in the area. At the time of such application, the State must submit a revision to the implementation plan that includes a demonstration of attainment by the most expeditious alternative date practicable. In determining whether to grant an extension, and the appropriate length of time for any such extension, the Administrator may consider the nature and extent of nonattainment, the types and numbers of sources or other emitting activities in the area (including the influence of uncontrollable natural sources and transboundary emissions from foreign countries), the population exposed to concentrations in excess of the standard, the presence and concentration of potentially toxic substances in the mix of particulate emissions in the area, and the technological and economic feasibility of various control measures. The Administrator may not approve an extension until the State submits an attainment demonstration for the area. The Administrator may grant at most one such extension for an area, of no more than 5 years.

(f) Waivers for certain areas

The Administrator may, on a case-by-case basis, waive any requirement applicable to any Serious Area under this subpart where the Administrator determines that anthropogenic sources of PM-10 do not contribute significantly to the violation of the PM-10 standard in the area. The Administrator may also waive a specific date for attainment of the standard where the Administrator determines that non-anthropogenic sources of PM-10 contribute significantly to the violation of the PM-10 standard in the area.

(July 14, 1955, ch. 360, title I, § 188, as added Pub. L. 101-549, title I, § 105(a), Nov. 15, 1990, 104 Stat. 2458.)

§ 7513a. Plan provisions and schedules for plan submissions

(a) Moderate Areas

(1) Plan provisions

Each State in which all or part of a Moderate Area is located shall submit, according to the applicable schedule under paragraph (2), an implementation plan that includes each of the following:

(A) For the purpose of meeting the requirements of section 7502(c)(5) of this title, a permit program providing that permits meeting the requirements of section 7503 of this title are required for the construction and operation of new and modified major stationary sources of PM-10.

(B) Either (i) a demonstration (including air quality modeling) that the plan will provide for attainment by the applicable attainment date; or (ii) a demonstration that attainment by such date is impracticable.

(C) Provisions to assure that reasonably available control measures for the control of PM-10 shall be implemented no later than December 10, 1993, or 4 years after designation in the case of an area classified as moderate after November 15, 1990.

(2) Schedule for plan submissions

A State shall submit the plan required under subparagraph (1) no later than the following:

(A) Within 1 year of November 15, 1990, for areas designated nonattainment under section 7407(d)(4) of this title, except that the provision required under subparagraph (1)(A) shall be submitted no later than June 30, 1992.

(B) 18 months after the designation as nonattainment, for those areas designated nonattainment after the designations prescribed under section 7407(d)(4) of this title.

(b) Serious Areas

(1) Plan provisions

In addition to the provisions submitted to meet the requirements of paragraph (a)(1) (relating to Moderate Areas), each State in which all or part of a Serious Area is located shall submit an implementation plan for such area that includes each of the following:

(A) A demonstration (including air quality modeling)—

(i) that the plan provides for attainment of the PM-10 national ambient air quality standard by the applicable attainment date, or

(ii) for any area for which the State is seeking, pursuant to section 7513(e) of this title, an extension of the attainment date beyond the date set forth in section 7513(c) of this title, that attainment by that date would be impracticable, and that the plan provides for attainment by the most expeditious alternative date practicable.

(B) Provisions to assure that the best available control measures for the control of PM-10 shall be implemented no later than 4 years after the date the area is classified (or reclassified) as a Serious Area.

¹So in original. Probably should be "subsection".

SEC. 2. *Designation of Facilities.* (a) The Administrator of the Environmental Protection Agency (hereinafter referred to as "the Administrator") shall be responsible for the attainment of the purposes and objectives of this Order.

(b) In carrying out his responsibilities under this Order, the Administrator shall, in conformity with all applicable requirements of law, designate facilities which have given rise to a conviction for an offense under section 113(c)(1) of the Air Act [42 U.S.C. 7413(c)(1)] or section 309(c) of the Water Act [33 U.S.C. 1319(c)]. The Administrator shall, from time to time, publish and circulate to all Federal agencies lists of those facilities, together with the names and addresses of the persons who have been convicted of such offenses. Whenever the Administrator determines that the condition which gave rise to a conviction has been corrected, he shall promptly remove the facility and the name and address of the person concerned from the list.

SEC. 3. *Contracts, Grants, or Loans.* (a) Except as provided in section 8 of this Order, no Federal agency shall enter into any contract for the procurement of goods, materials, or services which is to be performed in whole or in part in a facility then designated by the Administrator pursuant to section 2.

(b) Except as provided in section 8 of this Order, no Federal agency authorized to extend Federal assistance by way of grant, loan, or contract shall extend such assistance in any case in which it is to be used to support any activity or program involving the use of a facility then designated by the Administrator pursuant to section 2.

SEC. 4. *Procurement, Grant, and Loan Regulations.* The Federal Procurement Regulations, the Armed Services Procurement Regulations, and to the extent necessary, any supplemental or comparable regulations issued by any agency of the Executive Branch shall, following consultation with the Administrator, be amended to require, as a condition of entering into, renewing, or extending any contract for the procurement of goods, materials, or services or extending any assistance by way of grant, loan, or contract, inclusion of a provision requiring compliance with the Air Act, the Water Act, and standards issued pursuant thereto in the facilities in which the contract is to be performed, or which are involved in the activity or program to receive assistance.

SEC. 5. *Rules and Regulations.* The Administrator shall issue such rules, regulations, standards, and guidelines as he may deem necessary or appropriate to carry out the purposes of this Order.

SEC. 6. *Cooperation and Assistance.* The head of each Federal agency shall take such steps as may be necessary to insure that all officers and employees of this agency whose duties entail compliance or comparable functions with respect to contracts, grants, and loans are familiar with the provisions of this Order. In addition to any other appropriate action, such officers and employees shall report promptly any condition in a facility which may involve noncompliance with the Air Act or the Water Act or any rules, regulations, standards, or guidelines issued pursuant to this Order to the head of the agency, who shall transmit such reports to the Administrator.

SEC. 7. *Enforcement.* The Administrator may recommend to the Department of Justice or other appropriate agency that legal proceedings be brought or other appropriate action be taken whenever he becomes aware of a breach of any provision required, under the amendments issued pursuant to section 4 of this Order, to be included in a contract or other agreement.

SEC. 8. *Exemptions—Reports to Congress.* (a) Upon a determination that the paramount interest of the United States so requires—

(1) The head of a Federal agency may exempt any contract, grant, or loan, and, following consultation with the Administrator, any class of contracts, grants or loans from the provisions of this Order. In any such case, the head of the Federal agency granting such ex-

emption shall (A) promptly notify the Administrator of such exemption and the justification therefor; (B) review the necessity for each such exemption annually; and (C) report to the Administrator annually all such exemptions in effect. Exemptions granted pursuant to this section shall be for a period not to exceed one year. Additional exemptions may be granted for periods not to exceed one year upon the making of a new determination by the head of the Federal agency concerned.

(2) The Administrator may, by rule or regulation, exempt any or all Federal agencies from any or all of the provisions of this Order with respect to any class or classes of contracts, grants, or loans, which (A) involve less than specified dollar amounts, or (B) have a minimal potential impact upon the environment, or (C) involve persons who are not prime contractors or direct recipients of Federal assistance by way of contracts, grants, or loans.

(b) Federal agencies shall reconsider any exemption granted under subsection (a) whenever requested to do so by the Administrator.

(c) The Administrator shall annually notify the President and the Congress of all exemptions granted, or in effect, under this Order during the preceding year.

SEC. 9. *Related Actions.* The imposition of any sanction or penalty under or pursuant to this Order shall not relieve any person of any legal duty to comply with any provisions of the Air Act or the Water Act.

SEC. 10. *Applicability.* This Order shall not apply to contracts, grants, or loans involving the use of facilities located outside the United States.

SEC. 11. *Uniformity.* Rules, regulations, standards, and guidelines issued pursuant to this order and section 508 of the Water Act [33 U.S.C. 1368] shall, to the maximum extent feasible, be uniform with regulations issued pursuant to this order, Executive Order No. 11602 of June 29, 1971 [formerly set out above], and section 308 of the Air Act [this section].

SEC. 12. *Order Superseded.* Executive Order No. 11602 of June 29, 1971, is hereby superseded.

RICHARD NIXON.

§7607. Administrative proceedings and judicial review

(a) Administrative subpoenas; confidentiality; witnesses

In connection with any determination under section 7410(f) of this title, or for purposes of obtaining information under section 7521(b)(4)¹ or 7545(c)(3) of this title, any investigation, monitoring, reporting requirement, entry, compliance inspection, or administrative enforcement proceeding under the² chapter (including but not limited to section 7413, section 7414, section 7420, section 7429, section 7477, section 7524, section 7525, section 7542, section 7603, or section 7606 of this title),³ the Administrator may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for emission data, upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes of such owner or operator, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18, except that such paper, book, document, or information may be dis-

¹ See References in Text note below.

² So in original. Probably should be "this".

³ So in original.

closed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, to persons carrying out the National Academy of Sciences' study and investigation provided for in section 7521(c) of this title, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpoena served upon any person under this subparagraph,⁴ the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5)¹ of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title,³ under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and pub-

⁴So in original. Probably should be "subsection."

lishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

(c) Additional evidence

In any judicial proceeding in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to⁵ the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

(d) Rulemaking

(1) This subsection applies to—

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

(B) the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title,

(C) the promulgation or revision of any standard of performance under section 7411 of this title, or emission standard or limitation under section 7412(d) of this title, any standard under section 7412(f) of this title, or any regulation under section 7412(g)(1)(D) and (F) of this title, or any regulation under section 7412(m) or (n) of this title,

(D) the promulgation of any requirement for solid waste combustion under section 7429 of this title,

⁵So in original. The word "to" probably should not appear.

(E) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,

(F) the promulgation or revision of any aircraft emission standard under section 7571 of this title,

(G) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to control of acid deposition),

(H) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419 of this title (but not including the granting or denying of any such order),

(I) promulgation or revision of regulations under subchapter VI of this chapter (relating to stratosphere and ozone protection),

(J) promulgation or revision of regulations under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility),

(K) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521(a)(3) of this title,

(L) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

(M) promulgation or revision of any regulations promulgated under section 7541 of this title (relating to warranties and compliance by vehicles in actual use),

(N) action of the Administrator under section 7426 of this title (relating to interstate pollution abatement),

(O) the promulgation or revision of any regulation pertaining to consumer and commercial products under section 7511b(e) of this title,

(P) the promulgation or revision of any regulation pertaining to field citations under section 7413(d)(3) of this title,

(Q) the promulgation or revision of any regulation pertaining to urban buses or the clean-fuel vehicle, clean-fuel fleet, and clean fuel programs under part C of subchapter II of this chapter,

(R) the promulgation or revision of any regulation pertaining to nonroad engines or nonroad vehicles under section 7547 of this title,

(S) the promulgation or revision of any regulation relating to motor vehicle compliance program fees under section 7552 of this title,

(T) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to acid deposition),

(U) the promulgation or revision of any regulation under section 7511b(f) of this title pertaining to marine vessels, and

(V) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of title 5.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of--

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4)(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B)(i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management

and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7)(A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

(e) Other methods of judicial review not authorized

Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section.

(f) Costs

In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

(g) Stay, injunction, or similar relief in proceedings relating to noncompliance penalties

In any action respecting the promulgation of regulations under section 7420 of this title or the administration or enforcement of section 7420 of this title no court shall grant any stay, injunctive, or similar relief before final judgment by such court in such action.

(h) Public participation

It is the intent of Congress that, consistent with the policy of subchapter II of chapter 5 of

(2)(A)(ii) of this subsection [amending this section] shall take effect October 1, 2005."

Pub. L. 109-59, title I, §1113(c), Aug. 10, 2005, 119 Stat. 1172, provided that the amendment made by section 1113(c) is effective Oct. 1, 2005.

Pub. L. 109-59, title I, §1113(e), Aug. 10, 2005, 119 Stat. 1172, provided that the amendment made by section 1113(e) is effective June 9, 1998.

EFFECTIVE DATE

Section effective Dec. 18, 1991, and applicable to funds authorized to be appropriated or made available after Sept. 30, 1991, and, with certain exceptions, not applicable to funds appropriated or made available on or before Sept. 30, 1991, see section 1100 of Pub. L. 102-240, set out as an Effective Date of 1991 Amendment note under section 104 of this title.

DIVISION OF STP FUNDS FOR AREAS OF LESS THAN 5,000 POPULATION

Pub. L. 105-178, title I, §1108(f), June 9, 1998, 112 Stat. 141, provided that:

"(1) SPECIAL RULE.—Notwithstanding section 133(c) of title 23, United States Code, and except as provided in paragraph (2), up to 15 percent of the amounts required to be obligated under section 133(d)(3)(B) of such title for each of fiscal years 1998 through 2003 may be obligated on roads functionally classified as minor collectors.

"(2) SUSPENSION.—The Secretary may suspend the application of paragraph (1) if the Secretary determines that paragraph (1) is being used excessively."

ENCOURAGEMENT OF USE OF YOUTH CONSERVATION OR SERVICE CORPS

Pub. L. 105-178, title I, §1108(g), June 9, 1998, 112 Stat. 141, provided that: "The Secretary shall encourage the States to enter into contracts and cooperative agreements with qualified youth conservation or service corps to perform appropriate transportation enhancement activities under chapter 1 of title 23, United States Code."

§ 134. Metropolitan transportation planning

(a) POLICY.—It is in the national interest to—

(1) encourage and promote the safe and efficient management, operation, and development of surface transportation systems that will serve the mobility needs of people and freight and foster economic growth and development within and between States and urbanized areas, while minimizing transportation-related fuel consumption and air pollution through metropolitan and statewide transportation planning processes identified in this chapter; and

(2) encourage the continued improvement and evolution of the metropolitan and statewide transportation planning processes by metropolitan planning organizations, State departments of transportation, and public transit operators as guided by the planning factors identified in subsection (h) and section 135(d).

(b) DEFINITIONS.—In this section and section 135, the following definitions apply:

(1) METROPOLITAN PLANNING AREA.—The term "metropolitan planning area" means the geographic area determined by agreement between the metropolitan planning organization for the area and the Governor under subsection (e).

(2) METROPOLITAN PLANNING ORGANIZATION.—The term "metropolitan planning organiza-

tion" means the policy board of an organization created as a result of the designation process in subsection (d).

(3) NONMETROPOLITAN AREA.—The term "nonmetropolitan area" means a geographic area outside designated metropolitan planning areas.

(4) NONMETROPOLITAN LOCAL OFFICIAL.—The term "nonmetropolitan local official" means elected and appointed officials of general purpose local government in a nonmetropolitan area with responsibility for transportation.

(5) TIP.—The term "TIP" means a transportation improvement program developed by a metropolitan planning organization under subsection (j).

(6) URBANIZED AREA.—The term "urbanized area" means a geographic area with a population of 50,000 or more, as designated by the Bureau of the Census.

(c) GENERAL REQUIREMENTS.—

(1) DEVELOPMENT OF LONG-RANGE PLANS AND TIPS.—To accomplish the objectives in subsection (a), metropolitan planning organizations designated under subsection (d), in cooperation with the State and public transportation operators, shall develop long-range transportation plans and transportation improvement programs for metropolitan planning areas of the State.

(2) CONTENTS.—The plans and TIPs for each metropolitan area shall provide for the development and integrated management and operation of transportation systems and facilities (including accessible pedestrian walkways and bicycle transportation facilities) that will function as an intermodal transportation system for the metropolitan planning area and as an integral part of an intermodal transportation system for the State and the United States.

(3) PROCESS OF DEVELOPMENT.—The process for developing the plans and TIPs shall provide for consideration of all modes of transportation and shall be continuing, cooperative, and comprehensive to the degree appropriate, based on the complexity of the transportation problems to be addressed.

(d) DESIGNATION OF METROPOLITAN PLANNING ORGANIZATIONS.—

(1) IN GENERAL.—To carry out the transportation planning process required by this section, a metropolitan planning organization shall be designated for each urbanized area with a population of more than 50,000 individuals—

(A) by agreement between the Governor and units of general purpose local government that together represent at least 75 percent of the affected population (including the largest incorporated city (based on population) as named by the Bureau of the Census); or

(B) in accordance with procedures established by applicable State or local law.

(2) STRUCTURE.—Each metropolitan planning organization that serves an area designated as a transportation management area, when designated or redesignated under this subsection, shall consist of—

- (A) local elected officials;
- (B) officials of public agencies that administer or operate major modes of transportation in the metropolitan area; and
- (C) appropriate State officials.
- (3) **LIMITATION ON STATUTORY CONSTRUCTION.**—Nothing in this subsection shall be construed to interfere with the authority, under any State law in effect on December 18, 1991, of a public agency with multimodal transportation responsibilities to—
- (A) develop the plans and TIPs for adoption by a metropolitan planning organization; and
- (B) develop long-range capital plans, coordinate transit services and projects, and carry out other activities pursuant to State law.
- (4) **CONTINUING DESIGNATION.**—A designation of a metropolitan planning organization under this subsection or any other provision of law shall remain in effect until the metropolitan planning organization is redesignated under paragraph (5).
- (5) **REDESIGNATION PROCEDURES.**—A metropolitan planning organization may be redesignated by agreement between the Governor and units of general purpose local government that together represent at least 75 percent of the existing planning area population (including the largest incorporated city (based on population) as named by the Bureau of the Census) as appropriate to carry out this section.
- (6) **DESIGNATION OF MORE THAN 1 METROPOLITAN PLANNING ORGANIZATION.**—More than 1 metropolitan planning organization may be designated within an existing metropolitan planning area only if the Governor and the existing metropolitan planning organization determine that the size and complexity of the existing metropolitan planning area make designation of more than 1 metropolitan planning organization for the area appropriate.
- (e) **METROPOLITAN PLANNING AREA BOUNDARIES.**—
- (1) **IN GENERAL.**—For the purposes of this section, the boundaries of a metropolitan planning area shall be determined by agreement between the metropolitan planning organization and the Governor.
- (2) **INCLUDED AREA.**—Each metropolitan planning area—
- (A) shall encompass at least the existing urbanized area and the contiguous area expected to become urbanized within a 20-year forecast period for the transportation plan; and
- (B) may encompass the entire metropolitan statistical area or consolidated metropolitan statistical area, as defined by the Bureau of the Census.
- (3) **IDENTIFICATION OF NEW URBANIZED AREAS WITHIN EXISTING PLANNING AREA BOUNDARIES.**—The designation by the Bureau of the Census of new urbanized areas within an existing metropolitan planning area shall not require the redesignation of the existing metropolitan planning organization.
- (4) **EXISTING METROPOLITAN PLANNING AREAS IN NONATTAINMENT.**—Notwithstanding paragraph (2), in the case of an urbanized area designated as a nonattainment area for ozone or carbon monoxide under the Clean Air Act (42 U.S.C. 7401 et seq.) as of the date of enactment of the SAFETEA-LU, the boundaries of the metropolitan planning area in existence as of such date of enactment shall be retained; except that the boundaries may be adjusted by agreement of the Governor and affected metropolitan planning organizations in the manner described in subsection (d)(5).
- (5) **NEW METROPOLITAN PLANNING AREAS IN NONATTAINMENT.**—In the case of an urbanized area designated after the date of enactment of the SAFETEA-LU, as a nonattainment area for ozone or carbon monoxide, the boundaries of the metropolitan planning area—
- (A) shall be established in the manner described in subsection (d)(1);
- (B) shall encompass the areas described in paragraph (2)(A);
- (C) may encompass the areas described in paragraph (2)(B); and
- (D) may address any nonattainment area identified under the Clean Air Act for ozone or carbon monoxide.
- (f) **COORDINATION IN MULTISTATE AREAS.**—
- (1) **IN GENERAL.**—The Secretary shall encourage each Governor with responsibility for a portion of a multistate metropolitan area and the appropriate metropolitan planning organizations to provide coordinated transportation planning for the entire metropolitan area.
- (2) **INTERSTATE COMPACTS.**—The consent of Congress is granted to any two or more States—
- (A) to enter into agreements or compacts, not in conflict with any law of the United States, for cooperative efforts and mutual assistance in support of activities authorized under this section as the activities pertain to interstate areas and localities within the States; and
- (B) to establish such agencies, joint or otherwise, as the States may determine desirable for making the agreements and compacts effective.
- (3) **LAKE TAHOE REGION.**—
- (A) **DEFINITION.**—In this paragraph, the term "Lake Tahoe region" has the meaning given the term "region" in subdivision (a) of article II of the Tahoe Regional Planning Compact, as set forth in the first section of Public Law 96-551 (94 Stat. 3234).
- (B) **TRANSPORTATION PLANNING PROCESS.**—The Secretary shall—
- (i) establish with the Federal land management agencies that have jurisdiction over land in the Lake Tahoe region a transportation planning process for the region; and
- (ii) coordinate the transportation planning process with the planning process required of State and local governments under this section and section 135.
- (C) **INTERSTATE COMPACT.**—
- (i) **IN GENERAL.**—Subject to clause (ii), and notwithstanding subsection (b), to

carry out the transportation planning process required by this section, the consent of Congress is granted to the States of California and Nevada to designate a metropolitan planning organization for the Lake Tahoe region, by agreement between the Governors of the States of California and Nevada and units of general purpose local government that together represent at least 75 percent of the affected population (including the central city or cities (as defined by the Bureau of the Census)), or in accordance with procedures established by applicable State or local law.

(1) INVOLVEMENT OF FEDERAL LAND MANAGEMENT AGENCIES.—

(I) REPRESENTATION.—The policy board of a metropolitan planning organization designated under clause (1) shall include a representative of each Federal land management agency that has jurisdiction over land in the Lake Tahoe region.

(II) FUNDING.—In addition to funds made available to the metropolitan planning organization for the Lake Tahoe region under other provisions of this title and under chapter 53 of title 49, 1 percent of the funds allocated under section 202 shall be used to carry out the transportation planning process for the Lake Tahoe region under this subparagraph.

(D) ACTIVITIES.—Highway projects included in transportation plans developed under this paragraph—

(i) shall be selected for funding in a manner that facilitates the participation of the Federal land management agencies that have jurisdiction over land in the Lake Tahoe region; and

(ii) may, in accordance with chapter 2, be funded using funds allocated under section 202.

(4) RESERVATION OF RIGHTS.—The right to alter, amend, or repeal interstate compacts entered into under this subsection is expressly reserved.

(g) MPO CONSULTATION IN PLAN AND TIP COORDINATION.—

(1) NONATTAINMENT AREAS.—If more than 1 metropolitan planning organization has authority within a metropolitan area or an area which is designated as a nonattainment area for ozone or carbon monoxide under the Clean Air Act, each metropolitan planning organization shall consult with the other metropolitan planning organizations designated for such area and the State in the coordination of plans and TIPs required by this section.

(2) TRANSPORTATION IMPROVEMENTS LOCATED IN MULTIPLE MPOS.—If a transportation improvement, funded from the Highway Trust Fund or authorized under chapter 53 of title 49, is located within the boundaries of more than 1 metropolitan planning area, the metropolitan planning organizations shall coordinate plans and TIPs regarding the transportation improvement.

(3) RELATIONSHIP WITH OTHER PLANNING OFFICIALS.—The Secretary shall encourage each metropolitan planning organization to consult

with officials responsible for other types of planning activities that are affected by transportation in the area (including State and local planned growth, economic development, environmental protection, airport operations, and freight movements) or to coordinate its planning process, to the maximum extent practicable, with such planning activities. Under the metropolitan planning process, transportation plans and TIPs shall be developed with due consideration of other related planning activities within the metropolitan area, and the process shall provide for the design and delivery of transportation services within the metropolitan area that are provided by—

(A) recipients of assistance under chapter 53 of title 49;

(B) governmental agencies and nonprofit organizations (including representatives of the agencies and organizations) that receive Federal assistance from a source other than the Department of Transportation to provide nonemergency transportation services; and

(C) recipients of assistance under section 204.

(h) SCOPE OF PLANNING PROCESS.—

(1) IN GENERAL.—The metropolitan planning process for a metropolitan planning area under this section shall provide for consideration of projects and strategies that will—

(A) support the economic vitality of the metropolitan area, especially by enabling global competitiveness, productivity, and efficiency;

(B) increase the safety of the transportation system for motorized and non-motorized users;

(C) increase the security of the transportation system for motorized and non-motorized users;

(D) increase the accessibility and mobility of people and for freight;

(E) protect and enhance the environment, promote energy conservation, improve the quality of life, and promote consistency between transportation improvements and State and local planned growth and economic development patterns;

(F) enhance the integration and connectivity of the transportation system, across and between modes, for people and freight;

(G) promote efficient system management and operation; and

(H) emphasize the preservation of the existing transportation system.

(2) FAILURE TO CONSIDER FACTORS.—The failure to consider any factor specified in paragraph (1) shall not be reviewable by any court under this title or chapter 53 of title 49, subchapter II of chapter 5 of title 5, or chapter 7 of title 5 in any matter affecting a transportation plan, a TIP, a project or strategy, or the certification of a planning process.

(i) DEVELOPMENT OF TRANSPORTATION PLAN.—

(1) IN GENERAL.—Each metropolitan planning organization shall prepare and update a transportation plan for its metropolitan planning area in accordance with the requirements of this subsection. The metropolitan planning or-

ganization shall prepare and update such plan every 4 years (or more frequently, if the metropolitan planning organization elects to update more frequently) in the case of each of the following:

(A) Any area designated as nonattainment, as defined in section 107(d) of the Clean Air Act (42 U.S.C. 7407(d)).

(B) Any area that was nonattainment and subsequently designated to attainment in accordance with section 107(d)(3) of that Act (42 U.S.C. 7407(d)(3)) and that is subject to a maintenance plan under section 175A of that Act (42 U.S.C. 7505a).

In the case of any other area required to have a transportation plan in accordance with the requirements of this subsection, the metropolitan planning organization shall prepare and update such plan every 5 years unless the metropolitan planning organization elects to update more frequently.

(2) **TRANSPORTATION PLAN.**—A transportation plan under this section shall be in a form that the Secretary determines to be appropriate and shall contain, at a minimum, the following:

(A) **IDENTIFICATION OF TRANSPORTATION FACILITIES.**—An identification of transportation facilities (including major roadways, transit, multimodal and intermodal facilities, and intermodal connectors) that should function as an integrated metropolitan transportation system, giving emphasis to those facilities that serve important national and regional transportation functions. In formulating the transportation plan, the metropolitan planning organization shall consider factors described in subsection (h) as such factors relate to a 20-year forecast period.

(B) **MITIGATION ACTIVITIES.**—

(i) **IN GENERAL.**—A long-range transportation plan shall include a discussion of types of potential environmental mitigation activities and potential areas to carry out these activities, including activities that may have the greatest potential to restore and maintain the environmental functions affected by the plan.

(ii) **CONSULTATION.**—The discussion shall be developed in consultation with Federal, State, and tribal wildlife, land management, and regulatory agencies.

(C) **FINANCIAL PLAN.**—A financial plan that demonstrates how the adopted transportation plan can be implemented, indicates resources from public and private sources that are reasonably expected to be made available to carry out the plan, and recommends any additional financing strategies for needed projects and programs. The financial plan may include, for illustrative purposes, additional projects that would be included in the adopted transportation plan if reasonable additional resources beyond those identified in the financial plan were available. For the purpose of developing the transportation plan, the metropolitan planning organization, transit operator, and State shall cooperatively develop estimates

of funds that will be available to support plan implementation.

(D) **OPERATIONAL AND MANAGEMENT STRATEGIES.**—Operational and management strategies to improve the performance of existing transportation facilities to relieve vehicular congestion and maximize the safety and mobility of people and goods.

(E) **CAPITAL INVESTMENT AND OTHER STRATEGIES.**—Capital investment and other strategies to preserve the existing and projected future metropolitan transportation infrastructure and provide for multimodal capacity increases based on regional priorities and needs.

(F) **TRANSPORTATION AND TRANSIT ENHANCEMENT ACTIVITIES.**—Proposed transportation and transit enhancement activities.

(3) **COORDINATION WITH CLEAN AIR ACT AGENCIES.**—In metropolitan areas which are in nonattainment for ozone or carbon monoxide under the Clean Air Act, the metropolitan planning organization shall coordinate the development of a transportation plan with the process for development of the transportation control measures of the State implementation plan required by the Clean Air Act.

(4) **CONSULTATION.**—

(A) **IN GENERAL.**—In each metropolitan area, the metropolitan planning organization shall consult, as appropriate, with State and local agencies responsible for land use management, natural resources, environmental protection, conservation, and historic preservation concerning the development of a long-range transportation plan.

(B) **ISSUES.**—The consultation shall involve, as appropriate—

(i) comparison of transportation plans with State conservation plans or maps, if available; or

(ii) comparison of transportation plans to inventories of natural or historic resources, if available.

(5) **PARTICIPATION BY INTERESTED PARTIES.**—

(A) **IN GENERAL.**—Each metropolitan planning organization shall provide citizens, affected public agencies, representatives of public transportation employees, freight shippers, providers of freight transportation services, private providers of transportation, representatives of users of public transportation, representatives of users of pedestrian walkways and bicycle transportation facilities, representatives of the disabled, and other interested parties with a reasonable opportunity to comment on the transportation plan.

(B) **CONTENTS OF PARTICIPATION PLAN.**—A participation plan—

(i) shall be developed in consultation with all interested parties; and

(ii) shall provide that all interested parties have reasonable opportunities to comment on the contents of the transportation plan.

(C) **METHODS.**—In carrying out subparagraph (A), the metropolitan planning organization shall, to the maximum extent practicable—

(i) hold any public meetings at convenient and accessible locations and times;

(ii) employ visualization techniques to describe plans; and

(iii) make public information available in electronically accessible format and means, such as the World Wide Web, as appropriate to afford reasonable opportunity for consideration of public information under subparagraph (A).

(6) PUBLICATION.—A transportation plan involving Federal participation shall be published or otherwise made readily available by the metropolitan planning organization for public review, including (to the maximum extent practicable) in electronically accessible formats and means, such as the World Wide Web, approved by the metropolitan planning organization and submitted for information purposes to the Governor at such times and in such manner as the Secretary shall establish.

(7) SELECTION OF PROJECTS FROM ILLUSTRATIVE LIST.—Notwithstanding paragraph (2)(C), a State or metropolitan planning organization shall not be required to select any project from the illustrative list of additional projects included in the financial plan under paragraph (2)(C).

(j) METROPOLITAN TIP.—

(1) DEVELOPMENT.—

(A) IN GENERAL.—In cooperation with the State and any affected public transportation operator, the metropolitan planning organization designated for a metropolitan area shall develop a TIP for the area for which the organization is designated.

(B) OPPORTUNITY FOR COMMENT.—In developing the TIP, the metropolitan planning organization, in cooperation with the State and any affected public transportation operator, shall provide an opportunity for participation by interested parties in the development of the program, in accordance with subsection (i)(5).

(C) FUNDING ESTIMATES.—For the purpose of developing the TIP, the metropolitan planning organization, public transportation agency, and State shall cooperatively develop estimates of funds that are reasonably expected to be available to support program implementation.

(D) UPDATING AND APPROVAL.—The TIP shall be updated at least once every 4 years and shall be approved by the metropolitan planning organization and the Governor.

(2) CONTENTS.—

(A) PRIORITY LIST.—The TIP shall include a priority list of proposed federally supported projects and strategies to be carried out within each 4-year period after the initial adoption of the TIP.

(B) FINANCIAL PLAN.—The TIP shall include a financial plan that—

(i) demonstrates how the TIP can be implemented;

(ii) indicates resources from public and private sources that are reasonably expected to be available to carry out the program;

(iii) identifies innovative financing techniques to finance projects, programs, and strategies; and

(iv) may include, for illustrative purposes, additional projects that would be included in the approved TIP if reasonable additional resources beyond those identified in the financial plan were available.

(C) DESCRIPTIONS.—Each project in the TIP shall include sufficient descriptive material (such as type of work, termini, length, and other similar factors) to identify the project or phase of the project.

(3) INCLUDED PROJECTS.—

(A) PROJECTS UNDER THIS TITLE AND CHAPTER 53 OF TITLE 49.—A TIP developed under this subsection for a metropolitan area shall include the projects within the area that are proposed for funding under chapter 1 of this title and chapter 53 of title 49.

(B) PROJECTS UNDER CHAPTER 2.—

(i) REGIONALLY SIGNIFICANT PROJECTS.—Regionally significant projects proposed for funding under chapter 2 shall be identified individually in the transportation improvement program.

(ii) OTHER PROJECTS.—Projects proposed for funding under chapter 2 that are not determined to be regionally significant shall be grouped in one line item or identified individually in the transportation improvement program.

(C) CONSISTENCY WITH LONG-RANGE TRANSPORTATION PLAN.—Each project shall be consistent with the long-range transportation plan developed under subsection (i) for the area.

(D) REQUIREMENT OF ANTICIPATED FULL FUNDING.—The program shall include a project, or an identified phase of a project, only if full funding can reasonably be anticipated to be available for the project within the time period contemplated for completion of the project.

(4) NOTICE AND COMMENT.—Before approving a TIP, a metropolitan planning organization, in cooperation with the State and any affected public transportation operator, shall provide an opportunity for participation by interested parties in the development of the program, in accordance with subsection (i)(5).

(5) SELECTION OF PROJECTS.—

(A) IN GENERAL.—Except as otherwise provided in subsection (k)(4) and in addition to the TIP development required under paragraph (1), the selection of federally funded projects in metropolitan areas shall be carried out, from the approved TIP—

(i) by—

(I) in the case of projects under this title, the State; and

(II) in the case of projects under chapter 53 of title 49, the designated recipients of public transportation funding; and

(ii) in cooperation with the metropolitan planning organization.

(B) MODIFICATIONS TO PROJECT PRIORITY.—Notwithstanding any other provision of law,

action by the Secretary shall not be required to advance a project included in the approved TIP in place of another project in the program.

(6) SELECTION OF PROJECTS FROM ILLUSTRATIVE LIST.—

(A) NO REQUIRED SELECTION.—Notwithstanding paragraph (2)(B)(iv), a State or metropolitan planning organization shall not be required to select any project from the illustrative list of additional projects included in the financial plan under paragraph (2)(B)(iv).

(B) REQUIRED ACTION BY THE SECRETARY.—Action by the Secretary shall be required for a State or metropolitan planning organization to select any project from the illustrative list of additional projects included in the financial plan under paragraph (2)(B)(iv) for inclusion in an approved TIP.

(7) PUBLICATION.—

(A) PUBLICATION OF TIPS.—A TIP involving Federal participation shall be published or otherwise made readily available by the metropolitan planning organization for public review.

(B) PUBLICATION OF ANNUAL LISTINGS OF PROJECTS.—An annual listing of projects, including investments in pedestrian walkways and bicycle transportation facilities, for which Federal funds have been obligated in the preceding year shall be published or otherwise made available by the cooperative effort of the State, transit operator, and metropolitan planning organization for public review. The listing shall be consistent with the categories identified in the TIP.

(k) TRANSPORTATION MANAGEMENT AREAS.—

(1) IDENTIFICATION AND DESIGNATION.—

(A) REQUIRED IDENTIFICATION.—The Secretary shall identify as a transportation management area each urbanized area (as defined by the Bureau of the Census) with a population of over 200,000 individuals.

(B) DESIGNATIONS ON REQUEST.—The Secretary shall designate any additional area as a transportation management area on the request of the Governor and the metropolitan planning organization designated for the area.

(2) TRANSPORTATION PLANS.—In a metropolitan planning area serving a transportation management area, transportation plans shall be based on a continuing and comprehensive transportation planning process carried out by the metropolitan planning organization in cooperation with the State and public transportation operators.

(3) CONGESTION MANAGEMENT PROCESS.—Within a metropolitan planning area serving a transportation management area, the transportation planning process under this section shall address congestion management through a process that provides for effective management and operation, based on a cooperatively developed and implemented metropolitan-wide strategy, of new and existing transportation facilities eligible for funding under this title and chapter 53 of title 49 through the use of

travel demand reduction and operational management strategies. The Secretary shall establish an appropriate phase-in schedule for compliance with the requirements of this section but no sooner than 1 year after the identification of a transportation management area.

(4) SELECTION OF PROJECTS.—

(A) IN GENERAL.—All federally funded projects carried out within the boundaries of a metropolitan planning area serving a transportation management area under this title (excluding projects carried out on the National Highway System and projects carried out under the bridge program or the Interstate maintenance program) or under chapter 53 of title 49 shall be selected for implementation from the approved TIP by the metropolitan planning organization designated for the area in consultation with the State and any affected public transportation operator.

(B) NATIONAL HIGHWAY SYSTEM PROJECTS.—Projects carried out within the boundaries of a metropolitan planning area serving a transportation management area on the National Highway System and projects carried out within such boundaries under the bridge program or the Interstate maintenance program under this title shall be selected for implementation from the approved TIP by the State in cooperation with the metropolitan planning organization designated for the area.

(5) CERTIFICATION.—

(A) IN GENERAL.—The Secretary shall—

(i) ensure that the metropolitan planning process of a metropolitan planning organization serving a transportation management area is being carried out in accordance with applicable provisions of Federal law; and

(ii) subject to subparagraph (B), certify, not less often than once every 4 years, that the requirements of this paragraph are met with respect to the metropolitan planning process.

(B) REQUIREMENTS FOR CERTIFICATION.—The Secretary may make the certification under subparagraph (A) if—

(i) the transportation planning process complies with the requirements of this section and other applicable requirements of Federal law; and

(ii) there is a TIP for the metropolitan planning area that has been approved by the metropolitan planning organization and the Governor.

(C) EFFECT OF FAILURE TO CERTIFY.—

(i) WITHHOLDING OF PROJECT FUNDS.—If a metropolitan planning process of a metropolitan planning organization serving a transportation management area is not certified, the Secretary may withhold up to 20 percent of the funds attributable to the metropolitan planning area of the metropolitan planning organization for projects funded under this title and chapter 53 of title 49.

(ii) RESTORATION OF WITHHELD FUNDS.—The withheld funds shall be restored to the

metropolitan planning area at such time as the metropolitan planning process is certified by the Secretary.

(D) REVIEW OF CERTIFICATION.—In making certification determinations under this paragraph, the Secretary shall provide for public involvement appropriate to the metropolitan area under review.

(I) ABBREVIATED PLANS FOR CERTAIN AREAS.—

(1) IN GENERAL.—Subject to paragraph (2), in the case of a metropolitan area not designated as a transportation management area under this section, the Secretary may provide for the development of an abbreviated transportation plan and TIP for the metropolitan planning area that the Secretary determines is appropriate to achieve the purposes of this section, taking into account the complexity of transportation problems in the area.

(2) NONATTAINMENT AREAS.—The Secretary may not permit abbreviated plans or TIPs for a metropolitan area that is in nonattainment for ozone or carbon monoxide under the Clean Air Act.

(m) ADDITIONAL REQUIREMENTS FOR CERTAIN NONATTAINMENT AREAS.—

(1) IN GENERAL.—Notwithstanding any other provisions of this title or chapter 53 of title 49, for transportation management areas classified as nonattainment for ozone or carbon monoxide pursuant to the Clean Air Act, Federal funds may not be advanced in such area for any highway project that will result in a significant increase in the carrying capacity for single-occupant vehicles unless the project is addressed through a congestion management process.

(2) APPLICABILITY.—This subsection applies to a nonattainment area within the metropolitan planning area boundaries determined under subsection (e).

(n) LIMITATION ON STATUTORY CONSTRUCTION.—Nothing in this section shall be construed to confer on a metropolitan planning organization the authority to impose legal requirements on any transportation facility, provider, or project not eligible under this title or chapter 53 of title 49.

(o) FUNDING.—Funds set aside under section 104(f) of this title or section 5305(g) of title 49 shall be available to carry out this section.

(p) CONTINUATION OF CURRENT REVIEW PRACTICE.—Since plans and TIPs described in this section are subject to a reasonable opportunity for public comment, since individual projects included in plans and TIPs are subject to review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), and since decisions by the Secretary concerning plans and TIPs described in this section have not been reviewed under such Act as of January 1, 1997, any decision by the Secretary concerning a plan or TIP described in this section shall not be considered to be a Federal action subject to review under such Act.

(Added Pub. L. 87-866, §9(a), Oct. 23, 1962, 76 Stat. 1148; amended Pub. L. 91-605, title I, §143, Dec. 31, 1970, 84 Stat. 1737; Pub. L. 95-599, title I, §169, Nov. 6, 1978, 92 Stat. 2723; Pub. L. 102-240, title I,

§1024(a), Dec. 18, 1991, 105 Stat. 1955; Pub. L. 102-388, title V, §502(b), Oct. 6, 1992, 106 Stat. 1566; Pub. L. 103-429, §3(5), Oct. 31, 1994, 108 Stat. 4377; Pub. L. 104-59, title III, §317, Nov. 28, 1995, 109 Stat. 588; Pub. L. 105-178, title I, §1203(a)-(m), (o), June 9, 1998, 112 Stat. 170-179; Pub. L. 105-206, title IX, §9003(c), July 22, 1998, 112 Stat. 839; Pub. L. 109-59, title VI, §6001(a), Aug. 10, 2005, 119 Stat. 1839.)

REFERENCES IN TEXT

The Clean Air Act, referred to in subsecs. (e)(4), (5)(D), (g)(1), (i)(3), (i)(2), and (m)(1), is act July 14, 1955, ch. 360, 69 Stat. 322, as amended, which is classified generally to chapter 85 (§7401 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 7401 of Title 42 and Tables.

The date of enactment of the SAFETEA-LU, referred to in subsec. (e)(4), (5), is the date of enactment of Pub. L. 109-59, which was approved Aug. 10, 2005.

Public Law 96-551, referred to in subsec. (f)(3)(A), is Pub. L. 96-551, Dec. 19, 1980, 94 Stat. 3233, which is not classified to the Code.

The National Environmental Policy Act of 1969, referred to in subsec. (p), is Pub. L. 91-190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

AMENDMENTS

2005—Pub. L. 109-59 amended section catchline and text generally, substituting provisions relating to metropolitan transportation planning for provisions relating to, in subsec. (a), general requirements for development of transportation plans and programs for urbanized areas, in subsec. (b), designation of metropolitan planning organizations, in subsec. (c), determination of metropolitan planning area boundaries, in subsec. (d), coordination of transportation planning in multistate metropolitan areas, in subsec. (e), coordination of metropolitan planning organizations, in subsec. (f), scope of the planning process, in subsec. (g), development of a long-range transportation plan, in subsec. (h), development of a metropolitan area transportation improvement program, in subsec. (i), designation of transportation management areas, in subsec. (j), abbreviated plans and programs for areas not designated as transportation management areas, in subsec. (k), transfer of funds, in subsec. (l), additional requirements for nonattainment areas under the Clean Air Act, in subsec. (m), limitation on statutory construction, in subsec. (n), funding, and in subsec. (o), review of plans and programs under the National Environmental Policy Act of 1969.

1998—Subsec. (a), Pub. L. 105-178, §1203(a), reenacted heading without change and amended text of subsec. (a) generally. Prior to amendment, text read as follows: "It is in the national interest to encourage and promote the development of transportation systems embracing various modes of transportation in a manner which will efficiently maximize mobility of people and goods within and through urbanized areas and minimize transportation-related fuel consumption and air pollution. To accomplish this objective, metropolitan planning organizations, in cooperation with the State, shall develop transportation plans and programs for urbanized areas of the State. Such plans and programs shall provide for the development of transportation facilities (including pedestrian walkways and bicycle transportation facilities) which will function as an intermodal transportation system for the State, the metropolitan areas, and the Nation. The process for developing such plans and programs shall provide for consideration of all modes of transportation and shall be continuing, cooperative, and comprehensive to the de-

metropolitan planning organization plan or program updates shall reflect changes made by this section."

DEMONSTRATION PROJECT FOR RESTRICTED ACCESS TO CENTRAL BUSINESS DISTRICT OF METROPOLITAN AREAS

Section 155 of Pub. L. 95-599 authorized Secretary of Transportation to carry out a demonstration project in a metropolitan area respecting the restriction of access of motor vehicles to the central business district during peak hours of traffic, authorized the necessary appropriations, and required progress reports and a final report and recommendations not later than three years after Nov. 6, 1978.

REDUCTION OF URBAN BLIGHT ADJACENT TO FEDERAL-AID PRIMARY AND INTERSTATE HIGHWAYS LOCATED IN CENTRAL BUSINESS DISTRICTS

Section 159 of Pub. L. 95-599 directed Secretary to conduct a study and submit a report to Congress not later than two years after Nov. 6, 1978, respecting the potential for reducing urban blight adjacent to Federal-aid primary and interstate highways located in central business districts.

URBAN SYSTEM STUDY

Pub. L. 94-280, title I, §149, May 5, 1976, 90 Stat. 447, directed Secretary of Transportation to conduct a study of the factors involved in planning, selection, etc., of Federal-aid urban system routes including an analysis of organizations carrying out the planning process, the status of jurisdiction over roads, programing responsibilities under local and State laws, and authority of local units, such study to be submitted to Congress within six months of May 5, 1976.

FRINGE PARKING DEMONSTRATION PROJECTS

Pub. L. 90-495, §11, Aug. 23, 1968, 82 Stat. 820, authorized Secretary to approve construction of publicly owned parking facilities under this title until June 30, 1971, as a demonstration project, authorized the Federal share of any project under this section to be 50%, prevented approval of projects by the Secretary unless the State or political subdivision thereof where the project is located can construct, maintain, and operate the facility, unless the Secretary has entered into an agreement with the State or political subdivision governing the financing, maintenance, and operation of the facility, and unless the Secretary has approved design standards for construction of the facility, defined "parking facilities", permitted a State or political subdivision to contract for the operation of such facility, prohibited approval of the project by the Secretary unless it is carried on in accordance with section 134 of this title (this section), and required annual reports to Congress on the demonstration projects approved under this section, prior to repeal by Pub. L. 91-605, title I, §134(c), Dec. 31, 1970, 84 Stat. 1734. See section 137 of this title.

§ 135. Statewide transportation planning

(a) GENERAL REQUIREMENTS.—

(1) DEVELOPMENT OF PLANS AND PROGRAMS.—

To accomplish the objectives stated in section 134(a), each State shall develop a statewide transportation plan and a statewide transportation improvement program for all areas of the State, subject to section 134.

(2) CONTENTS.—The statewide transportation plan and the transportation improvement program developed for each State shall provide for the development and integrated management and operation of transportation systems and facilities (including accessible pedestrian walkways and bicycle transportation facilities) that will function as an intermodal transportation system for the State and an in-

tegral part of an intermodal transportation system for the United States.

(3) PROCESS OF DEVELOPMENT.—The process for developing the statewide plan and the transportation improvement program shall provide for consideration of all modes of transportation and the policies stated in section 134(a), and shall be continuing, cooperative, and comprehensive to the degree appropriate, based on the complexity of the transportation problems to be addressed.

(b) COORDINATION WITH METROPOLITAN PLANNING; STATE IMPLEMENTATION PLAN.—A State shall—

(1) coordinate planning carried out under this section with the transportation planning activities carried out under section 134 for metropolitan areas of the State and with statewide trade and economic development planning activities and related multistate planning efforts; and

(2) develop the transportation portion of the State implementation plan as required by the Clean Air Act (42 U.S.C. 7401 et seq.).

(c) INTERSTATE AGREEMENTS.—

(1) IN GENERAL.—The consent of Congress is granted to two or more States entering into agreements or compacts, not in conflict with any law of the United States, for cooperative efforts and mutual assistance in support of activities authorized under this section related to interstate areas and localities in the States and establishing authorities the States consider desirable for making the agreements and compacts effective.

(2) RESERVATION OF RIGHTS.—The right to alter, amend, or repeal interstate compacts entered into under this subsection is expressly reserved.

(d) SCOPE OF PLANNING PROCESS.—

(1) IN GENERAL.—Each State shall carry out a statewide transportation planning process that provides for consideration and implementation of projects, strategies, and services that will—

(A) support the economic vitality of the United States, the States, nonmetropolitan areas, and metropolitan areas, especially by enabling global competitiveness, productivity, and efficiency;

(B) increase the safety of the transportation system for motorized and non-motorized users;

(C) increase the security of the transportation system for motorized and non-motorized users;

(D) increase the accessibility and mobility of people and freight;

(E) protect and enhance the environment, promote energy conservation, improve the quality of life, and promote consistency between transportation improvements and State and local planned growth and economic development patterns;

(F) enhance the integration and connectivity of the transportation system, across and between modes throughout the State, for people and freight;

(G) promote efficient system management and operation; and

(H) emphasize the preservation of the existing transportation system.

(2) FAILURE TO CONSIDER FACTORS.—The failure to consider any factor specified in paragraph (1) shall not be reviewable by any court under this title or chapter 53 of title 49, subchapter II of chapter 5 of title 5, or chapter 7 of title 5 in any matter affecting a statewide transportation plan, the transportation improvement program, a project or strategy, or the certification of a planning process.

(e) ADDITIONAL REQUIREMENTS.—In carrying out planning under this section, each State shall consider, at a minimum—

(1) with respect to nonmetropolitan areas, the concerns of affected local officials with responsibility for transportation;

(2) the concerns of Indian tribal governments and Federal land management agencies that have jurisdiction over land within the boundaries of the State; and

(3) coordination of transportation plans, the transportation improvement program, and planning activities with related planning activities being carried out outside of metropolitan planning areas and between States.

(f) LONG-RANGE STATEWIDE TRANSPORTATION PLAN.—

(1) DEVELOPMENT.—Each State shall develop a long-range statewide transportation plan, with a minimum 20-year forecast period for all areas of the State, that provides for the development and implementation of the intermodal transportation system of the State.

(2) CONSULTATION WITH GOVERNMENTS.—

(A) METROPOLITAN AREAS.—The statewide transportation plan shall be developed for each metropolitan area in the State in cooperation with the metropolitan planning organization designated for the metropolitan area under section 134.

(B) NONMETROPOLITAN AREAS.—With respect to nonmetropolitan areas, the statewide transportation plan shall be developed in consultation with affected nonmetropolitan officials with responsibility for transportation. The Secretary shall not review or approve the consultation process in each State.

(C) INDIAN TRIBAL AREAS.—With respect to each area of the State under the jurisdiction of an Indian tribal government, the statewide transportation plan shall be developed in consultation with the tribal government and the Secretary of the Interior.

(D) CONSULTATION, COMPARISON, AND CONSIDERATION.—

(i) IN GENERAL.—The long-range transportation plan shall be developed, as appropriate, in consultation with State, tribal, and local agencies responsible for land use management, natural resources, environmental protection, conservation, and historic preservation.

(ii) COMPARISON AND CONSIDERATION.—Consultation under clause (i) shall involve comparison of transportation plans to State and tribal conservation plans or maps, if available, and comparison of transportation plans to inventories of natural or historic resources, if available.

(3) PARTICIPATION BY INTERESTED PARTIES.—

(A) IN GENERAL.—In developing the statewide transportation plan, the State shall provide citizens, affected public agencies, representatives of public transportation employees, freight shippers, private providers of transportation, representatives of users of public transportation, representatives of users of pedestrian walkways and bicycle transportation facilities, representatives of the disabled, providers of freight transportation services, and other interested parties with a reasonable opportunity to comment on the proposed plan.

(B) METHODS.—In carrying out subparagraph (A), the State shall, to the maximum extent practicable—

(i) hold any public meetings at convenient and accessible locations and times;

(ii) employ visualization techniques to describe plans; and

(iii) make public information available in electronically accessible format and means, such as the World Wide Web, as appropriate to afford reasonable opportunity for consideration of public information under subparagraph (A).

(4) MITIGATION ACTIVITIES.—

(A) IN GENERAL.—A long-range transportation plan shall include a discussion of potential environmental mitigation activities and potential areas to carry out these activities, including activities that may have the greatest potential to restore and maintain the environmental functions affected by the plan.

(B) CONSULTATION.—The discussion shall be developed in consultation with Federal, State, and tribal wildlife, land management, and regulatory agencies.

(5) FINANCIAL PLAN.—The statewide transportation plan may include a financial plan that demonstrates how the adopted statewide transportation plan can be implemented, indicates resources from public and private sources that are reasonably expected to be made available to carry out the plan, and recommends any additional financing strategies for needed projects and programs. The financial plan may include, for illustrative purposes, additional projects that would be included in the adopted statewide transportation plan if reasonable additional resources beyond those identified in the financial plan were available.

(6) SELECTION OF PROJECTS FROM ILLUSTRATIVE LIST.—A State shall not be required to select any project from the illustrative list of additional projects included in the financial plan described in paragraph (5).

(7) EXISTING SYSTEM.—The statewide transportation plan should include capital, operations and management strategies, investments, procedures, and other measures to ensure the preservation and most efficient use of the existing transportation system.

(8) PUBLICATION OF LONG-RANGE TRANSPORTATION PLANS.—Each long-range transportation plan prepared by a State shall be published or otherwise made available, including

(to the maximum extent practicable) in electronically accessible formats and means, such as the World Wide Web.

(g) STATEWIDE TRANSPORTATION IMPROVEMENT PROGRAM.—

(1) DEVELOPMENT.—Each State shall develop a statewide transportation improvement program for all areas of the State. Such program shall cover a period of 4 years and be updated every 4 years or more frequently if the Governor elects to update more frequently.

(2) CONSULTATION WITH GOVERNMENTS.—

(A) METROPOLITAN AREAS.—With respect to each metropolitan area in the State, the program shall be developed in cooperation with the metropolitan planning organization designated for the metropolitan area under section 134.

(B) NONMETROPOLITAN AREAS.—With respect to each nonmetropolitan area in the State, the program shall be developed in consultation with affected nonmetropolitan local officials with responsibility for transportation. The Secretary shall not review or approve the specific consultation process in the State.

(C) INDIAN TRIBAL AREAS.—With respect to each area of the State under the jurisdiction of an Indian tribal government, the program shall be developed in consultation with the tribal government and the Secretary of the Interior.

(3) PARTICIPATION BY INTERESTED PARTIES.—In developing the program, the State shall provide citizens, affected public agencies, representatives of public transportation employees, freight shippers, private providers of transportation, providers of freight transportation services, representatives of users of public transportation, representatives of users of pedestrian walkways and bicycle transportation facilities, representatives of the disabled, and other interested parties with a reasonable opportunity to comment on the proposed program.

(4) INCLUDED PROJECTS.—

(A) IN GENERAL.—A transportation improvement program developed under this subsection for a State shall include federally supported surface transportation expenditures within the boundaries of the State.

(B) LISTING OF PROJECTS.—An annual listing of projects for which funds have been obligated in the preceding year in each metropolitan planning area shall be published or otherwise made available by the cooperative effort of the State, transit operator, and the metropolitan planning organization for public review. The listing shall be consistent with the funding categories identified in each metropolitan transportation improvement program.

(C) PROJECTS UNDER CHAPTER 2.—

(i) REGIONALLY SIGNIFICANT PROJECTS.—Regionally significant projects proposed for funding under chapter 2 shall be identified individually in the transportation improvement program.

(ii) OTHER PROJECTS.—Projects proposed for funding under chapter 2 that are not

determined to be regionally significant shall be grouped in one line item or identified individually in the transportation improvement program.

(D) CONSISTENCY WITH STATEWIDE TRANSPORTATION PLAN.—Each project shall be—

(i) consistent with the statewide transportation plan developed under this section for the State;

(ii) identical to the project or phase of the project as described in an approved metropolitan transportation plan; and

(iii) in conformance with the applicable State air quality implementation plan developed under the Clean Air Act, if the project is carried out in an area designated as nonattainment for ozone, particulate matter, or carbon monoxide under such Act.

(E) REQUIREMENT OF ANTICIPATED FULL FUNDING.—The transportation improvement program shall include a project, or an identified phase of a project, only if full funding can reasonably be anticipated to be available for the project within the time period contemplated for completion of the project.

(F) FINANCIAL PLAN.—The transportation improvement program may include a financial plan that demonstrates how the approved transportation improvement program can be implemented, indicates resources from public and private sources that are reasonably expected to be made available to carry out the transportation improvement program, and recommends any additional financing strategies for needed projects and programs. The financial plan may include, for illustrative purposes, additional projects that would be included in the adopted transportation plan if reasonable additional resources beyond those identified in the financial plan were available.

(G) SELECTION OF PROJECTS FROM ILLUSTRATIVE LIST.—

(i) NO REQUIRED SELECTION.—Notwithstanding subparagraph (F), a State shall not be required to select any project from the illustrative list of additional projects included in the financial plan under subparagraph (F).

(ii) REQUIRED ACTION BY THE SECRETARY.—Action by the Secretary shall be required for a State to select any project from the illustrative list of additional projects included in the financial plan under subparagraph (F) for inclusion in an approved transportation improvement program.

(H) PRIORITIES.—The transportation improvement program shall reflect the priorities for programming and expenditures of funds, including transportation enhancement activities, required by this title and chapter 53 of title 49.

(5) PROJECT SELECTION FOR AREAS OF LESS THAN 50,000 POPULATION.—Projects carried out in areas with populations of less than 50,000 individuals shall be selected, from the approved transportation improvement program (exclud-

ing projects carried out on the National Highway System and projects carried out under the bridge program or the Interstate maintenance program under this title or under sections 5310, 5311, 5316, and 5317 of title 49; by the State in cooperation with the affected non-metropolitan local officials with responsibility for transportation. Projects carried out in areas with populations of less than 50,000 individuals on the National Highway System or under the bridge program or the Interstate maintenance program under this title or under sections 5310, 5311, 5316, and 5317 of title 49 shall be selected, from the approved statewide transportation improvement program, by the State in consultation with the affected non-metropolitan local officials with responsibility for transportation.

(6) **TRANSPORTATION IMPROVEMENT PROGRAM APPROVAL.**—Every 4 years, a transportation improvement program developed under this subsection shall be reviewed and approved by the Secretary if based on a current planning finding.

(7) **PLANNING FINDING.**—A finding shall be made by the Secretary at least every 4 years that the transportation planning process through which statewide transportation plans and programs are developed is consistent with this section and section 134.

(8) **MODIFICATIONS TO PROJECT PRIORITY.**—Notwithstanding any other provision of law, action by the Secretary shall not be required to advance a project included in the approved transportation improvement program in place of another project in the program.

(h) **FUNDING.**—Funds set aside pursuant to section 104(f) of this title and section 5305(g) of title 49, shall be available to carry out this section.

(i) **TREATMENT OF CERTAIN STATE LAWS AS CONGESTION MANAGEMENT PROCESSES.**—For purposes of this section and section 134, and sections 5303 and 5304 of title 49, State laws, rules, or regulations pertaining to congestion management systems or programs may constitute the congestion management process under this section and section 134, and sections 5303 and 5304 of title 49, if the Secretary finds that the State laws, rules, or regulations are consistent with, and fulfill the intent of, the purposes of this section and section 134 and sections 5303 and 5304 of title 49, as appropriate.

(j) **CONTINUATION OF CURRENT REVIEW PRACTICE.**—Since the statewide transportation plan and the transportation improvement program described in this section are subject to a reasonable opportunity for public comment, since individual projects included in the statewide transportation plans and the transportation improvement program are subject to review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), and since decisions by the Secretary concerning statewide transportation plans or the transportation improvement program described in this section have not been reviewed under such Act as of January 1, 1997, any decision by the Secretary concerning a metropolitan or statewide transportation plan or the transportation improvement program described in this section shall not be considered to be a Federal action subject to review under such Act.

(Added Pub. L. 90-495, §10(a), Aug. 23, 1968, 82 Stat. 820; amended Pub. L. 91-605, title I, §§106(g), 125, Dec. 31, 1970, 84 Stat. 1718, 1729; Pub. L. 93-87, title I, §119, Aug. 13, 1973, 87 Stat. 259; Pub. L. 94-280, title I, §123(a), May 5, 1976, 90 Stat. 439; Pub. L. 102-240, title I, §1025(a), Dec. 18, 1991, 105 Stat. 1962; Pub. L. 103-429, §3(6), Oct. 31, 1994, 108 Stat. 4378; Pub. L. 105-178, title I, §1204(a)-(h), June 9, 1998, 112 Stat. 180-184; Pub. L. 109-59, title VI, §6001(a), Aug. 10, 2005, 119 Stat. 1851.)

REFERENCES IN TEXT

The Clean Air Act, referred to in subsecs. (b)(2) and (g)(4)(D)(iii), is act July 14, 1955, ch. 360, 69 Stat. 322, as amended, which is classified generally to chapter 85 (§7401 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 7401 of Title 42 and Tables.

The National Environmental Policy Act of 1969, referred to in subsec. (j), is Pub. L. 91-190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

PRIOR PROVISIONS

A prior section 135, Pub. L. 89-139, §4(a), Aug. 28, 1966, 79 Stat. 578, called for a highway safety program in each State approved by the Secretary, prior to repeal by Pub. L. 89-564, title I, §102(a), Sept. 9, 1966, 80 Stat. 734. See section 402 of this title.

AMENDMENTS

2005—Pub. L. 109-59 amended section catchline and text generally, substituting provisions relating to statewide transportation planning for provisions relating to, in subsec. (a), development of plans and programs by each State, in subsec. (b), coordination of State with Federal planning, in subsec. (c), scope of planning process, in subsec. (d), additional minimum requirements for each State to consider, in subsec. (e), development of a long-range transportation plan, in subsec. (f), development of a State transportation improvement program, in subsec. (g), funding, in subsec. (h), treatment of certain State laws as congestion management systems, and, in subsec. (i), review of plans and programs under the National Environmental Policy Act of 1969.

1998—Subsec. (a), Pub. L. 105-178, §1204(a), reenacted heading without change and amended text of subsec. (a) generally. Prior to amendment, text read as follows: "It is in the national interest to encourage and promote the development of transportation systems embracing various modes of transportation in a manner that will serve all areas of the State efficiently and effectively. Subject to section 134 of this title, the State shall develop transportation plans and programs for all areas of the State. Such plans and programs shall provide for development of transportation facilities (including pedestrian walkways and bicycle transportation facilities) which will function as an intermodal State transportation system. The process for developing such plans and programs shall provide for consideration of all modes of transportation and shall be continuing, cooperative, and comprehensive to the degree appropriate, based on the complexity of the transportation problems."

Subsec. (b), Pub. L. 105-178, §1204(b), inserted "and sections 5303 through 5305 of title 49" after "section 134 of this title".

Subsec. (c), Pub. L. 105-178, §1204(c), amended heading and text of subsec. (c) generally, substituting provisions relating to scope of planning process for provisions relating to considerations to be involved in State's continuous transportation planning process.

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(4) The requirements in paragraphs (b)(1) through (3) of this section shall be met for 3 consecutive years in order to produce a valid spatially averaged annual standard design value. Otherwise, the individual (single) site annual standard design values shall be compared directly to the level of the annual NAAQS.

(c) Section 58.12 of this chapter specifies the required minimum frequency of sampling for $PM_{2.5}$. Exceptions to the specified sampling frequencies, such as a reduced frequency during a season of expected low concentrations (i.e., "seasonal sampling"), are subject to the approval of EPA. Annual 98th percentile values are to be calculated according to equation 5 in section 4.5 of this appendix when a site operates on a "seasonal sampling" schedule.

3.0 Requirements for Data Used for Comparisons With the $PM_{2.5}$ NAAQS and Data Reporting Considerations.

(a) Except as otherwise provided in this appendix, only valid FRM/FEM/ARM $PM_{2.5}$ data required to be submitted to EPA's Air Quality System (AQS) shall be used in the design value calculations.

(b) $PM_{2.5}$ measurement data (typically hourly for continuous instruments and daily for filter-based instruments) shall be reported to AQS in micrograms per cubic meter ($\mu\text{g}/\text{m}^3$) to one decimal place, with additional digits to the right being truncated.

(c) Block 24-hour averages shall be computed from available hourly $PM_{2.5}$ concentration data for each corresponding day of the year and the result shall be stored in the first, or start, hour (i.e., midnight, hour '0') of the 24-hour period. A 24-hour average shall be considered valid if at least 75 percent (i.e., 18) of the hourly averages for the 24-hour period are available. In the event that less than all 24 hourly averages are available (i.e., less than 24, but at least 18), the 24-hour average shall be computed on the basis of the hours available using the number of available hours as the divisor (e.g., 19). 24-hour periods with seven or more missing hours shall be considered valid if, after substituting zero for all missing hourly concentrations, the 24-hour average concentration is greater than the level of the standard. The computed 24-hour average $PM_{2.5}$ concentrations shall be reported to one decimal place (the additional digits to the right of the first decimal place are truncated, consistent with the data handling procedures for the reported data).

(d) Except for calculation of spatially averaged annual means and spatially averaged annual standard design values, all other calculations shown in this appendix shall be implemented on a site-level basis. Site level data shall be processed as follows:

(1) The default dataset for a site shall consist of the measured concentrations recorded from the designated primary FRM/FEM/ARM

monitor. The primary monitor shall be designated in the appropriate State or local agency PM Monitoring Network Description. All daily values produced by the primary sampler are considered part of the site record (i.e., that site's daily value); this includes all creditable samples and all extra samples.

(2) Data for the primary monitor shall be augmented as much as possible with data from collocated FRM/FEM/ARM monitors. If a valid 24-hour measurement is not produced from the primary monitor for a particular day (scheduled or otherwise), but a valid sample is generated by a collocated FRM/FEM/ARM instrument (and recorded in AQS), then that collocated value shall be considered part of the site data record (i.e., that site's daily value). If more than one valid collocated FRM/FEM/ARM value is available, the average of those valid collocated values shall be used as the daily value.

(e) All daily values in the composite site record are used in annual mean and 98th percentile calculations, however, not all daily values are given credit towards data completeness requirements. Only "creditable" samples are given credit for data completeness. Creditable samples include valid samples on scheduled sampling days and valid make-up samples. All other types of daily values are referred to as "extra" samples.

4.0 Comparisons With the $PM_{2.5}$ NAAQS.

4.1 Annual $PM_{2.5}$ NAAQS.

(a) The annual $PM_{2.5}$ NAAQS is met when the annual standard design value is less than or equal to 15.0 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$).

(b) For single site comparisons, 3 years of valid annual means are required to produce a valid annual standard design value. In the case of spatial averaging, 3 years of valid spatially averaged annual means are required to produce a valid annual standard design value. Designated sites with less than 3 years of data shall be included in annual spatial averages for those years that data completeness requirements are met. A year meets data completeness requirements when at least 75 percent of the scheduled sampling days for each quarter have valid data. [Quarterly data capture rates (expressed as a percentage) are specifically calculated as the number of creditable samples for the quarter divided by the number of scheduled samples for the quarter, the result then multiplied by 100 and rounded to the nearest integer.] However, years with at least 11 samples in each quarter shall be considered valid, notwithstanding quarters with less than complete data, if the resulting annual mean, spatially

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averaged annual mean concentration, or resulting annual standard design value concentration (rounded according to the conventions of section 4.3 of this appendix) is greater than the level of the standard. Furthermore, where the explicit 11 sample per quarter requirement is not met, the site annual mean shall still be considered valid if, by substituting a low value (described below) for the missing data in the deficient quarters (substituting enough to meet the 11 sample minimum), the computation still yields a recalculated annual mean, spatially averaged annual mean concentration, or annual standard design value concentration over the level of the standard. The low value used for this substitution test shall be the lowest reported daily value in the site data record for that calendar quarter over the most recent 3-year period. If an annual mean is deemed complete using this test, the original annual mean (without substituted low values) shall be considered the official mean value for this site, not the result of the recalculated test using the low values.

(c) The use of less than complete data is subject to the approval of EPA, which may consider factors such as monitoring site closures/moves, monitoring diligence, and nearby concentrations in determining whether to use such data.

(d) The equations for calculating the annual standard design values are given in section 4.4 of this appendix.

4.2 24-Hour PM_{2.5} NAAQS.

(a) The 24-hour PM_{2.5} NAAQS is met when the 24-hour standard design value at each monitoring site is less than or equal to 35 µg/m³. This comparison shall be based on 3 consecutive, complete years of air quality data. A year meets data completeness requirements when at least 75 percent of the scheduled sampling days for each quarter have valid data. However, years shall be considered valid, notwithstanding quarters with less than complete data (even quarters with less than 11 samples), if the resulting annual 98th percentile value or resulting 24-hour standard design value (rounded according to the conventions of section 4.3 of this appendix) is greater than the level of the standard.

(b) The use of less than complete data is subject to the approval of EPA which may consider factors such as monitoring site closures/moves, monitoring diligence, and nearby concentrations in determining whether to use such data for comparisons to the NAAQS.

(c) The procedures and equations for calculating the 24-hour standard design values are given in section 4.5 of this appendix.

4.3 Rounding Conventions. For the purposes of comparing calculated values to the applicable level of the standard, it is necessary to round the final results of the calculations described in sections 4.4 and 4.5 of

this appendix. Results for all intermediate calculations shall not be rounded.

(a) Annual PM_{2.5} standard design values shall be rounded to the nearest 0.1 µg/m³ (decimals 0.05 and greater are rounded up to the next 0.1, and any decimal lower than 0.05 is rounded down to the nearest 0.1).

(b) 24-hour PM_{2.5} standard design values shall be rounded to the nearest 1 µg/m³ (decimals 0.5 and greater are rounded up to the nearest whole number, and any decimal lower than 0.5 is rounded down to the nearest whole number).

4.4 Equations for the Annual PM_{2.5} NAAQS.

(a) An annual mean value for PM_{2.5} is determined by first averaging the daily values of a calendar quarter using equation 1 of this appendix:

Equation 1

$$\bar{X}_{q,y,s} = \frac{1}{n_q} \sum_{i=1}^{n_q} X_{i,q,y,s}$$

Where:

$\bar{X}_{q,y,s}$ = the mean for quarter q of the year y for site s;

n_q = the number of daily values in the quarter; and

$X_{i,q,y,s}$ = the i^{th} value in quarter q for year y for site s.

(b) Equation 2 of this appendix is then used to calculate the site annual mean:

Equation 2

$$\bar{X}_{y,s} = \frac{1}{4} \sum_{q=1}^4 \bar{X}_{q,y,s}$$

Where:

$\bar{X}_{y,s}$ = the annual mean concentration for year y (y = 1, 2, or 3) and for site s; and

$\bar{X}_{q,y,s}$ = the mean for quarter q of year y for site s.

(c) If spatial averaging is utilized, the site-based annual means will then be averaged together to derive the spatially averaged annual mean using equation 3 of this appendix. Otherwise (i.e., for single site comparisons), skip to equation 4.B of this appendix.

Equation 3

$$\bar{X}_y = \frac{1}{n_s} \sum_{s=1}^{n_s} \bar{X}_{y,s}$$

Where:

\bar{X}_y = the spatially averaged mean for year y,
 $\bar{X}_{y,s}$ = the annual mean for year y and site s for sites designated to be averaged that meet completeness criteria, and

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(e) The annual primary standard is met when the annual average concentration in a calendar year is less than or equal to 53 ppb, as determined in accordance with Appendix S of this part for the annual standard.

(f) The 1-hour primary standard is met when the three-year average of the annual 98th percentile of the daily maximum 1-hour average concentration is less than or equal to 100 ppb, as determined in accordance with Appendix S of this part for the 1-hour standard.

(g) The secondary standard is attained when the annual arithmetic mean concentration in a calendar year is less than or equal to 0.053 ppm, rounded to three decimal places (fractional parts equal to or greater than 0.0005 ppm must be rounded up). To demonstrate attainment, an annual mean must be based upon hourly data that are at least 75 percent complete or upon data derived from manual methods that are at least 75 percent complete for the scheduled sampling days in each calendar quarter.

[75 FR 6531, Feb. 9, 2010]

§ 50.12 National primary and secondary ambient air quality standards for lead.

(a) National primary and secondary ambient air quality standards for lead and its compounds, measured as elemental lead by a reference method based on appendix G to this part, or by an equivalent method, are: 1.5 micrograms per cubic meter, maximum arithmetic mean averaged over a calendar quarter.

(b) The standards set forth in this section will remain applicable to all areas notwithstanding the promulgation of lead national ambient air quality standards (NAAQS) in § 50.16. The lead NAAQS set forth in this section will no longer apply to an area one year after the effective date of the designation of that area, pursuant to section 107 of the Clean Air Act, for the lead NAAQS set forth in § 50.16; except that for areas designated nonattainment for the lead NAAQS set forth in this section as of the effective date of § 50.16, the lead NAAQS set forth in this section will apply until that area submits, pursuant to section 191 of the

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Clean Air Act, and EPA approves, an implementation plan providing for attainment and/or maintenance of the lead NAAQS set forth in § 50.16.

(Secs. 109, 301(a) Clean Air Act as amended (42 U.S.C. 7409, 7601(a)))

[43 FR 46258, Oct. 5, 1978, as amended at 73 FR 67051, Nov. 12, 2008]

§ 50.13 National primary and secondary ambient air quality standards for PM_{2.5}.

(a) The national primary and secondary ambient air quality standards for particulate matter are 15.0 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$) annual arithmetic mean concentration, and 35 $\mu\text{g}/\text{m}^3$ 24-hour average concentration measured in the ambient air as PM_{2.5} (particles with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers) by either:

(1) A reference method based on appendix L of this part and designated in accordance with part 53 of this chapter; or

(2) An equivalent method designated in accordance with part 53 of this chapter.

(b) The annual primary and secondary PM_{2.5} standards are met when the annual arithmetic mean concentration, as determined in accordance with appendix N of this part, is less than or equal to 15.0 $\mu\text{g}/\text{m}^3$.

(c) The 24-hour primary and secondary PM_{2.5} standards are met when the 98th percentile 24-hour concentration, as determined in accordance with appendix N of this part, is less than or equal to 35 $\mu\text{g}/\text{m}^3$.

[71 FR 61224, Oct. 17, 2006]

§ 50.14 Treatment of air quality monitoring data influenced by exceptional events.

(a) *Requirements.* (1) A State may request EPA to exclude data showing exceedances or violations of the national ambient air quality standard that are directly due to an exceptional event from use in determinations by demonstrating to EPA's satisfaction that such event caused a specific air pollution concentration at a particular air quality monitoring location.

(2) Demonstration to justify data exclusion may include any reliable and

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 52.828 Enforcement.
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 52.833 Significant deterioration of air quality.
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 52.929 [Reserved]
 52.930 Control strategy: Ozone.
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 52.975 Redesignations and maintenance plans; ozone.
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52.985 [Reserved]
 52.986 Significant deterioration of air quality.
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 52.994 [Reserved]
 52.995 Enhanced ambient air quality monitoring.
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 52.999 Original identification of plan section.

AUTHORITY: 42 U.S.C. 7401 *et seq.*

Subpart A—General Provisions

SOURCE: 37 FR 10846, May 31, 1972, unless otherwise noted.

§ 52.01 Definitions.

All terms used in this part but not defined herein shall have the meaning given them in the Clean Air Act and in parts 51 and 60 of this chapter.

(a) The term *stationary source* means any building, structure, facility, or installation which emits or may emit an air pollutant for which a national standard is in effect.

(b) The term *commenced* means that an owner or operator has undertaken a continuous program of construction or modification.

(c) The term *construction* means fabrication, erection, or installation.

(d) The phrases *modification* or *modified source* mean any physical change in, or change in the method of operation of, a stationary source which increases the emission rate of any pollutant for which a national standard has been promulgated under part 50 of this chapter or which results in the emission of any such pollutant not previously emitted, except that:

(1) Routine maintenance, repair, and replacement shall not be considered a physical change, and

(2) The following shall not be considered a change in the method of operation:

(i) An increase in the production rate, if such increase does not exceed

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the operating design capacity of the source;

(ii) An increase in the hours of operation;

(iii) Use of an alternative fuel or raw material, if prior to the effective date of a paragraph in this part which imposes conditions on or limits modifications, the source is designed to accommodate such alternative use.

(e) The term *startup* means the setting in operation of a source for any purpose.

(f) [Reserved]

(g) The term *heat input* means the total gross calorific value (where gross calorific value is measured by ASTM Method D2015-66, D240-64, or D1826-64) of all fuels burned.

(h) The term *total rated capacity* means the sum of the rated capacities of all fuel-burning equipment connected to a common stack. The rated capacity shall be the maximum guaranteed by the equipment manufacturer or the maximum normally achieved during use, whichever is greater.

[37 FR 19807, Sept. 22, 1972, as amended at 38 FR 12698, May 14, 1973; 39 FR 42514, Dec. 5, 1974; 43 FR 26410, June 19, 1978]

§ 52.02 Introduction.

(a) This part sets forth the Administrator's approval and disapproval of State plans and the Administrator's promulgation of such plans or portions thereof. Approval of a plan or any portion thereof is based upon a determination by the Administrator that such plan or portion meets the requirements of section 110 of the Act and the provisions of part 51 of this chapter.

(b) Any plan or portion thereof promulgated by the Administrator substitutes for a State plan or portion thereof disapproved by the Administrator or not submitted by a State, or supplements a State plan or portion thereof. The promulgated provisions, together with any portions of a State plan approved by the Administrator, constitute the applicable plan for purposes of the Act.

(c) Where nonregulatory provisions of a plan are disapproved, the disapproval is noted in this part and a detailed evaluation is provided to the State, but no substitute provisions are promulgated by the Administrator.

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(d) All approved plans and plan revisions listed in subparts B through DDD of this part and on file at the Office of the Federal Register are approved for incorporation by reference by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Notice of amendments to the plans will be published in the FEDERAL REGISTER. The plans and plan revisions are available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html. In addition the plans and plan revisions are available at the following locations:

(1) Office of Air and Radiation, Docket and Information Center (Air Docket), EPA, 401 M St., SW., Room M1500, Washington, DC 20460.

(2) The appropriate EPA Regional Office as listed below:

(i) Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. Environmental Protection Agency, Region 1, John F. Kennedy Federal Building, One Congress Street, Boston, MA 02203.

(ii) New York, New Jersey, Puerto Rico, and Virgin Islands. Environmental Protection Agency, Region 2, 290 Broadway, New York, NY 10007-1866.

(iii) Delaware, District of Columbia, Pennsylvania, Maryland, Virginia, and West Virginia. Environmental Protection Agency, Region 3, 1650 Arch Street, Philadelphia, PA 19103-2029.

(iv) Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee. Environmental Protection Agency, Region 4, 61 Forsyth Street, Atlanta, Georgia 30303.

(v) Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, IL 60604-3507.

(vi) Arkansas, Louisiana, New Mexico, Oklahoma, and Texas. Environmental Protection Agency, Region 6, Fountain Place, 1445 Ross Avenue, Suite 1200, Dallas TX 75202-2733.

(vii) Iowa, Kansas, Missouri, and Nebraska. Environmental Protection

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plan required by § 58.10. The plan shall include a statement of purposes for each SPM monitor and evidence that operation of each monitor meets the requirements of appendix A or an approved alternative as provided by § 58.11(a)(2) where applicable. The monitoring agency may designate a monitor as an SPM after January 1, 2007 only if it is a new monitor, i.e., a SLAMS monitor that is not included in the currently applicable monitoring plan or, for a monitor included in the monitoring plan prior to January 1, 2007, if the Regional Administrator has approved the discontinuation of the monitor as a SLAMS site.

(b) Any SPM data collected by an air monitoring agency using a Federal reference method (FRM), Federal equivalent method (FEM), or approved regional method (ARM) must meet the requirements of § 58.11, § 58.12, and appendix A to this part or an approved alternative to appendix A to this part. Compliance with appendix E to this part is optional but encouraged except when the monitoring agency's data objectives are inconsistent with those requirements. Data collected at an SPM using a FRM, FEM, or ARM meeting the requirements of appendix A must be submitted to AQS according to the requirements of § 58.16. Data collected by other SPMs may be submitted. The monitoring agency must also submit to AQS an indication of whether each SPM reporting data to AQS monitor meets the requirements of appendices A and E to this part.

(c) All data from an SPM using an FRM, FEM, or ARM which has operated for more than 24 months is eligible for comparison to the relevant NAAQS, subject to the conditions of § 58.30, unless the air monitoring agency demonstrates that the data came from a particular period during which the requirements of appendix A, appendix C, or appendix E to this part were not met in practice.

(d) If an SPM using an FRM, FEM, or ARM is discontinued within 24 months of start-up, the Administrator will not base a NAAQS violation determination for the PM_{2.5} or ozone NAAQS solely on data from the SPM.

(e) If an SPM using an FRM, FEM, or ARM is discontinued within 24 months

of start-up, the Administrator will not designate an area as nonattainment for the CO, SO₂, NO₂, or 24-hour PM₁₀ NAAQS solely on the basis of data from the SPM. Such data are eligible for use in determinations of whether a nonattainment area has attained one of these NAAQS.

(f) Prior approval from EPA is not required for discontinuance of an SPM.

[71 FR 61298, Oct. 17, 2006, as amended at 72 FR 32210, June 12, 2007; 73 FR 67060, Nov. 12, 2008]

Subpart D—National Air Monitoring Stations (NAMS)

SOURCE: 71 FR 61302, Oct. 17, 2006, unless otherwise noted.

§ 58.30 Special considerations for data comparisons to the NAAQS.

(a) *Comparability of PM_{2.5} data.* (1) There are two forms of the PM_{2.5} NAAQS described in part 50 of this chapter. The PM_{2.5} monitoring site characteristics (see appendix D to this part, section 4.7.1) impact how the resulting PM_{2.5} data can be compared to the annual PM_{2.5} NAAQS form. PM_{2.5} data that are representative, not of areawide but rather, of relatively unique population-oriented microscale, or localized hot spot, or unique population-oriented middle-scale impact sites are only eligible for comparison to the 24-hour PM_{2.5} NAAQS. For example, if the PM_{2.5} monitoring site is adjacent to a unique dominating local PM_{2.5} source or can be shown to have average 24-hour concentrations representative of a smaller than neighborhood spatial scale, then data from a monitor at the site would only be eligible for comparison to the 24-hour PM_{2.5} NAAQS.

(2) There are cases where certain population-oriented microscale or middle scale PM_{2.5} monitoring sites are determined by the Regional Administrator to collectively identify a larger region of localized high ambient PM_{2.5} concentrations. In those cases, data from these population-oriented sites would be eligible for comparison to the annual PM_{2.5} NAAQS.

(b) [Reserved]

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- 93.122 Procedures for determining regional transportation-related emissions.
- 93.123 Procedures for determining localized CO, PM₁₀, and PM_{2.5} concentrations (hot-spot analysis).
- 93.124 Using the motor vehicle emissions budget in the applicable implementation plan (or implementation plan submission).
- 93.125 Enforceability of design concept and scope and project-level mitigation and control measures.
- 93.126 Exempt projects.
- 93.127 Projects exempt from regional emissions analyses.
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Subpart B—Determining Conformity of General Federal Actions to State or Federal Implementation Plans

- 93.150 Prohibition.
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- 93.165 Early emission reduction credit programs at Federal facilities and installation subject to Federal oversight.

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

SOURCE: 58 FR 62235, Nov. 24, 1993, unless otherwise noted.

Subpart A—Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit Laws

SOURCE: 62 FR 43801, Aug. 15, 1997, unless otherwise noted.

§93.100 Purpose.

The purpose of this subpart is to implement section 176(c) of the Clean Air Act (CAA), as amended (42 U.S.C. 7401 *et seq.*), and the related requirements of 23 U.S.C. 109(j), with respect to the conformity of transportation plans, programs, and projects which are developed, funded, or approved by the United States Department of Transportation (DOT), and by metropolitan planning organizations (MPOs) or other recipients of funds under title 23 U.S.C. or the Federal Transit Laws (49 U.S.C. Chapter 53). This subpart sets forth policy, criteria, and procedures for demonstrating and assuring conformity of such activities to an applicable implementation plan developed pursuant to section 110 and Part D of the CAA.

§93.101 Definitions.

Terms used but not defined in this subpart shall have the meaning given them by the CAA, titles 23 and 49 U.S.C., other Environmental Protection Agency (EPA) regulations, or other DOT regulations, in that order of priority.

Applicable implementation plan is defined in section 302(q) of the CAA and means the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under section 110, or promulgated under section 110(c), or promulgated or approved pursuant to regulations promulgated under section 301(d) and which implements the relevant requirements of the CAA.

CAA means the Clean Air Act, as amended (42 U.S.C. 7401 *et seq.*).

Cause or contribute to a new violation for a project means:

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(1) To cause or contribute to a new violation of a standard in the area substantially affected by the project or over a region which would otherwise not be in violation of the standard during the future period in question, if the project were not implemented; or

(2) To contribute to a new violation in a manner that would increase the frequency or severity of a new violation of a standard in such area.

Clean data means air quality monitoring data determined by EPA to meet the requirements of 40 CFR part 58 that indicate attainment of the national ambient air quality standard.

Control strategy implementation plan revision is the implementation plan which contains specific strategies for controlling the emissions of and reducing ambient levels of pollutants in order to satisfy CAA requirements for demonstrations of reasonable further progress and attainment (including implementation plan revisions submitted to satisfy CAA sections 172(c), 182(b)(1), 182(c)(2)(A), 182(c)(2)(B), 187(a)(7), 187(g), 189(a)(1)(B), 189(b)(1)(A), and 189(d); sections 192(a) and 192(b), for nitrogen dioxide; and any other applicable CAA provision requiring a demonstration of reasonable further progress or attainment).

Design concept means the type of facility identified by the project, e.g., freeway, expressway, arterial highway, grade-separated highway, reserved right-of-way rail transit, mixed-traffic rail transit, exclusive busway, etc.

Design scope means the design aspects which will affect the proposed facility's impact on regional emissions, usually as they relate to vehicle or person carrying capacity and control, e.g., number of lanes or tracks to be constructed or added, length of project, signalization, access control including approximate number and location of interchanges, preferential treatment for high-occupancy vehicles, etc.

DOT means the United States Department of Transportation.

Donut areas are geographic areas outside a metropolitan planning area boundary, but inside the boundary of a nonattainment or maintenance area that contains any part of a metropolitan area(s). These areas are not iso-

lated rural nonattainment and maintenance areas.

EPA means the Environmental Protection Agency.

FHWA means the Federal Highway Administration of DOT.

FHWA/FTA project, for the purpose of this subpart, is any highway or transit project which is proposed to receive funding assistance and approval through the Federal-Aid Highway program or the Federal mass transit program, or requires Federal Highway Administration (FHWA) or Federal Transit Administration (FTA) approval for some aspect of the project, such as connection to an interstate highway or deviation from applicable design standards on the interstate system.

Forecast period with respect to a transportation plan is the period covered by the transportation plan pursuant to 23 CFR part 450.

FTA means the Federal Transit Administration of DOT.

Highway project is an undertaking to implement or modify a highway facility or highway-related program. Such an undertaking consists of all required phases necessary for implementation. For analytical purposes, it must be defined sufficiently to:

(1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;

(2) Have independent utility or significance, i.e., be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and

(3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

Horizon year is a year for which the transportation plan describes the envisioned transportation system according to §93.106.

Hot-spot analysis is an estimation of likely future localized CO, PM₁₀, and/or PM_{2.5} pollutant concentrations and a comparison of those concentrations to the national ambient air quality standards. Hot-spot analysis assesses impacts on a scale smaller than the entire nonattainment or maintenance area, including, for example, congested roadway intersections and highways or

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transit terminals, and uses an air quality dispersion model to determine the effects of emissions on air quality.

Increase the frequency or severity means to cause a location or region to exceed a standard more often or to cause a violation at a greater concentration than previously existed and/or would otherwise exist during the future period in question, if the project were not implemented.

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

Lapse means that the conformity determination for a transportation plan or TIP has expired, and thus there is no currently conforming transportation plan and TIP.

Limited maintenance plan is a maintenance plan that EPA has determined meets EPA's limited maintenance plan policy criteria for a given NAAQS and pollutant. To qualify for a limited maintenance plan, for example, an area must have a design value that is significantly below a given NAAQS, and it must be reasonable to expect that a NAAQS violation will not result from any level of future motor vehicle emissions growth.

Maintenance area means any geographic region of the United States previously designated nonattainment pursuant to the CAA Amendments of 1990 and subsequently redesignated to attainment subject to the requirement to develop a maintenance plan under section 175A of the CAA, as amended.

Maintenance plan means an implementation plan under section 175A of the CAA, as amended.

Metropolitan planning organization (MPO) means the policy board of an organization created as a result of the designation process in 23 U.S.C. 134(d).

Milestone has the meaning given in CAA sections 182(g)(1) and 189(c) for serious and above ozone nonattainment areas and PM₁₀ nonattainment areas, respectively. For all other nonattainment areas, a milestone consists of an emissions level and the date on which that level is to be achieved as required by the applicable CAA provision for reasonable further progress towards attainment.

Motor vehicle emissions budget is that portion of the total allowable emissions defined in the submitted or approved control strategy implementation plan revision or maintenance plan for a certain date for the purpose of meeting reasonable further progress milestones or demonstrating attainment or maintenance of the NAAQS, for any criteria pollutant or its precursors, allocated to highway and transit vehicle use and emissions.

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

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

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

(3) *24-hour PM₁₀ NAAQS* means the 24-hour PM₁₀ national ambient air quality standard codified at 40 CFR 50.6.

(4) *1997 PM_{2.5} NAAQS* means the PM_{2.5} national ambient air quality standards codified at 40 CFR 50.7.

(5) *2006 PM_{2.5} NAAQS* means the 24-hour PM_{2.5} national ambient air quality standard codified at 40 CFR 50.13.

(6) *Annual PM₁₀ NAAQS* means the annual PM₁₀ national ambient air quality standard that EPA revoked on December 18, 2006.

NEPA means the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*).

NEPA process completion, for the purposes of this subpart, with respect to FHWA or FTA, means the point at which there is a specific action to make a determination that a project is categorically excluded, to make a Finding of No Significant Impact, or to issue a record of decision on a Final Environmental Impact Statement under NEPA.

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Nonattainment area means any geographic region of the United States which has been designated as non-attainment under section 107 of the CAA for any pollutant for which a national ambient air quality standard exists.

Project means a highway project or transit project.

Protective finding means a determination by EPA that a submitted control strategy implementation plan revision contains adopted control measures or written commitments to adopt enforceable control measures that fully satisfy the emissions reductions requirements relevant to the statutory provision for which the implementation plan revision was submitted, such as reasonable further progress or attainment.

Recipient of funds designated under title 23 U.S.C. or the Federal Transit Laws means any agency at any level of State, county, city, or regional government that routinely receives title 23 U.S.C. or Federal Transit Laws funds to construct FHWA/FTA projects, operate FHWA/FTA projects or equipment, purchase equipment, or undertake other services or operations via contracts or agreements. This definition does not include private landowners or developers, or contractors or entities that are only paid for services or products created by their own employees.

Regionally significant project means a transportation project (other than an exempt project) that is on a facility which serves regional transportation needs (such as access to and from the area outside of the region, major activity centers in the region, major planned developments such as new retail malls, sports complexes, etc., or transportation terminals as well as most terminals themselves) and would normally be included in the modeling of a metropolitan area's transportation network, including at a minimum all principal arterial highways and all fixed guideway transit facilities that offer an alternative to regional highway travel.

Safety margin means the amount by which the total projected emissions from all sources of a given pollutant are less than the total emissions that would satisfy the applicable require-

ment for reasonable further progress, attainment, or maintenance.

Standard means a national ambient air quality standard.

Transit is mass transportation by bus, rail, or other conveyance which provides general or special service to the public on a regular and continuing basis. It does not include school buses or charter or sightseeing services.

Transit project is an undertaking to implement or modify a transit facility or transit-related program; purchase transit vehicles or equipment; or provide financial assistance for transit operations. It does not include actions that are solely within the jurisdiction of local transit agencies, such as changes in routes, schedules, or fares. It may consist of several phases. For analytical purposes, it must be defined inclusively enough to:

(1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;

(2) Have independent utility or independent significance, i.e., be a reasonable expenditure even if no additional transportation improvements in the area are made; and

(3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

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

Transportation improvement program (TIP) means a transportation improvement program developed by a metropolitan planning organization under 23 U.S.C. 134(j).

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Transportation plan means the official intermodal metropolitan transportation plan that is developed through the metropolitan planning process for the metropolitan planning area, developed pursuant to 23 CFR part 450.

Transportation project is a highway project or a transit project.

Written commitment for the purposes of this subpart means a written commitment that includes a description of the action to be taken; a schedule for the completion of the action; a demonstration that funding necessary to implement the action has been authorized by the appropriating or authorizing body; and an acknowledgment that the commitment is an enforceable obligation under the applicable implementation plan.

[62 FR 43801, Aug. 15, 1997, as amended at 69 FR 40072, July 1, 2004; 71 FR 12510, Mar. 10, 2006; 73 FR 4439, Jan. 24, 2008; 75 FR 14283, Mar. 24, 2010]

§ 93.102 Applicability.

(a) *Action applicability.* (1) Except as provided for in paragraph (c) of this section or § 93.126, conformity determinations are required for:

(i) The adoption, acceptance, approval or support of transportation plans and transportation plan amendments developed pursuant to 23 CFR part 450 or 49 CFR part 613 by an MPO or DOT;

(ii) The adoption, acceptance, approval or support of TIPs and TIP amendments developed pursuant to 23 CFR part 450 or 49 CFR part 613 by an MPO or DOT; and

(iii) The approval, funding, or implementation of FHWA/FTA projects.

(2) Conformity determinations are not required under this subpart for individual projects which are not FHWA/FTA projects. However, § 93.121 applies to such projects if they are regionally significant.

(b) *Geographic applicability.* The provisions of this subpart shall apply in all nonattainment and maintenance areas for transportation-related criteria pollutants for which the area is designated nonattainment or has a maintenance plan.

(1) The provisions of this subpart apply with respect to emissions of the following criteria pollutants: ozone,

carbon monoxide (CO), nitrogen dioxide (NO₂), particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM₁₀); and particles with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers (PM_{2.5}).

(2) The provisions of this subpart also apply with respect to emissions of the following precursor pollutants:

(1) Volatile organic compounds (VOC) and nitrogen oxides (NO_x) in ozone areas;

(ii) NO_x in NO₂ areas;

(iii) VOC and/or NO_x in PM₁₀ areas if the EPA Regional Administrator or the director of the State air agency has made a finding that transportation-related emissions of one or both of these precursors within the nonattainment area are a significant contributor to the PM₁₀ nonattainment problem and has so notified the MPO and DOT, or if the applicable implementation plan (or implementation plan submission) establishes an approved (or adequate) budget for such emissions as part of the reasonable further progress, attainment or maintenance strategy;

(iv) NO_x in PM_{2.5} areas, unless both the EPA Regional Administrator and the director of the state air agency have made a finding that transportation-related emissions of NO_x within the nonattainment area are not a significant contributor to the PM_{2.5} nonattainment problem and has so notified the MPO and DOT, or the applicable implementation plan (or implementation plan submission) does not establish an approved (or adequate) budget for such emissions as part of the reasonable further progress, attainment or maintenance strategy; and

(v) VOC, sulfur dioxide (SO₂) and/or ammonia (NH₃) in PM_{2.5} areas either if the EPA Regional Administrator or the director of the state air agency has made a finding that transportation-related emissions of any of these precursors within the nonattainment area are a significant contributor to the PM_{2.5} nonattainment problem and has so notified the MPO and DOT, or if the applicable implementation plan (or implementation plan submission) establishes an approved (or adequate) budget

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the criteria and procedures of §§ 93.109 through 93.119.

(d) *Timeframe of conformity determination.* (1) Unless an election is made under paragraph (d)(2) or (d)(3) of this section, the timeframe of the conformity determination must be through the last year of the transportation plan's forecast period.

(2) For areas that do not have an adequate or approved CAA section 175A(b) maintenance plan, the MPO may elect to shorten the timeframe of the transportation plan and TIP conformity determination, after consultation with state and local air quality agencies, solicitation of public comments, and consideration of such comments.

(1) The shortened timeframe of the conformity determination must extend at least to the latest of the following years:

(A) The tenth year of the transportation plan;

(B) The latest year for which an adequate or approved motor vehicle emissions budget(s) is established in the submitted or applicable implementation plan; or

(C) The year after the completion date of a regionally significant project if the project is included in the TIP or the project requires approval before the subsequent conformity determination.

(1) The conformity determination must be accompanied by a regional emissions analysis (for informational purposes only) for the last year of the transportation plan and for any year shown to exceed motor vehicle emissions budgets in a prior regional emissions analysis, if such a year extends beyond the timeframe of the conformity determination.

(3) For areas that have an adequate or approved CAA section 175A(b) maintenance plan, the MPO may elect to shorten the timeframe of the conformity determination to extend through the last year of such maintenance plan after consultation with state and local air quality agencies, solicitation of public comments, and consideration of such comments.

(4) Any election made by an MPO under paragraphs (d)(2) or (d)(3) of this section shall continue in effect until the MPO elects otherwise, after consultation with state and local air qual-

ity agencies, solicitation of public comments, and consideration of such comments.

(e) *Savings.* The requirements of this section supplement other requirements of applicable law or regulation governing the format or content of transportation plans.

[62 FR 43801, Aug. 15, 1997, as amended at 69 FR 40073, July 1, 2004; 73 FR 4439, Jan. 24, 2008]

§ 93.107 Relationship of transportation plan and TIP conformity with the NEPA process.

The degree of specificity required in the transportation plan and the specific travel network assumed for air quality modeling do not preclude the consideration of alternatives in the NEPA process or other project development studies. Should the NEPA process result in a project with design concept and scope significantly different from that in the transportation plan or TIP, the project must meet the criteria in §§ 93.109 through 93.119 for projects not from a TIP before NEPA process completion.

§ 93.108 Fiscal constraints for transportation plans and TIPs.

Transportation plans and TIPs must be fiscally constrained consistent with DOT's metropolitan planning regulations at 23 CFR part 450 in order to be found in conformity.

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

(a) In order for each transportation plan, program, and FHWA/FTA project to be found to conform, the MPO and DOT must demonstrate that the applicable criteria and procedures in this subpart are satisfied, and the MPO and DOT must comply with all applicable conformity requirements of implementation plans and of court orders for the area which pertain specifically to conformity. The criteria for making conformity determinations differ based on the action under review (transportation plans, TIPs, and FHWA/FTA projects), the relevant pollutant(s), and the status of the implementation plan.

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(b) Table 1 in this paragraph indicates the criteria and procedures in §§ 93.110 through 93.119 which apply for transportation plans, TIPs, and FHWA/FTA projects. Paragraphs (c) through (k) of this section explain when the budget, interim emissions, and hot-spot tests are required for each pollutant and NAAQS. Paragraph (l) of this section addresses conformity requirements for areas with approved or adequate limited maintenance plans. Paragraph (m) of this section addresses nonattainment and maintenance areas which EPA has determined have insignificant motor vehicle emissions. Paragraph (n) of this section addresses isolated rural nonattainment and maintenance areas. Table 1 follows:

TABLE 1—CONFORMITY CRITERIA

| | |
|---|---|
| All Actions at all times: | |
| § 93.110 | Latest planning assumptions |
| § 93.111 | Latest emissions model |
| § 93.112 | Consultation |
| Transportation Plan: | |
| § 93.113(b) | TCMs |
| § 93.118 or § 93.119 | Emissions budget and/or Interim emissions |
| TIP: | |
| § 93.113(c) | TCMs |
| § 93.118 or § 93.119 | Emissions budget and/or Interim emissions |
| Project (From a Conforming Plan and TIP): | |
| § 93.114 | Currently conforming plan and TIP |
| § 93.115 | Project from a conforming plan and TIP |
| § 93.116 | CO, PM ₁₀ , and PM _{2.5} hot-spots. |
| § 93.117 | PM ₁₀ and PM _{2.5} control measures |
| Project (Not From a Conforming Plan and TIP): | |
| § 93.113(d) | TCMs |
| § 93.114 | Currently conforming plan and TIP |
| § 93.116 | CO, PM ₁₀ , and PM _{2.5} hot-spots. |
| § 93.117 | PM ₁₀ and PM _{2.5} control measures |
| § 93.118 and/or § 93.119 | Emissions budget and/or Interim emissions |

(c) *1-hour ozone NAAQS nonattainment and maintenance areas.* This paragraph applies when an area is nonattainment or maintenance for the 1-hour ozone NAAQS (i.e., until the effective date of any revocation of the 1-hour ozone NAAQS for an area). In addition to the criteria listed in Table 1 in paragraph (b) of this section that are required to be satisfied at all times, in such ozone nonattainment and maintenance areas conformity determinations must include a demonstration that the budget

and/or interim emissions tests are satisfied as described in the following:

(1) In all 1-hour ozone nonattainment and maintenance areas the budget test must be satisfied as required by § 93.118 for conformity determinations made on or after:

(i) The effective date of EPA's finding that a motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan for the 1-hour ozone NAAQS is adequate for transportation conformity purposes;

(ii) The publication date of EPA's approval of such a budget in the FEDERAL REGISTER; or

(iii) The effective date of EPA's approval of such a budget in the FEDERAL REGISTER, if such approval is completed through direct final rulemaking.

(2) In ozone nonattainment areas that are required to submit a control strategy implementation plan revision for the 1-hour ozone NAAQS (usually moderate and above areas), the interim emissions tests must be satisfied as required by § 93.119 for conformity determinations made when there is no approved motor vehicle emissions budget from an applicable implementation plan for the 1-hour ozone NAAQS and no adequate motor vehicle emissions budget from a submitted control strategy implementation plan revision or maintenance plan for the 1-hour ozone NAAQS.

(3) An ozone nonattainment area must satisfy the interim emissions test for NO_x, as required by § 93.119, if the implementation plan or plan submission that is applicable for the purposes of conformity determinations is a 15% plan or Phase I attainment demonstration that does not include a motor vehicle emissions budget for NO_x. The implementation plan for the 1-hour ozone NAAQS will be considered to establish a motor vehicle emissions budget for NO_x if the implementation plan or plan submission contains an explicit NO_x motor vehicle emissions budget that is intended to act as a ceiling on future NO_x emissions, and the NO_x motor vehicle emissions budget is a net reduction from NO_x emissions levels in 1990.

(4) Ozone nonattainment areas that have not submitted a maintenance plan

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applies for any State air agency comments on a conformity determination.

[62 FR 43801, Aug. 15, 1997, as amended at 69 FR 40093, July 1, 2004; 71 FR 12510, Mar. 10, 2006; 73 FR 4440, Jan. 24, 2008; 75 FR 14284, Mar. 24, 2010]

§ 93.110 Criteria and procedures: Latest planning assumptions.

(a) Except as provided in this paragraph, the conformity determination, with respect to all other applicable criteria in §§ 93.111 through 93.119, must be based upon the most recent planning assumptions in force at the time the conformity analysis begins. The conformity determination must satisfy the requirements of paragraphs (b) through (f) of this section using the planning assumptions available at the time the conformity analysis begins as determined through the interagency consultation process required in § 93.105(c)(1)(i). The "time the conformity analysis begins" for a transportation plan or TIP determination is the point at which the MPO or other designated agency begins to model the impact of the proposed transportation plan or TIP on travel and/or emissions. New data that becomes available after an analysis begins is required to be used in the conformity determination only if a significant delay in the analysis has occurred, as determined through interagency consultation.

(b) Assumptions must be derived from the estimates of current and future population, employment, travel, and congestion most recently developed by the MPO or other agency authorized to make such estimates and approved by the MPO. The conformity determination must also be based on the latest assumptions about current and future background concentrations.

(c) The conformity determination for each transportation plan and TIP must discuss how transit operating policies (including fares and service levels) and assumed transit ridership have changed since the previous conformity determination.

(d) The conformity determination must include reasonable assumptions about transit service and increases in transit fares and road and bridge tolls over time.

(e) The conformity determination must use the latest existing information regarding the effectiveness of the TCMs and other implementation plan measures which have already been implemented.

(f) Key assumptions shall be specified and included in the draft documents and supporting materials used for the interagency and public consultation required by § 93.105.

[62 FR 43801, Aug. 15, 1997, as amended at 69 FR 40077, July 1, 2004]

§ 93.111 Criteria and procedures: Latest emissions model.

(a) The conformity determination must be based on the latest emission estimation model available. This criterion is satisfied if the most current version of the motor vehicle emissions model specified by EPA for use in the preparation or revision of implementation plans in that State or area is used for the conformity analysis. Where EMFAC is the motor vehicle emissions model used in preparing or revising the applicable implementation plan, new versions must be approved by EPA before they are used in the conformity analysis.

(b) EPA will consult with DOT to establish a grace period following the specification of any new model.

(1) The grace period will be no less than three months and no more than 24 months after notice of availability is published in the FEDERAL REGISTER.

(2) The length of the grace period will depend on the degree of change in the model and the scope of re-planning likely to be necessary by MPOs in order to assure conformity. If the grace period will be longer than three months, EPA will announce the appropriate grace period in the FEDERAL REGISTER.

(c) Transportation plan and TIP conformity analyses for which the emissions analysis was begun during the grace period or before the FEDERAL REGISTER notice of availability of the latest emission model may continue to use the previous version of the model. Conformity determinations for projects may also be based on the previous model if the analysis was begun during the grace period or before the FEDERAL REGISTER notice of availability, and if

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the final environmental document for the project is issued no more than three years after the issuance of the draft environmental document.

§93.112 Criteria and procedures: Consultation.

Conformity must be determined according to the consultation procedures in this subpart and in the applicable implementation plan, and according to the public involvement procedures established in compliance with 23 CFR part 450. Until the implementation plan revision required by §51.390 of this chapter is fully approved by EPA, the conformity determination must be made according to §93.105 (a)(2) and (e) and the requirements of 23 CFR part 450.

§93.113 Criteria and procedures: Timely implementation of TCMs.

(a) The transportation plan, TIP, or any FHWA/FTA project which is not from a conforming plan and TIP must provide for the timely implementation of TCMs from the applicable implementation plan.

(b) For transportation plans, this criterion is satisfied if the following two conditions are met:

(1) The transportation plan, in describing the envisioned future transportation system, provides for the timely completion or implementation of all TCMs in the applicable implementation plan which are eligible for funding under title 23 U.S.C. or the Federal Transit Laws, consistent with schedules included in the applicable implementation plan.

(2) Nothing in the transportation plan interferes with the implementation of any TCM in the applicable implementation plan.

(c) For TIPs, this criterion is satisfied if the following conditions are met:

(1) An examination of the specific steps and funding source(s) needed to fully implement each TCM indicates that TCMs which are eligible for funding under title 23 U.S.C. or the Federal Transit Laws are on or ahead of the schedule established in the applicable implementation plan, or, if such TCMs are behind the schedule established in the applicable implementation plan,

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the MPO and DOT have determined that past obstacles to implementation of the TCMs have been identified and have been or are being overcome, and that all State and local agencies with influence over approvals or funding for TCMs are giving maximum priority to approval or funding of TCMs over other projects within their control, including projects in locations outside the non-attainment or maintenance area.

(2) If TCMs in the applicable implementation plan have previously been programmed for Federal funding but the funds have not been obligated and the TCMs are behind the schedule in the implementation plan, then the TIP cannot be found to conform if the funds intended for those TCMs are reallocated to projects in the TIP other than TCMs, or if there are no other TCMs in the TIP, if the funds are reallocated to projects in the TIP other than projects which are eligible for Federal funding intended for air quality improvement projects, e.g., the Congestion Mitigation and Air Quality Improvement Program.

(3) Nothing in the TIP may interfere with the implementation of any TCM in the applicable implementation plan.

(d) For FHWA/FTA projects which are not from a conforming transportation plan and TIP, this criterion is satisfied if the project does not interfere with the implementation of any TCM in the applicable implementation plan.

§93.114 Criteria and procedures: Currently conforming transportation plan and TIP.

There must be a currently conforming transportation plan and currently conforming TIP at the time of project approval, or a project must meet the requirements in §93.104(f) during the 12-month lapse grace period.

(a) Only one conforming transportation plan or TIP may exist in an area at any time; conformity determinations of a previous transportation plan or TIP expire once the current plan or TIP is found to conform by DOT. The conformity determination on a transportation plan or TIP will also lapse if conformity is not determined according to the frequency requirements specified in §93.104.

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(b) This criterion is not required to be satisfied at the time of project approval for a TCM specifically included in the applicable implementation plan, provided that all other relevant criteria of this subpart are satisfied.

[62 FR 43801, Aug. 15, 1997, as amended at 73 FR 4440, Jan. 24, 2008]

§93.115 Criteria and procedures: Projects from a transportation plan and TIP.

(a) The project must come from a conforming plan and program. If this criterion is not satisfied, the project must satisfy all criteria in Table 1 of §93.109(b) for a project not from a conforming transportation plan and TIP. A project is considered to be from a conforming transportation plan if it meets the requirements of paragraph (b) of this section and from a conforming program if it meets the requirements of paragraph (c) of this section. Special provisions for TCMs in an applicable implementation plan are provided in paragraph (d) of this section.

(b) A project is considered to be from a conforming transportation plan if one of the following conditions applies:

(1) For projects which are required to be identified in the transportation plan in order to satisfy §93.106 ("Content of transportation plans"), the project is specifically included in the conforming transportation plan and the project's design concept and scope have not changed significantly from those which were described in the transportation plan, or in a manner which would significantly impact use of the facility; or

(2) For projects which are not required to be specifically identified in the transportation plan, the project is identified in the conforming transportation plan, or is consistent with the policies and purpose of the transportation plan and will not interfere with other projects specifically included in the transportation plan.

(c) A project is considered to be from a conforming program if the following conditions are met:

(1) The project is included in the conforming TIP and the design concept and scope of the project were adequate at the time of the TIP conformity determination to determine its contribu-

tion to the TIP's regional emissions, and the project design concept and scope have not changed significantly from those which were described in the TIP; and

(2) If the TIP describes a project design concept and scope which includes project-level emissions mitigation or control measures, written commitments to implement such measures must be obtained from the project sponsor and/or operator as required by §93.125(a) in order for the project to be considered from a conforming program. Any change in these mitigation or control measures that would significantly reduce their effectiveness constitutes a change in the design concept and scope of the project.

(d) *TCMs*. This criterion is not required to be satisfied for TCMs specifically included in an applicable implementation plan.

(e) Notwithstanding the requirements of paragraphs (a), (b), and (c) of this section, a project must meet the requirements of §93.104(f) during the 12-month lapse grace period.

[62 FR 43801, Aug. 15, 1997, as amended at 73 FR 4440, Jan. 24, 2008]

§93.116 Criteria and procedures: Localized CO, PM₁₀, and PM_{2.5} violations (hot-spots).

(a) This paragraph applies at all times. The FHWA/FTA project must not cause or contribute to any new localized CO, PM₁₀, and/or PM_{2.5} violations, increase the frequency or severity of any existing CO, PM₁₀, and/or PM_{2.5} violations, or delay timely attainment of any NAAQS or any required interim emission reductions or other milestones in CO, PM₁₀, and PM_{2.5} nonattainment and maintenance areas. This criterion is satisfied without a hot-spot analysis in PM₁₀ and PM_{2.5} nonattainment and maintenance areas for FHWA/FTA projects that are not identified in §93.123(b)(1). This criterion is satisfied for all other FHWA/FTA projects in CO, PM₁₀ and PM_{2.5} nonattainment and maintenance areas if it is demonstrated that during the time frame of the transportation plan no new local violations will be created and the severity or number of existing violations will not be increased as a result of the project, and the project has

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been included in a regional emissions analysis that meets applicable §§93.118 and/or 93.119 requirements. The demonstration must be performed according to the consultation requirements of §93.105(c)(1)(i) and the methodology requirements of §93.123.

(b) This paragraph applies for CO nonattainment areas as described in §93.109(f)(1). Each FHWA/FTA project must eliminate or reduce the severity and number of localized CO violations in the area substantially affected by the project (in CO nonattainment areas). This criterion is satisfied with respect to existing localized CO violations if it is demonstrated that during the time frame of the transportation plan (or regional emissions analysis) existing localized CO violations will be eliminated or reduced in severity and number as a result of the project. The demonstration must be performed according to the consultation requirements of §93.105(c)(1)(i) and the methodology requirements of §93.123.

[69 FR 40077, July 1, 2004, as amended at 71 FR 12510, Mar. 10, 2006; 73 FR 4440, Jan. 24, 2008; 75 FR 14285, Mar. 24, 2010]

§93.117 Criteria and procedures: Compliance with PM₁₀ and PM_{2.5} control measures.

The FHWA/FTA project must comply with any PM₁₀ and PM_{2.5} control measures in the applicable implementation plan. This criterion is satisfied if the project-level conformity determination contains a written commitment from the project sponsor to include in the final plans, specifications, and estimates for the project those control measures (for the purpose of limiting PM₁₀ and PM_{2.5} emissions from the construction activities and/or normal use and operation associated with the project) that are contained in the applicable implementation plan.

[69 FR 40078, July 1, 2004]

§93.118 Criteria and procedures: Motor vehicle emissions budget.

(a) The transportation plan, TIP, and project not from a conforming transportation plan and TIP must be consistent with the motor vehicle emissions budget(s) in the applicable implementation plan (or implementation plan submission). This criterion applies

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as described in §93.109(c) through (n). This criterion is satisfied if it is demonstrated that emissions of the pollutants or pollutant precursors described in paragraph (c) of this section are less than or equal to the motor vehicle emissions budget(s) established in the applicable implementation plan or implementation plan submission.

(b) Consistency with the motor vehicle emissions budget(s) must be demonstrated for each year for which the applicable (and/or submitted) implementation plan specifically establishes motor vehicle emissions budget(s), for the attainment year (if it is within the timeframe of the transportation plan and conformity determination), for the last year of the timeframe of the conformity determination (as described under §93.106(d)), and for any intermediate years within the timeframe of the conformity determination as necessary so that the years for which consistency is demonstrated are no more than ten years apart, as follows:

(1) Until a maintenance plan is submitted:

(i) Emissions in each year (such as milestone years and the attainment year) for which the control strategy implementation plan revision establishes motor vehicle emissions budget(s) must be less than or equal to that year's motor vehicle emissions budget(s); and

(ii) Emissions in years for which no motor vehicle emissions budget(s) are specifically established must be less than or equal to the motor vehicle emissions budget(s) established for the most recent prior year. For example, emissions in years after the attainment year for which the implementation plan does not establish a budget must be less than or equal to the motor vehicle emissions budget(s) for the attainment year.

(2) When a maintenance plan has been submitted:

(i) Emissions must be less than or equal to the motor vehicle emissions budget(s) established for the last year of the maintenance plan, and for any other years for which the maintenance plan establishes motor vehicle emissions budgets. If the maintenance plan does not establish motor vehicle emissions budgets for any years other than

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the last year of the maintenance plan, the demonstration of consistency with the motor vehicle emissions budget(s) must be accompanied by a qualitative finding that there are no factors which would cause or contribute to a new violation or exacerbate an existing violation in the years before the last year of the maintenance plan. The interagency consultation process required by §93.105 shall determine what must be considered in order to make such a finding:

(i) For years after the last year of the maintenance plan, emissions must be less than or equal to the maintenance plan's motor vehicle emissions budget(s) for the last year of the maintenance plan;

(ii) If an approved and/or submitted control strategy implementation plan has established motor vehicle emissions budgets for years in the timeframe of the transportation plan, emissions in these years must be less than or equal to the control strategy implementation plan's motor vehicle emissions budget(s) for these years; and

(iv) For any analysis years before the last year of the maintenance plan, emissions must be less than or equal to the motor vehicle emissions budget(s) established for the most recent prior year.

(c) Consistency with the motor vehicle emissions budget(s) must be demonstrated for each pollutant or pollutant precursor in §93.102(b) for which the area is in nonattainment or maintenance and for which the applicable implementation plan (or implementation plan submission) establishes a motor vehicle emissions budget.

(d) Consistency with the motor vehicle emissions budget(s) must be demonstrated by including emissions from the entire transportation system, including all regionally significant projects contained in the transportation plan and all other regionally significant highway and transit projects expected in the nonattainment or maintenance area in the timeframe of the transportation plan.

(1) Consistency with the motor vehicle emissions budget(s) must be demonstrated with a regional emissions analysis that meets the requirements of §§93.122 and 93.105(c)(1)(1).

(2) The regional emissions analysis may be performed for any years in the timeframe of the conformity determination (as described under §93.106(d)) provided they are not more than ten years apart and provided the analysis is performed for the attainment year (if it is in the timeframe of the transportation plan and conformity determination) and the last year of the timeframe of the conformity determination. Emissions in years for which consistency with motor vehicle emissions budgets must be demonstrated, as required in paragraph (b) of this section, may be determined by interpolating between the years for which the regional emissions analysis is performed.

(3) When the timeframe of the conformity determination is shortened under §93.106(d)(2), the conformity determination must be accompanied by a regional emissions analysis (for informational purposes only) for the last year of the transportation plan, and for any year shown to exceed motor vehicle emissions budgets in a prior regional emissions analysis (if such a year extends beyond the timeframe of the conformity determination).

(e) *Motor vehicle emissions budgets in submitted control strategy implementation plan revisions and submitted maintenance plans.* (1) Consistency with the motor vehicle emissions budgets in submitted control strategy implementation plan revisions or maintenance plans must be demonstrated if EPA has declared the motor vehicle emissions budget(s) adequate for transportation conformity purposes, and the adequacy finding is effective. However, motor vehicle emissions budgets in submitted implementation plans do not supersede the motor vehicle emissions budgets in approved implementation plans for the same Clean Air Act requirement and the period of years addressed by the previously approved implementation plan, unless EPA specifies otherwise in its approval of a SIP.

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

(i) 2002 emissions, in areas designated nonattainment for the 1997 PM_{2.5} NAAQS; or

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(1) Emissions in the most recent year for which EPA's Air Emissions Reporting Requirements (40 CFR part 51, subpart A) requires submission of on-road mobile source emissions inventories, as of the effective date of non-attainment designations for any PM_{2.5} NAAQS other than the 1997 PM_{2.5} NAAQS.

(3) If EPA declares an implementation plan submission's motor vehicle emissions budget(s) inadequate for transportation conformity purposes after EPA had previously found the budget(s) adequate, and conformity of a transportation plan or TIP has already been determined by DOT using the budget(s), the conformity determination will remain valid. Projects included in that transportation plan or TIP could still satisfy §§93.114 and 93.115, which require a currently conforming transportation plan and TIP to be in place at the time of a project's conformity determination and that projects come from a conforming transportation plan and TIP.

(4) EPA will not find a motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan to be adequate for transportation conformity purposes unless the following minimum criteria are satisfied:

(i) The submitted control strategy implementation plan revision or maintenance plan was endorsed by the Governor (or his or her designee) and was subject to a State public hearing;

(ii) Before the control strategy implementation plan or maintenance plan was submitted to EPA, consultation among federal, State, and local agencies occurred; full implementation plan documentation was provided to EPA; and EPA's stated concerns, if any, were addressed;

(iii) The motor vehicle emissions budget(s) is clearly identified and precisely quantified;

(iv) The motor vehicle emissions budget(s), when considered together with all other emissions sources, is consistent with applicable requirements for reasonable further progress, attainment, or maintenance (whichever is relevant to the given implementation plan submission);

(v) The motor vehicle emissions budget(s) is consistent with and clearly related to the emissions inventory and the control measures in the submitted control strategy implementation plan revision or maintenance plan; and

(vi) Revisions to previously submitted control strategy implementation plans or maintenance plans explain and document any changes to previously submitted budgets and control measures; impacts on point and area source emissions; any changes to established safety margins (see §93.101 for definition); and reasons for the changes (including the basis for any changes related to emission factors or estimates of vehicle miles traveled).

(5) Before determining the adequacy of a submitted motor vehicle emissions budget, EPA will review the State's compilation of public comments and response to comments that are required to be submitted with any implementation plan. EPA will document its consideration of such comments and responses in a letter to the State indicating the adequacy of the submitted motor vehicle emissions budget.

(6) When the motor vehicle emissions budget(s) used to satisfy the requirements of this section are established by an implementation plan submittal that has not yet been approved or disapproved by EPA, the MPO and DOT's conformity determinations will be deemed to be a statement that the MPO and DOT are not aware of any information that would indicate that emissions consistent with the motor vehicle emissions budget will cause or contribute to any new violation of any standard; increase the frequency or severity of any existing violation of any standard; or delay timely attainment of any standard or any required interim emission reductions or other milestones.

(f) *Adequacy review process for implementation plan submissions.* EPA will use the procedure listed in paragraph (f)(1) or (f)(2) of this section to review the adequacy of an implementation plan submission:

(1) When EPA reviews the adequacy of an implementation plan submission prior to EPA's final action on the implementation plan,

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(i) EPA will notify the public through EPA's website when EPA receives an implementation plan submission that will be reviewed for adequacy.

(ii) The public will have a minimum of 30 days to comment on the adequacy of the implementation plan submission. If the complete implementation plan is not accessible electronically through the internet and a copy is requested within 15 days of the date of the website notice, the comment period will be extended for 30 days from the date that a copy of the implementation plan is mailed.

(iii) After the public comment period closes, EPA will inform the State in writing whether EPA has found the submission adequate or inadequate for use in transportation conformity, including response to any comments submitted directly and review of comments submitted through the State process, or EPA will include the determination of adequacy or inadequacy in a proposed or final action approving or disapproving the implementation plan under paragraph (f)(2)(iii) of this section.

(iv) EPA will publish a FEDERAL REGISTER notice to inform the public of EPA's finding. If EPA finds the submission adequate, the effective date of this finding will be 15 days from the date the notice is published as established in the FEDERAL REGISTER notice, unless EPA is taking a final approval action on the SIP as described in paragraph (f)(2)(iii) of this section.

(v) EPA will announce whether the implementation plan submission is adequate or inadequate for use in transportation conformity on EPA's website. The website will also include EPA's response to comments if any comments were received during the public comment period.

(vi) If after EPA has found a submission adequate, EPA has cause to reconsider this finding, EPA will repeat actions described in paragraphs (f)(1)(1) through (v) or (f)(2) of this section unless EPA determines that there is no need for additional public comment given the deficiencies of the implementation plan submission. In all cases where EPA reverses its previous finding to a finding of inadequacy under

paragraph (f)(1) of this section, such a finding will become effective immediately upon the date of EPA's letter to the State.

(vii) If after EPA has found a submission inadequate, EPA has cause to reconsider the adequacy of that budget, EPA will repeat actions described in paragraphs (f)(1)(i) through (v) or (f)(2) of this section.

(2) When EPA reviews the adequacy of an implementation plan submission simultaneously with EPA's approval or disapproval of the implementation plan,

(i) EPA's FEDERAL REGISTER notice of proposed or direct final rulemaking will serve to notify the public that EPA will be reviewing the implementation plan submission for adequacy.

(ii) The publication of the notice of proposed rulemaking will start a public comment period of at least 30 days.

(iii) EPA will indicate whether the implementation plan submission is adequate and thus can be used for conformity either in EPA's final rulemaking or through the process described in paragraphs (f)(1)(iii) through (v) of this section. If EPA makes an adequacy finding through a final rulemaking that approves the implementation plan submission, such a finding will become effective upon the publication date of EPA's approval in the FEDERAL REGISTER, or upon the effective date of EPA's approval if such action is conducted through direct final rulemaking. EPA will respond to comments received directly and review comments submitted through the State process and include the response to comments in the applicable docket.

[62 FR 43801, Aug. 15, 1997, as amended at 69 FR 40078, July 1, 2004; 73 FR 4440, Jan. 24, 2008; 75 FR 14285, Mar. 24, 2010]

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

(a) The transportation plan, TIP, and project not from a conforming transportation plan and TIP must satisfy the interim emissions test(s) as described in §93.109(c) through (n). This criterion applies to the net effect of the action (transportation plan, TIP, or project not from a conforming plan

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and TIP) on motor vehicle emissions from the entire transportation system.

(b) *Ozone areas.* The requirements of this paragraph apply to all 1-hour ozone and 8-hour ozone NAAQS areas, except for certain requirements as indicated. This criterion may be met:

(1) In moderate and above ozone nonattainment areas that are subject to the reasonable further progress requirements of CAA section 182(b)(1) if a regional emissions analysis that satisfies the requirements of §93.122 and paragraphs (g) through (j) of this section demonstrates that for each analysis year and for each of the pollutants described in paragraph (f) of this section:

(i) The emissions predicted in the "Action" scenario are less than the emissions predicted in the "Baseline" scenario, and this can be reasonably expected to be true in the periods between the analysis years; and

(ii) The emissions predicted in the "Action" scenario are lower than:

(A) 1990 emissions by any nonzero amount, in areas for the 1-hour ozone NAAQS as described in §93.109(c); or

(B) 2002 emissions by any nonzero amount, in areas for the 8-hour ozone NAAQS as described in §93.109(d) and (e).

(2) In marginal and below ozone nonattainment areas and other ozone nonattainment areas that are not subject to the reasonable further progress requirements of CAA section 182(b)(1) if a regional emissions analysis that satisfies the requirements of §93.122 and paragraphs (g) through (j) of this section demonstrates that for each analysis year and for each of the pollutants described in paragraph (f) of this section:

(i) The emissions predicted in the "Action" scenario are not greater than the emissions predicted in the "Baseline" scenario, and this can be reasonably expected to be true in the periods between the analysis years; or

(ii) The emissions predicted in the "Action" scenario are not greater than:

(A) 1990 emissions, in areas for the 1-hour ozone NAAQS as described in §93.109(c); or

(B) 2002 emissions, in areas for the 8-hour ozone NAAQS as described in §93.109(d) and (e).

(c) *CO areas.* This criterion may be met:

(1) In moderate areas with design value greater than 12.7 ppm and serious CO nonattainment areas that are subject to CAA section 187(a)(7) if a regional emissions analysis that satisfies the requirements of §93.122 and paragraphs (g) through (j) of this section demonstrates that for each analysis year and for each of the pollutants described in paragraph (f) of this section:

(i) The emissions predicted in the "Action" scenario are less than the emissions predicted in the "Baseline" scenario, and this can be reasonably expected to be true in the periods between the analysis years; and

(ii) The emissions predicted in the "Action" scenario are lower than 1990 emissions by any nonzero amount.

(2) In moderate areas with design value less than 12.7 ppm and not classified CO nonattainment areas if a regional emissions analysis that satisfies the requirements of §93.122 and paragraphs (g) through (j) of this section demonstrates that for each analysis year and for each of the pollutants described in paragraph (f) of this section:

(i) The emissions predicted in the "Action" scenario are not greater than the emissions predicted in the "Baseline" scenario, and this can be reasonably expected to be true in the periods between the analysis years; or

(ii) The emissions predicted in the "Action" scenario are not greater than 1990 emissions.

(d) *PM₁₀ and NO₂ areas.* This criterion may be met in PM₁₀ and NO₂ nonattainment areas if a regional emissions analysis that satisfies the requirements of §93.122 and paragraphs (g) through (j) of this section demonstrates that for each analysis year and for each of the pollutants described in paragraph (f) of this section, one of the following requirements is met:

(1) The emissions predicted in the "Action" scenario are not greater than the emissions predicted in the "Baseline" scenario, and this can be reasonably expected to be true in the periods between the analysis years; or

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(2) The emissions predicted in the "Action" scenario are not greater than baseline emissions. Baseline emissions are those estimated to have occurred during calendar year 1990, unless the conformity implementation plan revision required by §51.390 of this chapter defines the baseline emissions for a PM₁₀ area to be those occurring in a different calendar year for which a baseline emissions inventory was developed for the purpose of developing a control strategy implementation plan.

(e) *PM_{2.5} areas.* This criterion may be met in PM_{2.5} nonattainment areas if a regional emissions analysis that satisfies the requirements of §93.122 and paragraphs (g) through (j) of this section demonstrates that for each analysis year and for each of the pollutants described in paragraph (f) of this section, one of the following requirements is met:

(1) The emissions predicted in the "Action" scenario are not greater than the emissions predicted in the "Baseline" scenario, and this can be reasonably expected to be true in the periods between the analysis years; or

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

(i) 2002 emissions, in areas designated nonattainment for the 1997 PM_{2.5} NAAQS; or

(ii) Emissions in the most recent year for which EPA's Air Emissions Reporting Requirements (40 CFR part 51, subpart A) requires submission of on-road mobile source emissions inventories, as of the effective date of nonattainment designations for any PM_{2.5} NAAQS other than the 1997 PM_{2.5} NAAQS.

(f) *Pollutants.* The regional emissions analysis must be performed for the following pollutants:

(1) VOC in ozone areas;

(2) NO_x in ozone areas, unless the EPA Administrator determines that additional reductions of NO_x would not contribute to attainment;

(3) CO in CO areas;

(4) PM₁₀ in PM₁₀ areas;

(5) VOC and/or NO_x in PM₁₀ areas if the EPA Regional Administrator or the director of the State air agency has made a finding that one or both of such precursor emissions from within the

area are a significant contributor to the PM₁₀ nonattainment problem and has so notified the MPO and DOT;

(6) NO_x in NO₂ areas;

(7) PM_{2.5} in PM_{2.5} areas;

(8) Reentrained road dust in PM_{2.5} areas only if the EPA Regional Administrator or the director of the State air agency has made a finding that emissions from reentrained road dust within the area are a significant contributor to the PM_{2.5} nonattainment problem and has so notified the MPO and DOT;

(9) NO_x in PM_{2.5} areas, unless the EPA Regional Administrator and the director of the State air agency have made a finding that emissions of NO_x from within the area are not a significant contributor to the PM_{2.5} nonattainment problem and has so notified the MPO and DOT; and

(10) VOC, SO₂, and/or ammonia in PM_{2.5} areas if the EPA Regional Administrator or the director of the State air agency has made a finding that any of such precursor emissions from within the area are a significant contributor to the PM_{2.5} nonattainment problem and has so notified the MPO and DOT.

(g) *Analysis years.* (1) The regional emissions analysis must be performed for analysis years that are no more than ten years apart. The first analysis year must be no more than five years beyond the year in which the conformity determination is being made. The last year of the timeframe of the conformity determination (as described under §93.108(d)) must also be an analysis year.

(2) For areas using paragraphs (b)(2)(i), (c)(2)(i), (d)(1), and (e)(1) of this section, a regional emissions analysis that satisfies the requirements of §93.122 and paragraphs (g) through (j) of this section would not be required for analysis years in which the transportation projects and planning assumptions in the "Action" and "Baseline" scenarios are exactly the same. In such a case, paragraph (a) of this section can be satisfied by documenting that the transportation projects and planning assumptions in both scenarios are exactly the same, and consequently, the emissions predicted in the "Action" scenario are not

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greater than the emissions predicted in the "Baseline" scenario for such analysis years.

(3) When the timeframe of the conformity determination is shortened under §93.106(d)(2), the conformity determination must be accompanied by a regional emissions analysis (for informational purposes only) for the last year of the transportation plan.

(h) "*Baseline*" scenario. The regional emissions analysis required by paragraphs (b) through (e) of this section must estimate the emissions that would result from the "Baseline" scenario in each analysis year. The "Baseline" scenario must be defined for each of the analysis years. The "Baseline" scenario is the future transportation system that will result from current programs, including the following (except that exempt projects listed in §93.126 and projects exempt from regional emissions analysis as listed in §93.127 need not be explicitly considered):

(1) All in-place regionally significant highway and transit facilities, services and activities;

(2) All ongoing travel demand management or transportation system management activities; and

(3) Completion of all regionally significant projects, regardless of funding source, which are currently under construction or are undergoing right-of-way acquisition (except for hardship acquisition and protective buying); come from the first year of the previously conforming transportation plan and/or TIP; or have completed the NEPA process.

(i) "*Action*" scenario. The regional emissions analysis required by paragraphs (b) and (c) of this section must estimate the emissions that would result from the "Action" scenario in each analysis year. The "Action" scenario must be defined for each of the analysis years. The "Action" scenario is the transportation system that would result from the implementation of the proposed action (transportation plan, TIP, or project not from a conforming transportation plan and TIP) and all other expected regionally significant projects in the nonattainment area. The "Action" scenario must include the following (except that ex-

empt projects listed in §93.126 and projects exempt from regional emissions analysis as listed in §93.127 need not be explicitly considered):

(1) All facilities, services, and activities in the "Baseline" scenario;

(2) Completion of all TCMs and regionally significant projects (including facilities, services, and activities) specifically identified in the proposed transportation plan which will be operational or in effect in the analysis year, except that regulatory TCMs may not be assumed to begin at a future time unless the regulation is already adopted by the enforcing jurisdiction or the TCM is identified in the applicable implementation plan;

(3) All travel demand management programs and transportation system management activities known to the MPO, but not included in the applicable implementation plan or utilizing any Federal funding or approval, which have been fully adopted and/or funded by the enforcing jurisdiction or sponsoring agency since the last conformity determination;

(4) The incremental effects of any travel demand management programs and transportation system management activities known to the MPO, but not included in the applicable implementation plan or utilizing any Federal funding or approval, which were adopted and/or funded prior to the date of the last conformity determination, but which have been modified since then to be more stringent or effective;

(5) Completion of all expected regionally significant highway and transit projects which are not from a conforming transportation plan and TIP; and

(6) Completion of all expected regionally significant non-FHWA/FTA highway and transit projects that have clear funding sources and commitments leading toward their implementation and completion by the analysis year.

(j) *Projects not from a conforming transportation plan and TIP.* For the regional emissions analysis required by paragraphs (b) through (e) of this section, if the project which is not from a conforming transportation plan and

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TIP is a modification of a project currently in the plan or TIP, the 'Baseline' scenario must include the project with its original design concept and scope, and the 'Action' scenario must include the project with its new design concept and scope.

[62 FR 43801, Aug. 15, 1997, as amended at 69 FR 40079, July 1, 2004; 70 FR 24291, May 6, 2005; 73 FR 4441, Jan. 24, 2008; 75 FR 14285, Mar. 24, 2010]

§93.120 Consequences of control strategy implementation plan failures.

(a) *Disapprovals.* (1) If EPA disapproves any submitted control strategy implementation plan revision (with or without a protective finding), the conformity status of the transportation plan and TIP shall lapse on the date that highway sanctions as a result of the disapproval are imposed on the nonattainment area under section 179(b)(1) of the CAA. No new transportation plan, TIP, or project may be found to conform until another control strategy implementation plan revision fulfilling the same CAA requirements is submitted and conformity to this submission is determined.

(2) If EPA disapproves a submitted control strategy implementation plan revision without making a protective finding, only projects in the first four years of the currently conforming transportation plan and TIP or that meet the requirements of §93.104(f) during the 12-month lapse grace period may be found to conform. This means that beginning on the effective date of a disapproval without a protective finding, no transportation plan, TIP, or project not in the first four years of the currently conforming transportation plan and TIP or that meets the requirements of §93.104(f) during the 12-month lapse grace period may be found to conform until another control strategy implementation plan revision fulfilling the same CAA requirements is submitted, EPA finds its motor vehicle emissions budget(s) adequate pursuant to §93.118 or approves the submission, and conformity to the implementation plan revision is determined.

(3) In disapproving a control strategy implementation plan revision, EPA would give a protective finding where a submitted plan contains adopted con-

trol measures or written commitments to adopt enforceable control measures that fully satisfy the emissions reductions requirements relevant to the statutory provision for which the implementation plan revision was submitted, such as reasonable further progress or attainment.

(b) *Failure to submit and incompleteness.* In areas where EPA notifies the State, MPO, and DOT of the State's failure to submit a control strategy implementation plan or submission of an incomplete control strategy implementation plan revision (either of which initiates the sanction process under CAA sections 179 or 110(m)), the conformity status of the transportation plan and TIP shall lapse on the date that highway sanctions are imposed on the nonattainment area for such failure under section 179(b)(1) of the CAA, unless the failure has been remedied and acknowledged by a letter from the EPA Regional Administrator.

(c) *Federal implementation plans.* If EPA promulgates a Federal implementation plan that contains motor vehicle emissions budget(s) as a result of a State failure, the conformity lapse imposed by this section because of that State failure is removed.

[62 FR 43801, Aug. 15, 1997, as amended at 69 FR 40080, July 1, 2004; 73 FR 4441, Jan. 24, 2008]

§93.121 Requirements for adoption or approval of projects by other recipients of funds designated under title 23 U.S.C. or the Federal Transit Laws.

(a) Except as provided in paragraph (b) of this section, no recipient of Federal funds designated under title 23 U.S.C. or the Federal Transit Laws shall adopt or approve a regionally significant highway or transit project, regardless of funding source, unless the recipient finds that the requirements of one of the following are met:

(1) The project comes from the currently conforming transportation plan and TIP (or meets the requirements of §93.104(f) during the 12-month lapse grace period), and the project's design concept and scope have not changed

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significantly from those that were included in the regional emissions analysis for that transportation plan and TIP;

(2) The project is included in the regional emissions analysis for the currently conforming transportation plan and TIP conformity determination (or meets the requirements of §93.104(f) during the 12-month lapse grace period), even if the project is not strictly included in the transportation plan or TIP for the purpose of MPO project selection or endorsement, and the project's design concept and scope have not changed significantly from those that were included in the regional emissions analysis; or

(3) A new regional emissions analysis including the project and the currently conforming transportation plan and TIP demonstrates that the transportation plan and TIP would still conform if the project were implemented (consistent with the requirements of §§93.118 and/or 93.119 for a project not from a conforming transportation plan and TIP).

(b) In isolated rural nonattainment and maintenance areas subject to §93.109(n), no recipient of Federal funds designated under title 23 U.S.C. or the Federal Transit Laws shall adopt or approve a regionally significant highway or transit project, regardless of funding source, unless the recipient finds that the requirements of one of the following are met:

(1) The project was included in the regional emissions analysis supporting the most recent conformity determination that reflects the portion of the statewide transportation plan and statewide TIP which are in the nonattainment or maintenance area, and the project's design concept and scope has not changed significantly; or

(2) A new regional emissions analysis including the project and all other regionally significant projects expected in the nonattainment or maintenance area demonstrates that those projects in the statewide transportation plan and statewide TIP which are in the nonattainment or maintenance area would still conform if the project were implemented (consistent with the requirements of §§93.118 and/or 93.119 for

projects not from a conforming transportation plan and TIP).

(c) Notwithstanding paragraphs (a) and (b) of this section, in nonattainment and maintenance areas subject to §93.109(l) or (m) for a given pollutant/precursor and NAAQS, no recipient of Federal funds designated under title 23 U.S.C. or the Federal Transit Laws shall adopt or approve a regionally significant highway or transit project, regardless of funding source, unless the recipient finds that the requirements of one of the following are met for that pollutant/precursor and NAAQS:

(1) The project was included in the most recent conformity determination for the transportation plan and TIP and the project's design concept and scope has not changed significantly; or

(2) The project was included in the most recent conformity determination that reflects the portion of the statewide transportation plan and statewide TIP which are in the nonattainment or maintenance area, and the project's design concept and scope has not changed significantly.

[62 FR 43801, Aug. 15, 1997, as amended at 69 FR 40080, July 1, 2004; 73 FR 4441, Jan. 24, 2008; 75 FR 14285, Mar. 24, 2010]

§93.122 Procedures for determining regional transportation-related emissions.

(a) *General requirements.* (1) The regional emissions analysis required by §§93.118 and 93.119 for the transportation plan, TIP, or project not from a conforming plan and TIP must include all regionally significant projects expected in the nonattainment or maintenance area. The analysis shall include FHWA/FTA projects proposed in the transportation plan and TIP and all other regionally significant projects which are disclosed to the MPO as required by §93.105. Projects which are not regionally significant are not required to be explicitly modeled, but vehicle miles traveled (VMT) from such projects must be estimated in accordance with reasonable professional practice. The effects of TCMS and similar projects that are not regionally significant may also be estimated in accordance with reasonable professional practice.

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(2) The emissions analysis may not include for emissions reduction credit any TCMs or other measures in the applicable implementation plan which have been delayed beyond the scheduled date(s) until such time as their implementation has been assured. If the measure has been partially implemented and it can be demonstrated that it is providing quantifiable emission reduction benefits, the emissions analysis may include that emissions reduction credit.

(3) Emissions reduction credit from projects, programs, or activities which require a regulatory action in order to be implemented may not be included in the emissions analysis unless:

(i) The regulatory action is already adopted by the enforcing jurisdiction;

(ii) The project, program, or activity is included in the applicable implementation plan;

(iii) The control strategy implementation plan submission or maintenance plan submission that establishes the motor vehicle emissions budget(s) for the purposes of §93.118 contains a written commitment to the project, program, or activity by the agency with authority to implement it; or

(iv) EPA has approved an opt-in to a Federally enforced program, EPA has promulgated the program (if the control program is a Federal responsibility, such as vehicle tailpipe standards), or the Clean Air Act requires the program without need for individual State action and without any discretionary authority for EPA to set its stringency, delay its effective date, or not implement the program.

(4) Emissions reduction credit from control measures that are not included in the transportation plan and TIP and that do not require a regulatory action in order to be implemented may not be included in the emissions analysis unless the conformity determination includes written commitments to implementation from the appropriate entities.

(i) Persons or entities voluntarily committing to control measures must comply with the obligations of such commitments.

(ii) The conformity implementation plan revision required in §51.390 of this chapter must provide that written

commitments to control measures that are not included in the transportation plan and TIP must be obtained prior to a conformity determination and that such commitments must be fulfilled.

(5) A regional emissions analysis for the purpose of satisfying the requirements of §93.119 must make the same assumptions in both the "Baseline" and "Action" scenarios regarding control measures that are external to the transportation system itself, such as vehicle tailpipe or evaporative emission standards, limits on gasoline volatility, vehicle inspection and maintenance programs, and oxygenated or reformulated gasoline or diesel fuel.

(6) The ambient temperatures used for the regional emissions analysis shall be consistent with those used to establish the emissions budget in the applicable implementation plan. All other factors, for example the fraction of travel in a hot stabilized engine mode, must be consistent with the applicable implementation plan, unless modified after interagency consultation according to §93.105(c)(1)(i) to incorporate additional or more geographically specific information or represent a logically estimated trend in such factors beyond the period considered in the applicable implementation plan.

(7) Reasonable methods shall be used to estimate nonattainment or maintenance area VMT on off-network roadways within the urban transportation planning area, and on roadways outside the urban transportation planning area.

(b) Regional emissions analysis in serious, severe, and extreme ozone nonattainment areas and serious CO nonattainment areas must meet the requirements of paragraphs (b) (1) through (3) of this section if their metropolitan planning area contains an urbanized area population over 200,000.

(1) By January 1, 1997, estimates of regional transportation-related emissions used to support conformity determinations must be made at a minimum using network-based travel models according to procedures and methods that are available and in practice and supported by current and available documentation. These procedures, methods, and practices are available from

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DOT and will be updated periodically. Agencies must discuss these modeling procedures and practices through the interagency consultation process, as required by §93.105(c)(1)(i). Network-based travel models must at a minimum satisfy the following requirements:

(i) Network-based travel models must be validated against observed counts (peak and off-peak, if possible) for a base year that is not more than 10 years prior to the date of the conformity determination. Model forecasts must be analyzed for reasonableness and compared to historical trends and other factors, and the results must be documented;

(ii) Land use, population, employment, and other network-based travel model assumptions must be documented and based on the best available information;

(iii) Scenarios of land development and use must be consistent with the future transportation system alternatives for which emissions are being estimated. The distribution of employment and residences for different transportation options must be reasonable;

(iv) A capacity-sensitive assignment methodology must be used, and emissions estimates must be based on a methodology which differentiates between peak and off-peak link volumes and speeds and uses speeds based on final assigned volumes;

(v) Zone-to-zone travel impedances used to distribute trips between origin and destination pairs must be in reasonable agreement with the travel times that are estimated from final assigned traffic volumes. Where use of transit currently is anticipated to be a significant factor in satisfying transportation demand, these times should also be used for modeling mode splits; and

(vi) Network-based travel models must be reasonably sensitive to changes in the time(s), cost(s), and other factors affecting travel choices.

(2) Reasonable methods in accordance with good practice must be used to estimate traffic speeds and delays in a manner that is sensitive to the estimated volume of travel on each roadway segment represented in the network-based travel model.

(3) Highway Performance Monitoring System (HPMS) estimates of vehicle miles traveled (VMT) shall be considered the primary measure of VMT within the portion of the nonattainment or maintenance area and for the functional classes of roadways included in HPMS, for urban areas which are sampled on a separate urban area basis. For areas with network-based travel models, a factor (or factors) may be developed to reconcile and calibrate the network-based travel model estimates of VMT in the base year of its validation to the HPMS estimates for the same period. These factors may then be applied to model estimates of future VMT. In this factoring process, consideration will be given to differences between HPMS and network-based travel models, such as differences in the facility coverage of the HPMS and the modeled network description. Locally developed count-based programs and other departures from these procedures are permitted subject to the interagency consultation procedures of §93.105(c)(1)(i).

(c) *Two-year grace period for regional emissions analysis requirements in certain ozone and CO areas.* The requirements of paragraph (b) of this section apply to such areas or portions of such areas that have not previously been required to meet these requirements for any existing NAAQS two years from the following:

(1) The effective date of EPA's reclassification of an ozone or CO nonattainment area that has an urbanized area population greater than 200,000 to serious or above;

(2) The official notice by the Census Bureau that determines the urbanized area population of a serious or above ozone or CO nonattainment area to be greater than 200,000; or,

(3) The effective date of EPA's action that classifies a newly designated ozone or CO nonattainment area that has an urbanized area population greater than 200,000 as serious or above.

(d) In all areas not otherwise subject to paragraph (b) of this section, regional emissions analyses must use those procedures described in paragraph (b) of this section if the use of those procedures has been the previous practice of the MPO. Otherwise, areas

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not subject to paragraph (b) of this section may estimate regional emissions using any appropriate methods that account for VMT growth by, for example, extrapolating historical VMT or projecting future VMT by considering growth in population and historical growth trends for VMT per person. These methods must also consider future economic activity, transit alternatives, and transportation system policies.

(e) *PM₁₀ from construction-related fugitive dust.* (1) For areas in which the implementation plan does not identify construction-related fugitive PM₁₀ as a contributor to the nonattainment problem, the fugitive PM₁₀ emissions associated with highway and transit project construction are not required to be considered in the regional emissions analysis.

(2) In PM₁₀ nonattainment and maintenance areas with implementation plans which identify construction-related fugitive PM₁₀ as a contributor to the nonattainment problem, the regional PM₁₀ emissions analysis shall consider construction-related fugitive PM₁₀ and shall account for the level of construction activity, the fugitive PM₁₀ control measures in the applicable implementation plan, and the dust-producing capacity of the proposed activities.

(f) *PM_{2.5} from construction-related fugitive dust.* (1) For PM_{2.5} areas in which the implementation plan does not identify construction-related fugitive PM_{2.5} as a significant contributor to the nonattainment problem, the fugitive PM_{2.5} emissions associated with highway and transit project construction are not required to be considered in the regional emissions analysis.

(2) In PM_{2.5} nonattainment and maintenance areas with implementation plans which identify construction-related fugitive PM_{2.5} as a significant contributor to the nonattainment problem, the regional PM_{2.5} emissions analysis shall consider construction-related fugitive PM_{2.5} and shall account for the level of construction activity, the fugitive PM_{2.5} control measures in the applicable implementation plan, and the dust-producing capacity of the proposed activities.

(g) *Reliance on previous regional emissions analysis.* (1) Conformity determinations for a new transportation plan and/or TIP may be demonstrated to satisfy the requirements of §§93.118 ("Motor vehicle emissions budget") or 93.119 ("Interim emissions in areas without motor vehicle emissions budgets") without new regional emissions analysis if the previous regional emissions analysis also applies to the new plan and/or TIP. This requires a demonstration that:

(i) The new plan and/or TIP contain all projects which must be started in the plan and TIP's timeframes in order to achieve the highway and transit system envisioned by the transportation plan;

(ii) All plan and TIP projects which are regionally significant are included in the transportation plan with design concept and scope adequate to determine their contribution to the transportation plan's and/or TIP's regional emissions at the time of the previous conformity determination;

(iii) The design concept and scope of each regionally significant project in the new plan and/or TIP are not significantly different from that described in the previous transportation plan; and

(iv) The previous regional emissions analysis is consistent with the requirements of §§93.118 (including that conformity to all currently applicable budgets is demonstrated) and/or 93.119, as applicable.

(2) A project which is not from a conforming transportation plan and a conforming TIP may be demonstrated to satisfy the requirements of §93.118 or §93.119 without additional regional emissions analysis if allocating funds to the project will not delay the implementation of projects in the transportation plan or TIP which are necessary to achieve the highway and transit system envisioned by the transportation plan, the previous regional emissions analysis is still consistent with the requirements of §93.118 (including that conformity to all currently applicable budgets is demonstrated) and/or §93.119, as applicable, and if the project is either:

(1) Not regionally significant; or

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(ii) Included in the conforming transportation plan (even if it is not specifically included in the latest conforming TIP) with design concept and scope adequate to determine its contribution to the transportation plan's regional emissions at the time of the transportation plan's conformity determination, and the design concept and scope of the project is not significantly different from that described in the transportation plan.

(3) A conformity determination that relies on paragraph (g) of this section does not satisfy the frequency requirements of § 93.104(b) or (c).

[62 FR 43601, Aug. 15, 1997, as amended at 69 FR 40080, July 1, 2004]

§ 93.123 Procedures for determining localized CO, PM₁₀, and PM_{2.5} concentrations (hot-spot analysis).

(a) *CO hot-spot analysis.* (1) The demonstrations required by § 93.116 ("Localized CO, PM₁₀, and PM_{2.5} violations") must be based on quantitative analysis using the applicable air quality models, data bases, and other requirements specified in 40 CFR part 51, Appendix W (Guideline on Air Quality Models). These procedures shall be used in the following cases, unless different procedures developed through the interagency consultation process required in § 93.105 and approved by the EPA Regional Administrator are used:

(i) For projects in or affecting locations, areas, or categories of sites which are identified in the applicable implementation plan as sites of violation or possible violation;

(ii) For projects affecting intersections that are at Level-of-Service D, E, or F, or those that will change to Level-of-Service D, E, or F because of increased traffic volumes related to the project;

(iii) For any project affecting one or more of the top three intersections in the nonattainment or maintenance area with highest traffic volumes, as identified in the applicable implementation plan; and

(iv) For any project affecting one or more of the top three intersections in the nonattainment or maintenance area with the worst level of service, as identified in the applicable implementation plan.

(2) In cases other than those described in paragraph (a)(1) of this section, the demonstrations required by § 93.116 may be based on either:

(i) Quantitative methods that represent reasonable and common professional practice; or

(ii) A qualitative consideration of local factors, if this can provide a clear demonstration that the requirements of § 93.116 are met.

(3) DOT, in consultation with EPA, may also choose to make a categorical hot-spot finding that § 93.116(a) is met without further hot-spot analysis for any project described in paragraphs (a)(1) and (a)(2) of this section based on appropriate modeling. DOT, in consultation with EPA, may also consider the current air quality circumstances of a given CO nonattainment or maintenance area in categorical hot-spot findings for applicable FHWA or FTA projects.

(b) *PM₁₀ and PM_{2.5} hot-spot analyses.* (1) The hot-spot demonstration required by § 93.116 must be based on quantitative analysis methods for the following types of projects:

(i) New highway projects that have a significant number of diesel vehicles, and expanded highway projects that have a significant increase in the number of diesel vehicles;

(ii) Projects affecting intersections that are at Level-of-Service D, E, or F with a significant number of diesel vehicles, or those that will change to Level-of-Service D, E, or F because of increased traffic volumes from a significant number of diesel vehicles related to the project;

(iii) New bus and rail terminals and transfer points that have a significant number of diesel vehicles congregating at a single location;

(iv) Expanded bus and rail terminals and transfer points that significantly increase the number of diesel vehicles congregating at a single location; and

(v) Projects in or affecting locations, areas, or categories of sites which are identified in the PM₁₀ or PM_{2.5} applicable implementation plan or implementation plan submission, as appropriate, as sites of violation or possible violation.

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(2) Where quantitative analysis methods are not available, the demonstration required by § 93.116 for projects described in paragraph (b)(1) of this section must be based on a qualitative consideration of local factors.

(3) DOT, in consultation with EPA, may also choose to make a categorical hot-spot finding that § 93.116 is met without further hot-spot analysis for any project described in paragraph (b)(1) of this section based on appropriate modeling. DOT, in consultation with EPA, may also consider the current air quality circumstances of a given PM_{2.5} or PM₁₀ nonattainment or maintenance area in categorical hot-spot findings for applicable FHWA or FTA projects.

(4) The requirements for quantitative analysis contained in this paragraph (b) will not take effect until EPA releases modeling guidance on this subject and announces in the FEDERAL REGISTER that these requirements are in effect.

(c) *General requirements.* (1) Estimated pollutant concentrations must be based on the total emissions burden which may result from the implementation of the project, summed together with future background concentrations. The total concentration must be estimated and analyzed at appropriate receptor locations in the area substantially affected by the project.

(2) Hot-spot analyses must include the entire project, and may be performed only after the major design features which will significantly impact concentrations have been identified. The future background concentration should be estimated by multiplying current background by the ratio of future to current traffic and the ratio of future to current emission factors.

(3) Hot-spot analysis assumptions must be consistent with those in the regional emissions analysis for those inputs which are required for both analyses.

(4) CO, PM₁₀, or PM_{2.5} mitigation or control measures shall be assumed in the hot-spot analysis only where there are written commitments from the project sponsor and/or operator to implement such measures, as required by § 93.125(a).

(5) CO, PM₁₀, and PM_{2.5} hot-spot analyses are not required to consider construction-related activities which cause temporary increases in emissions. Each site which is affected by construction-related activities shall be considered separately, using established "Guideline" methods. Temporary increases are defined as those which occur only during the construction phase and last five years or less at any individual site.

[58 FR 62235, Nov. 24, 1993, as amended at 71 FR 12510, Mar. 10, 2006; 73 FR 4441, Jan. 24, 2008]

§ 93.124 Using the motor vehicle emissions budget in the applicable implementation plan (or implementation plan submission).

(a) In interpreting an applicable implementation plan (or implementation plan submission) with respect to its motor vehicle emissions budget(s), the MPO and DOT may not infer additions to the budget(s) that are not explicitly intended by the implementation plan (or submission). Unless the implementation plan explicitly quantifies the amount by which motor vehicle emissions could be higher while still allowing a demonstration of compliance with the milestone, attainment, or maintenance requirement and explicitly states an intent that some or all of this additional amount should be available to the MPO and DOT in the emissions budget for conformity purposes, the MPO may not interpret the budget to be higher than the implementation plan's estimate of future emissions. This applies in particular to applicable implementation plans (or submissions) which demonstrate that after implementation of control measures in the implementation plan:

(1) Emissions from all sources will be less than the total emissions that would be consistent with a required demonstration of an emissions reduction milestone;

(2) Emissions from all sources will result in achieving attainment prior to the attainment deadline and/or ambient concentrations in the attainment deadline year will be lower than needed to demonstrate attainment; or

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(3) Emissions will be lower than needed to provide for continued maintenance.

(b) A conformity demonstration shall not trade emissions among budgets which the applicable implementation plan (or implementation plan submission) allocates for different pollutants or precursors, or among budgets allocated to motor vehicles and other sources, unless the implementation plan establishes appropriate mechanisms for such trades.

(c) If the applicable implementation plan (or implementation plan submission) estimates future emissions by geographic subarea of the nonattainment area, the MPO and DOT are not required to consider this to establish subarea budgets, unless the applicable implementation plan (or implementation plan submission) explicitly indicates an intent to create such subarea budgets for the purposes of conformity.

(d) If a nonattainment area includes more than one MPO, the implementation plan may establish motor vehicle emissions budgets for each MPO, or else the MPOs must collectively make a conformity determination for the entire nonattainment area.

[62 FR 43801, Aug. 15, 1997, as amended at 69 FR 40081, July 1, 2004]

§ 93.125 Enforceability of design concept and scope and project-level mitigation and control measures.

(a) Prior to determining that a transportation project is in conformity, the MPO, other recipient of funds designated under title 23 U.S.C. or the Federal Transit Laws, FHWA, or FTA must obtain from the project sponsor and/or operator written commitments to implement in the construction of the project and operation of the resulting facility or service any project-level mitigation or control measures which are identified as conditions for NEPA process completion with respect to local CO, PM₁₀, or PM_{2.5} impacts. Before a conformity determination is made, written commitments must also be obtained for project-level mitigation or control measures which are conditions for making conformity determinations for a transportation plan or TIP and are included in the project design concept and scope which is used in

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the regional emissions analysis required by §§ 93.118 ("Motor vehicle emissions budget") and 93.119 ("Interim emissions in areas without motor vehicle emissions budgets") or used in the project-level hot-spot analysis required by § 93.116.

(b) Project sponsors voluntarily committing to mitigation measures to facilitate positive conformity determinations must comply with the obligations of such commitments.

(c) The implementation plan revision required in § 51.390 of this chapter shall provide that written commitments to mitigation measures must be obtained prior to a positive conformity determination, and that project sponsors must comply with such commitments.

(d) If the MPO or project sponsor believes the mitigation or control measure is no longer necessary for conformity, the project sponsor or operator may be relieved of its obligation to implement the mitigation or control measure if it can demonstrate that the applicable hot-spot requirements of § 93.116, emission budget requirements of § 93.118, and interim emissions requirements of § 93.119 are satisfied without the mitigation or control measure, and so notifies the agencies involved in the interagency consultation process required under § 93.105. The MPO and DOT must find that the transportation plan and TIP still satisfy the applicable requirements of §§ 93.118 and/or 93.119 and that the project still satisfies the requirements of § 93.116, and therefore that the conformity determinations for the transportation plan, TIP, and project are still valid. This finding is subject to the applicable public consultation requirements in § 93.105(e) for conformity determinations for projects.

[62 FR 43801, Aug. 15, 1997, as amended at 69 FR 40081, July 1, 2004; 71 FR 12510, Mar. 10, 2006]

§ 93.126 Exempt projects.

Notwithstanding the other requirements of this subpart, highway and transit projects of the types listed in table 2 of this section are exempt from the requirement to determine conformity. Such projects may proceed toward implementation even in the absence of a conforming transportation