COPY

SEP 2013
Received

STATE OF NEW MEXICO
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD

IN THE MATTER OF PROPOSED AMENDMENTS TO 20.2.98 NMAC – CONFORMITY OF GENERAL FEDERAL ACTIONS TO THE STATE IMPLEMENTATION PLAN. **EIB 13-04(R)**

NEW MEXICO ENVIRONMENT DEPARTMENT'S NOTICE OF INTENT TO PRESENT TECHNICAL TESTIMONY

Pursuant to 20.1.302.A NMAC, the New Mexico Environment Department (NMED) hereby submits its Notice of Intent to Present Technical Testimony in this proceeding.

1. **The person for whom the witnesses will testify.**

   The New Mexico Environment Department.

2. **The name and qualifications of each technical witness.**

Ms. Gail Cooke. Gail Cooke is an Environmental Planner in the Control Strategies Section of the Department's Air Quality Bureau. She has worked in the Air Quality Bureau since June 1999. Ms. Cooke holds a bachelor degree in Environmental Design from Texas A&M University and a master degree in Urban and Regional Planning from Virginia Tech. Her resume is attached as Exhibit 1.

Ms. Rita Bates. Rita Bates is the Section Chief of the Planning Section of the Air Quality Bureau. She has more than 20 years of experience in the environmental field, including fourteen years with the Department. In addition to her work for the Air Quality Bureau, Ms. Bates has worked in industry as an environmental coordinator and in environmental consulting as a project manager. Ms. Bates holds a B.S. in Biology from Humboldt State University. Her resume is attached as Exhibit 2.

3. A copy of the direct testimony of each witness in narrative form.

A copy of the direct testimony of Ms. Cooke is attached as NMED Exhibit 8. Ms. Cooke will provide a brief summary of her testimony during the hearing. The Department does not intend to present direct testimony by Rita Bates, but may present her as a rebuttal witness, and will make her available to assist in answering questions that may go beyond the expertise of the direct witnesses.

4. Text of any recommended modifications to the proposed regulatory change.

The Department does not have any recommended modifications to the proposed regulatory change. The Department supports the repeal of 20.2.98 NMAC, as requested in its petition June 24, 2013.

5. List and attach all exhibits to be offered at the hearing.

The Department offers the following exhibits, which are attached hereto:

NMED Ex. 1	Resume of Gail Cooke
NMED Ex. 2	Resume of Rita Bates
NMED Ex. 3	Proposed Repeal of 20.2.98 NMAC
NMED Ex. 4	63 Fed. Reg. 48,106 (Sept. 9, 1998) – Approval of New Mexico General Conformity Regulations
NMED Ex. 5	75 Fed. Reg. 17,254 (Apr. 5, 2010) – Revisions to Federal General Conformity Regulations
NMED Ex. 6	Excerpt from SAFETEA-LU (Pub. Law 109-59, Aug. 10, 2005)
NMED Ex. 6a	Excerpt from CAA § 176 prior to revision by SAFETEA-LU (1996 U.S. Code)
NMED Ex. 7	Affidavits of publication of hearing notice
NMED Ex. 8	Written Testimony of Gail Cooke
NMED Ex. 9	Proposed Statement of Reasons and Order

6. Reservation of Rights

This Notice of Intent to Present Technical Testimony is based on the Department's petition. The Department reserves the right to call any person to testify and to present any exhibit in response to another notice of intent or public comment filed in this matter or to any

testimony or exhibit offered at the public hearing. The Department also reserves the right to call any person as a rebuttal witness and to present any exhibit in support thereof.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT
OFFICE OF GENERAL COUNSEL

Bill Grantham
Assistant General Counsel
New Mexico Environment Department
1190 St. Francis Drive, Suite N-4050
Santa Fe, New Mexico 87505
(505) 222-9594 bill.grantham@state.nm.us

Gail F. Cooke

EDUCATION

Master of Urban and Regional Planning, Concentration: Environmental Planning, Virginia Tech, Blacksburg, Virginia, 1998
Major Project: The Implementation of Virginia Erosion and Sediment Control Laws and Regulations.

Bachelor of Environmental Design, Texas A&M University, College Station, Texas, 1995
Other areas of study include Environmental Science, Soil Science, and Civil Engineering.

WORK HISTORY

State of New Mexico Environment Department, Air Quality Bureau ***1999-Present***
Environmental Analyst/Planner – Public outreach, including preparing outreach material for the general public and organizing public meetings and open houses; preparation of emission inventory updates and maintenance plans for the State Implementation Plan submittals; development of local initiative plans to help reduce criteria air pollutants; reviewing of environmental assessments and environmental impact statements; grant writing; and regulatory development.

Taschek Environmental Consulting ***1998-1999***
Environmental Planner – General environmental planning; conducted environmental assessments, and initial site assessments; assisted in public outreach; assisted in transportation planning, and land use planning projects; and worked extensively with state regulations and federal rules, including the National Environmental Policy Act.

RELEVANT PROJECT EXPERIENCE

Public Relations
Developed brochures, press releases, public service announcements, informational mail outs, and educational material on various air quality related issues throughout New Mexico. Assisted in the planning of open houses to educate the public on potential health and environmental risks resulting from air pollution. Presented technical information on air quality issues to the general public; local, state and federal employees; and industry representatives.

Grant Writing, Budget Development, and Project Management
Developed grant proposals and budgets for seven different grants over the last four years and have been award all seven grants. Have acted as project manager for three of the seven awarded grants. As a project manager for these awarded grants, I have been responsible for most budgetary and contractual related activities.

Plan and Regulation Development
Developed and authored several federally mandated plans on various air quality issues throughout New Mexico.

Assisted in the development of the Ozone Early Action Compact (EAC) plan for San Juan County, NM. The EAC was developed as a local initiative to control ozone levels within San Juan County, NM. Participants in the EAC include the Cities of Farmington, NM, Aztec, NM, and Bloomfield, NM; San Juan County, NM; the State of New Mexico; and the US Environmental Protection Agency. Job duties included plan development, preparation of fact sheets and other informational outreach material, the planning of open houses; and testifying before the Environmental Improvement Board

Developed SIP Maintenance plans for the Sunland Park, NM 1-hour ozone nonattainment area and the Grant County, NM sulfur dioxide nonattainment area. A maintenance plan is required by the federal government for areas that have violated federal ambient air quality standards to show compliance with the standard. Job duties for both plans included plan development; preparation of emission inventory; adoption of plan; public outreach, and testifying before the Environmental Improvement Board.

Acted as the lead in the adoption of revisions to 20.2.99 NMAC – *Conformity to the State Implementation Plan of Transportation Plans, Programs and Projects*. The revisions to 20.2.99 NMAC were in response to amendments made to the federal rule 40 CFR Part 93 –*Determining Conformity of Federal Actions to State or Federal Implementation Plans*. Revisions to this regulation were adopted by the Environmental Improvement Board in 2005, 2007 and 2009.

Coordinated the repeal and replacement of 20.2.7 NMAC – *Excess Emissions*. The repeal and replacement of 20.2.7 NMAC was done to conform to requirements in the Clean Air Act. Extensive outreach and negotiations were done throughout the regulatory development process for 20.2.7 NMAC. The repeal and replacement of this regulation was adopted by the Environmental Improvement Board in 2008.

RITA BATES

EDUCATION

HUMBOLDT STATE UNIVERSITY, ARCATA, CALIFORNIA
B.S., Biology, 1990. Minor in Botany, emphasis in Ecology. Attendance dates 1986-1990.

EXPERIENCE

STATE OF NEW MEXICO, ENVIRONMENT DEPARTMENT
AIR QUALITY BUREAU, PLANNING & POLICY SECTION

Section Chief, March 2005 – present
Program Manager (Natural Sciences Manager-2), March 2000 – March 2005
Environmental Specialist, December 1998 – March 2000
Environmental Scientist, August 1998 – December 1998

The Planning & Policy section of the Air Quality Bureau is responsible for the control strategy, dispersion modeling, emission inventory and small business assistance programs in the Air Quality Bureau. The control strategy section of the Air Quality Bureau is responsible for preparing state implementation plans, policies, and regulations for air quality. The modeling section ensures that all air dispersion modeling analyses submitted to our agency are accurate and complete. The Small Business Assistance Program assists small businesses in meeting air quality regulatory requirements.

EMPIRE GROUP, LLC
Empire, Nevada

Environmental Coordinator, June 1996 – July 1998

Empire Group, LLC is the parent company for several entities which own and operate a geothermal power plant, an onion and garlic dehydration plant, several ranches, and a garlic seed operation. In my position as environmental coordinator, I was responsible for permitting at all facilities.

JBR ENVIRONMENTAL CONSULTANTS, INC.
Reno, Nevada

Environmental Analyst IV, Reno Office Coordinator/Manager, July 1994 – July 1996
Environmental Analyst III, July 1993 – July 1994
Environmental Analyst I, June 1990 – July 1993

As the manager of the Reno office, I supervised seven technical staff and one administrative employee. During my employment with JBR, I worked on and managed numerous NEPA, environmental permitting and baseline projects.

NMED Exh. 2

[TITLE 20 ENVIRONMENTAL PROTECTION
CHAPTER 2 AIR QUALITY (STATEWIDE)
PART 98 ~~CONFORMITY OF GENERAL FEDERAL ACTIONS TO THE STATE IMPLEMENTATION PLAN~~[RESERVED]

~~20.2.98.1 ISSUING AGENCY: New Mexico Environmental Improvement Board.~~
~~[12/14/94; 08/02/96; 20.2.98.1 NMAC - Rn, 20 NMAC 2.98.100 10/31/02]~~

~~20.2.98.2 SCOPE: All departments, agencies and instrumentalities of the federal government.~~
~~A. The provisions of this Part shall apply in all nonattainment and maintenance areas for criteria pollutants for which the area is designated non-attainment or has a maintenance plan and for which the Department has jurisdiction.~~
~~B. Under section 176(c) of the Federal Act and 40 CFR part 51 subpart W, a Federal agency must make a determination that a Federal action conforms to the SIP in accordance with the requirements of this Part before the action is taken.~~
~~C. The preceding sentence does not include Federal actions where either:~~
~~(1) A National Environmental Policy Act (NEPA) analysis was completed as evidenced by a final environmental assessment (EA), environmental impact statement (EIS), or finding of no significant impact (FONSI) that was prepared prior to January 31, 1994, or~~
~~(2) Prior to January 31, 1994, an EA was commenced or a contract was awarded to develop the specific environmental analysis; sufficient environmental analysis was completed by March 15, 1994, so that the Federal agency may determine that the Federal action is in conformity with the specific requirements and the purposes of the SIP pursuant to the agency's affirmative obligation under section 176(c) of the Federal Act; and a written determination of conformity under section 176(c) of the Federal Act has been made by the Federal agency responsible for the Federal action by March 15, 1994.~~
~~D. Notwithstanding any provision of this Part, a determination that an action is in conformity with the SIP does not exempt the action from any other requirements of the SIP, the NEPA, or the Federal Act.~~
~~[12/14/94; 08/02/96; 20.2.98.2 NMAC - Rn, 20 NMAC 2.98.101 10/31/02]~~

~~20.2.98.3 STATUTORY AUTHORITY: NMSA 1978, section 72-4-5(B) provides that the Environmental Improvement Board shall adopt regulations "to attain and maintain national ambient air quality standards and prevent or abate air pollution...."~~
~~[12/14/94; 08/02/96; 20.2.98.3 NMAC - Rn, 20 NMAC 2.98.102 10/31/02]~~

~~20.2.98.4 DURATION: Permanent.~~
~~[12/14/94; 08/02/96; 20.2.98.4 NMAC - Rn, 20 NMAC 2.98.103 10/31/02]~~

~~20.2.98.5 EFFECTIVE DATE: December 10, 1994 except where a later date is cited at the end of a section or paragraph.~~
~~[12/14/94; 08/02/96; 20.2.98.5 NMAC - Rn, 20 NMAC 2.98.104 10/31/02]~~
~~[The latest effective date of any section in this Part is 10/31/02.]~~

~~20.2.98.6 OBJECTIVE: The purpose of this Part is to implement section 176(c) of the Federal Act, as amended (42 U.S.C. 7401 et seq.) and regulations under 40 CFR part 51 subpart W, with respect to the conformity of general Federal actions to the SIP. Under those authorities, 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 a SIP. This Part sets forth policy, criteria, and procedures for demonstrating and assuring conformity of such actions to the SIP.~~
~~[12/14/94; 08/02/96; 20.2.98.6 NMAC - Rn, 20 NMAC 2.98.105 10/31/02]~~

~~20.2.98.7 DEFINITIONS: Terms used but not defined in this Part shall have the meaning given them by the Federal Act and US EPA's regulations, in that order of priority.~~
~~A. "Affected Federal land manager" means the Federal agency or the Federal official charged with direct responsibility for management of an area designated as Class I under the Federal Act (42 U.S.C. 7472) that is located within one hundred kilometers (100 km) of the proposed Federal action.~~

~~B. "Areawide air quality modeling analysis" means an assessment on a scale that includes the entire nonattainment or maintenance area which uses an air quality dispersion model to determine the effects of emissions on air quality.~~

~~C. "Cause or contribute to a new violation" means a Federal action that:~~

~~(1) Causes a new violation of a national ambient air quality standard (NAAQS) at a location in a nonattainment or maintenance area which would otherwise not be in violation of the standard during the future period in question if the Federal action were not taken, or~~

~~(2) Contributes, in conjunction with other reasonably foreseeable actions, to a new violation of a NAAQS at a location in a nonattainment or maintenance area in a manner that would increase the frequency or severity of the new violation.~~

~~D. "Caused by," as used in the terms "direct emissions" and "indirect emissions," means emissions that would not otherwise occur in the absence of the Federal action.~~

~~E. "Criteria pollutant or standard" means any pollutant for which there is established a NAAQS at 40 CFR part 50.~~

~~F. "Direct emissions" means those emissions of a criteria pollutant or its precursors that are caused or initiated by the Federal action and occur at the same time and place as the action.~~

~~G. "Emergency" means a situation where extremely quick action on the part of the Federal agencies involved is needed and where the timing of such Federal activities makes it impractical to meet the requirements of this Part, such as natural disasters like hurricanes or earthquakes, civil disturbances such as terrorist acts, and military mobilizations~~

~~H. "Emissions budgets" are those portions of the total allowable emissions defined in a revision to the SIP for a certain date for the purpose of meeting reasonable further progress milestones or attainment or maintenance demonstrations, for any criteria pollutant or its precursors, allocated by the SIP to: (1) mobile sources, (2) any stationary source or class of stationary sources, (3) any class of area sources, or (4) any subcategory of the emissions inventory. The allocation system must be specific enough to assure meeting the criteria of section 176(c)(1)(B) of the Federal Act. An emissions budget may be expressed in terms of an annual period, a daily period, or other period established in the SIP.~~

~~I. "Emission offsets," for purposes of 20.2.98.113 NMAC are emissions reductions which are quantifiable, consistent with the SIP attainment and reasonable further progress demonstrations; surplus to reductions required by, and credited to, other SIP provisions; enforceable under both State and Federal law; and permanent within the time frame specified by the program.~~

~~J. "Emissions for which a Federal agency has a continuing program responsibility" means emissions that are specifically caused by an agency carrying out its authorities, and does not include emissions that occur due to subsequent activities, unless such activities are required by the Federal agency. Where an agency, in performing its normal program responsibilities, takes actions itself or imposes conditions that result in air pollutant emissions by a non-Federal entity taking subsequent actions, such emissions are covered by the meaning of a continuing program responsibility.~~

~~K. "Federal action" means any activity engaged in by a department, agency, or instrumentality of the Federal government, or any activity that a department, agency or instrumentality of the Federal government supports in any way, provides financial assistance for, licenses, permits, or approves, other than activities related to transportation plans, programs, and projects developed, funded, or approved under title 23 U.S.C. or the Federal Transit Act (49 U.S.C. 1601 et seq.). Where the Federal action is a permit, license, or other approval for some aspect of a non-Federal undertaking, the relevant activity is the part, portion, or phase of the non-Federal undertaking that requires the Federal permit, license, or approval.~~

~~L. "Federal agency" means, for purposes of this Part, a Federal department, agency, or instrumentality of the Federal government.~~

~~M. "Increase the frequency or severity of any existing violation of any standard in any area" means to cause a nonattainment area 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.~~

~~N. "Indirect emissions" means those emissions of a criteria pollutant or its precursors that:~~

~~(1) are caused by the Federal action, but may occur later in time and/or may be farther removed in distance from the action itself but are still reasonably foreseeable, and~~

~~(2) the Federal agency can practicably control and will maintain control over due to a continuing program responsibility of the Federal agency. These emissions may include, but are not limited to the following:~~

~~(a) traffic on or to, or stimulated or accommodated by, a proposed facility which is related to increases or other changes in the scale or timing of operations of such facility;~~
~~(b) emissions related to the activities of employees of contractors or Federal employees;~~
~~(c) emissions related to employee commuting and similar programs to increase average vehicle occupancy imposed on all employers of a certain size in the locality;~~
~~(d) emissions related to the use of Federal facilities under lease or temporary permit;~~
~~(e) emissions related to the activities of contractors or leaseholders that may be addressed by provisions that are usual and customary for contracts or leases or within the scope of contractual protection of the interests of the United States; and~~
~~(f) fugitive dust from dirt roads or disturbed soil.~~

~~O. "Local air quality modeling analysis" means an assessment of localized impacts on a scale smaller than the entire nonattainment or maintenance area, including, for example, congested roadway intersections and highways or transit terminals, which uses an air quality dispersion model to determine the effects of emissions on air quality.~~

~~P. "Maintenance area" means any geographic area of the United States previously designated nonattainment pursuant to the Federal Act Amendments of 1990 and subsequently redesignated to attainment subject to the requirement to develop a maintenance plan approved under section 175A of the Federal Act.~~

~~Q. "Maintenance plan" means a revision to the SIP, meeting the requirements of section 175A of the Federal Act.~~

~~R. "Metropolitan planning organization (MPO)" is that organization designated as being responsible, together with the State, for conducting the continuing, cooperative, and comprehensive planning process under 23 U.S.C. 134 and 49 U.S.C. 1607.~~

~~S. "Milestone" has the meaning given in sections 182(g)(l) and 189(c)(1) of the Federal Act. A milestone consists of an emissions level and the date on which it is required to be achieved.~~

~~T. "National ambient air quality standards (NAAQS)" are those standards established pursuant to section 109 of the Federal Act and include standards for carbon monoxide (CO), lead (Pb), nitrogen dioxide (NO2), ozone, particulate matter (PM10), and sulfur dioxide (SO2).~~

~~U. "NEPA" means the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.).~~

~~V. "Nonattainment area (NAA)" means any geographic area of the United States which has been designated as nonattainment under section 107 of the Federal Act and described in 40 CFR part 81.~~

~~W. "Precursors of a criteria pollutant" are:~~
~~(1) For ozone, nitrogen oxides (NOx) (unless an area is exempted from NOx requirements under section 182(f) of the Federal Act), and volatile organic compounds (VOC); and~~
~~(2) For PM10, those pollutants described in the PM10 nonattainment area SIP as significant contributors to the PM10 levels.~~

~~X. "Reasonably foreseeable emissions" are projected future indirect emissions that are: identified at the time the conformity determination is made; the location of such emissions is known; and the emissions are quantifiable, as described and documented by the Federal agency based on its own information and after reviewing any information presented to the Federal agency.~~

~~Y. "Regionally significant action" means a Federal action for which the direct and indirect emissions of any pollutant represent ten percent (10%) or more of a nonattainment or maintenance area's emissions inventory for that pollutant.~~

~~Z. "Regional water or wastewater projects" include construction, operation, and maintenance of water and/or wastewater conveyances, water and/or wastewater treatment facilities, and water storage reservoirs which affect a large portion of a nonattainment or maintenance area.~~

~~AA. "State Implementation Plan (SIP)" means the applicable portion (or portions) of the New Mexico State Implementation Plan (SIP), or most recent revision thereof, which has been approved under section 110 of the Federal Act, or promulgated under section 110(c) (Federal Implementation Plan) of the Federal Act, or promulgated or approved pursuant to regulations promulgated under section 301(d) of the Federal Act and which implements the relevant requirements of the Federal Act.~~

~~AB. "Total of direct and indirect emissions" means the sum of direct and indirect emissions increases and decreases caused by the Federal action; i.e., the "net" emissions considering all direct and indirect emissions. Any emissions decreases used to reduce such total shall have already occurred or shall be enforceable under State and Federal law. The portion of emissions which are exempt or presumed to conform under subsections A, B, C, or D of 20.2.98.108 NMAC are not included in the "total of direct and indirect emissions", except as~~

provided in subsection H of 20.2.98.108 NMAC. The "total of direct and indirect emissions" includes emissions of criteria pollutants and emissions of precursors of criteria pollutants. The segmentation of projects for conformity analyses when emissions are reasonably foreseeable is not permitted by this Part.
[12/14/94; 08/02/96; 20.2.98.7 NMAC - Rn, 20 NMAC.2.98.106 10/31/02]

20.2.98.8 to 20.2.98.106 [RESERVED]

20.2.98.107 CONFORMITY DETERMINATIONS:

A. Conformity determinations for Federal actions related to transportation plans, programs, and projects developed, funded, or approved under title 23 U.S.C. or the Federal Transit Act (49 U.S.C. 1601 et seq.) must meet the procedures and criteria of 20.2.99 NMAC (Conformity to the State Implementation Plan of Transportation Plans, Programs, and Projects), in lieu of the procedures set forth in this Part.

B. For Federal actions not covered by subsection A of 20.2.98.107 NMAC, a conformity determination is required for each pollutant where the total of direct and indirect emissions in a nonattainment or maintenance area caused by a Federal action would equal or exceed any of the rates in subsections C or D of 20.2.98.107 NMAC.

C. For purposes of subsection B of 20.2.98.107 NMAC, the following rates apply in nonattainment areas (NAAs):

Pollutant	Tons/Year
Ozone (VOCs or NOx):	
Serious NAAs	50
Severe NAAs	25
Extreme NAAs	10
Other ozone NAAs outside an ozone transport region	100
Marginal and moderate NAAs inside an ozone transport region	
VOC	50
NOx	100
Carbon monoxide: All NAAs	100
SO2 or NO2: All NAAs	100
PM10:	
Moderate NAAs	100
Serious NAAs	70
Pb: All NAAs	25

D. For purposes of subsection B of 20.2.98.107 NMAC, the following rates apply in maintenance areas:

Pollutant	Tons/Year
Ozone (NOx), SO2 or NO2: All maintenance areas:	100
Ozone (VOCs):	
Maintenance areas inside an ozone transport region	50
Maintenance areas outside an ozone transport region	100
Carbon monoxide: All maintenance areas	100
PM10: All maintenance areas	100
Pb: All maintenance areas	25

[12/14/94; 08/02/96; 20.2.98.107 NMAC - Rn, 20 NMAC 2.98.107 10/31/02]

20.2.98.108 EXEMPTIONS:

A. The requirements of this Part shall not apply to:

(1) Actions where the total of direct and indirect emissions are below the emissions levels specified in subsection B of 20.2.98.107 NMAC;

(2) The following actions which would result in no emissions increase or an increase in emissions that is clearly de minimis:

~~(a) Judicial and legislative proceedings.~~

~~(b) Continuing and recurring activities such as permit renewals where activities conducted will be similar in scope and operation to activities currently being conducted.~~

~~(c) Rulemaking and policy development and issuance.~~

~~(d) Routine maintenance and repair activities, including repair and maintenance of administrative sites, roads, trails, and facilities.~~

~~(e) Civil and criminal enforcement activities, such as investigations, audits, inspections, examinations, prosecutions, and the training of law enforcement personnel.~~

~~(f) Administrative actions such as personnel actions, organizational changes, debt management or collection, cash management, internal agency audits, program budget proposals, and matters relating to the administration and collection of taxes, duties and fees.~~

~~(g) The routine, recurring transportation of material and personnel.~~

~~(h) Routine movement of mobile assets, such as ships and aircraft, in home port reassignments and stations (when no new support facilities or personnel are required) to perform as operational groups and/or for repair or overhaul.~~

~~(i) Maintenance dredging and debris disposal where no new depths are required, applicable permits are secured, and disposal will be at an approved disposal site.~~

~~(j) With respect to existing structures, properties, facilities and lands where future activities conducted will be similar in scope and operation to activities currently being conducted at the existing structures, properties facilities, and lands; for example, actions such as relocation of personnel; disposition of federally owned existing structures, properties, facilities, and lands; rent subsidies; operation and maintenance cost subsidies; the exercise of receivership or conservatorship authority; assistance in purchasing structures; and the production of coins and currency.~~

~~(k) The granting of leases, licenses such as for exports and trade, permits, and easements where activities conducted will be similar in scope and operation to activities currently being conducted.~~

~~(l) Planning, studies, and provision of technical assistance.~~

~~(m) Routine operation of facilities, mobile assets and equipment.~~

~~(n) Transfers of ownership, interests, and titles in land, facilities, and real and personal properties, regardless of the form or method of the transfer.~~

~~(o) The designation of empowerment zones, enterprise communities, or viticultural areas.~~

~~(p) Actions by any of the Federal banking agencies or the Federal Reserve Banks, including actions regarding charters, applications, notices, licenses, the supervision or examination of depository institutions or depository institution holding companies, access to the discount window, or the provision of financial services to banking organizations or to any department, agency or instrumentality of the United States.~~

~~(q) Actions by the Board of Governors of the Federal Reserve System or any Federal Reserve Bank to affect monetary or exchange rate policy.~~

~~(r) Actions that implement a foreign affairs function of the United States.~~

~~(s) Actions (or portions thereof) associated with transfers of land, facilities, title, and real properties through an enforceable contract or lease agreement where the delivery of the deed is required to occur promptly after a specific, reasonable condition is met, such as promptly after the land is certified as meeting the requirements of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and where the Federal agency does not retain continuing authority to control emissions associated with the lands, facilities, title, or real properties.~~

~~(t) Transfers of real property, including land, facilities, and related personal property from a Federal entity to another Federal entity and assignments of real property, including land, facilities, and related personal property from a Federal entity to another Federal entity for subsequent deeding to eligible applicants.~~

~~(u) Actions by the Department of the Treasury to affect fiscal policy and to exercise the borrowing authority of the United States.~~

~~(3) Actions where the emissions are not reasonably foreseeable, such as the following:~~

~~(a) Initial Outer Continental Shelf lease sales which are made on a broad scale and are followed by exploration and development plans on a project level.~~

~~(b) Electric power marketing activities that involve the acquisition, sale and transmission of electric energy.~~

~~(4) Individual actions which implement a decision to conduct or carry out a program that has been found to conform to the SIP, such as prescribed burning actions which are consistent with a land management plan that has been found to conform to the SIP.~~

~~B. Notwithstanding the other requirements of this Part, a conformity determination is not required for the following Federal actions (or portion thereof):~~

~~(1) The portion of an action that includes major new or modified stationary sources that require a permit under the new source review (NSR) program (section 173 of the Federal Act) or the prevention of significant deterioration (PSD) program (title I, part C of the Federal Act).~~

~~(2) Actions in response to emergencies or natural disasters such as hurricanes, earthquakes, etc., which are commenced on the order of hours or days after the emergency or disaster and, if applicable, which meet the requirements of subsection C of 20.2.98.108 NMAC;~~

~~(3) Research, investigations, studies, demonstrations, or training (other than those exempted under paragraph (2) of subsection A of 20.2.98.108 NMAC) where no environmental detriment is incurred and/or the particular action furthers air quality research, as determined by the Department;~~

~~(4) Alteration and additions of existing structures as specifically required by new or existing applicable environmental legislation or environmental regulations (e.g., hush houses for aircraft engines and scrubbers for air emissions).~~

~~(5) Direct emissions from remedial and removal actions carried out under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and associated regulations to the extent such emissions either comply with the substantive requirements of the PSD/NSR permitting program or are exempted from other environmental regulation under the provisions of CERCLA and applicable regulations issued under CERCLA.~~

~~C. Federal actions which are part of a continuing response to an emergency or disaster under paragraph (2) of subsection B of 20.2.98.108 NMAC and which are to be taken more than six months after the commencement of the response to the emergency or disaster under paragraph (2) of subsection B of 20.2.98.108 NMAC are exempt from the requirements of this section (20.2.98.108 NMAC) only if:~~

~~(1) The Federal agency taking the actions makes a written determination that, for a specified period not to exceed an additional six months, it is impractical to prepare the conformity analyses which would otherwise be required and the actions cannot be delayed due to overriding concerns for public health and welfare, national security interests and foreign policy commitments; or~~

~~(2) For actions which are to be taken after those actions covered by paragraph (1) of subsection C 20.2.98.108 NMAC, the Federal agency makes a new determination as provided in paragraph (1) of subsection C 20.2.98.108 NMAC.~~

~~D. Notwithstanding other requirements of this Part, individual actions or classes of actions specified by individual Federal agencies that have met the criteria set forth in either paragraph (1) or (2) of subsection E of 20.2.98.108 NMAC and the procedures set forth in subsection F of 20.2.98.108 NMAC are presumed to conform, except as provided in subsection H of 20.2.98.108 NMAC.~~

~~E. The Federal agency shall meet the criteria for establishing activities that are presumed to conform by fulfilling the requirements set forth in either paragraph (1) or (2) of subsection E of 20.2.98.108 NMAC:~~

~~(1) The Federal agency shall clearly demonstrate using methods consistent with this Part that the total of direct and indirect emissions from the type of activities which would be presumed to conform would not:~~

~~(a) Cause or contribute to any new violation of any standard in any area;~~

~~(b) Interfere with provisions in the SIP for maintenance of any standard;~~

~~(c) Increase the frequency or severity of any existing violation of any standard in any area; or~~

~~(d) Delay timely attainment of any standard or any required interim emission reductions or other milestones in any area including, where applicable, emission levels specified in the SIP for purposes of:~~

~~(i) A demonstration of reasonable further progress;~~

~~(ii) A demonstration of attainment; or~~

~~(iii) A maintenance plan; or~~

~~(2) The Federal agency shall provide documentation that the total of direct and indirect emissions from such future actions would be below the emission rates for a conformity determination that are established in subsection B of 20.2.98.107 NMAC based, for example, on similar actions taken over recent years.~~

~~F. In addition to meeting the criteria for establishing exemptions set forth in paragraphs (1) or (2) of subsection E of 20.2.98.108 NMAC, the following procedures must also be complied with to presume that activities will conform:~~

~~(1) The Federal agency shall identify through publication in the Federal Register its list of proposed activities that are presumed to conform and the analysis, assumptions, emissions factors, and criteria used as the basis for the presumptions;~~

~~(2) The Federal agency shall notify the US EPA Region 6 Office, the Department and, where applicable, the agency designated under section 174 of the Act, and the MPO;~~

~~(3) The Federal agency shall document its response to all the comments received and make the comments, response, and final list of activities available to the public upon request; and~~

~~(4) The Federal agency shall publish the final list of such activities in the Federal Register.~~

~~C. Notwithstanding the other requirements of this Part, when the total of direct and indirect emissions of any pollutant from a Federal action does not equal or exceed the rates specified in subsection B of 20.2.98.107 NMAC, but represents ten percent or more of a nonattainment or maintenance area's total emissions of that pollutant, the action is defined as a regionally significant action and the requirements of 20.2.98.2 NMAC and 20.2.98.6 NMAC and 20.2.98.110 NMAC through 20.2.98.115 NMAC shall apply for the Federal action.~~

~~H. Where an action presumed to be de minimis under paragraphs (1) or (2) of subsection A of 20.2.98.108 NMAC or otherwise presumed to conform under subsection D of 20.2.98.108 NMAC is a regionally significant action or where an action otherwise presumed to conform under subsection D of 20.2.98.108 NMAC does not in fact meet one of the criteria in paragraph (1) of subsection E of 20.2.98.108 NMAC, that action shall not be considered to be de minimis or presumed to conform and the requirements of 20.2.98.2 NMAC and 20.2.98.6 NMAC and 20.2.98.110 NMAC through 20.2.98.115 NMAC shall apply for the Federal action.~~

~~I. Any measures used to affect or determine applicability of this Part, as determined under this section (20.2.98.108 NMAC), must result in projects that are in fact de minimis; must result in such de minimis levels prior to the time the applicability determination is made; and must be State or Federally enforceable. Any measures that are intended to reduce air quality impacts for this purpose shall be identified (including the identification and quantification of all emission reductions claimed) and the process for implementation (including any necessary funding of such measures and tracking of such emission reductions) and enforcement of such measures shall be described, including an implementation schedule containing explicit timelines for implementation. Prior to a determination of applicability, the Federal agency making the determination shall obtain written commitments from the appropriate persons or agencies to implement any measures which are identified as conditions for making such determinations. Such written commitment shall describe such mitigation measures and the nature of the commitment, in a manner consistent with the previous sentence. After this Part is approved by US EPA, enforceability through the SIP of any measures necessary for a determination of applicability will apply to all persons who agree to reduce direct and indirect emissions associated with a Federal action for a conformity applicability determination.~~

~~[12/14/94; 08/02/96; 20.2.98.108 NMAC - Rn, 20 NMAC 2.98.108 10/31/02]~~

~~**20.2.98.109 CONFORMITY ANALYSIS:** Any Federal department, agency, or instrumentality of the Federal government taking an action subject to 40 CFR part 51 subpart W and this Part must make its own conformity determination, consistent with the requirements of this Part. In making its conformity determination, a Federal agency shall consider comments from any interested parties. Where multiple Federal agencies have jurisdiction for various aspects of a project, a Federal agency may choose to adopt the analysis of another Federal agency (to the extent the proposed action and impacts analyzed are the same as the project for which a conformity determination is required) or develop its own analysis in order to make its conformity determination.~~

~~[12/14/94; 08/02/96; 20.2.98.109 NMAC - Rn, 20 NMAC 2.98.109 10/31/02]~~

~~**20.2.98.110 REPORTING REQUIREMENTS:**~~

~~A. Federal agency making a conformity determination under 20.2.98.113 NMAC shall provide to the US EPA Region 6 Office; the Department; and, where applicable, affected Federal land managers; the agency designated under section 174 of the Federal Act; and the MPO a thirty (30) day notice which describes the proposed action and the Federal agency's draft conformity determination on the action.~~

~~B. Federal agency shall notify the US EPA Region 6 Office; the Department; and, where applicable, affected Federal land managers; the agency designated under section 174 of the Federal Act; and the MPO; within thirty (30) days after making a final conformity determination under 20.2.98.113 NMAC.~~

~~[12/14/94; 08/02/96; 09/08/99; 20.2.98.110 NMAC - Rn, 20 NMAC 2.98.110 10/31/02]~~

~~**20.2.98.111 PUBLIC PARTICIPATION:**~~

~~A. Upon request by any person regarding a specific Federal action, a Federal agency shall make available for review its draft conformity determination under 20.2.98.113 NMAC with supporting materials which describe the analytical methods, assumptions, and conclusions relied upon in making the applicability analysis and draft conformity determination.~~

~~B. A Federal agency shall make public its draft conformity determination under 20.2.98.113 NMAC by placing a notice by prominent advertisement in a daily newspaper of general circulation in the areas affected by the action and by providing thirty (30) days for written public comment prior to taking any formal action on the draft~~

determination. This comment period may be concurrent with any other public involvement, such as occurs in the NEPA process.

C. A Federal agency shall document its response to all the comments received on its draft conformity determination under 20.2.98.113 NMAC and make the comments and responses available, upon request by any person, regarding a specific Federal action, within thirty (30) days of the final conformity determination.

D. A Federal agency shall make public its final conformity determination under 20.2.98.113 NMAC for a Federal action by placing a notice by prominent advertisement in a daily newspaper of general circulation in the areas affected by the action within thirty (30) days of the final conformity determination.

[12/14/94; 08/02/96; 20.2.98.111 NMAC - Rn, 20 NMAC 2.98.111 10/31/02]

20.2.98.112 FREQUENCY OF CONFORMITY DETERMINATIONS:

A. The conformity status of a Federal action automatically lapses five (5) years from the date a final conformity determination is reported under 20.2.98.110 NMAC unless the Federal action has been completed or a continuous program has been commenced to implement that Federal action within a reasonable time.

B. Ongoing Federal activities at a given site showing continuous progress are not new actions and do not require periodic redeterminations so long as the emissions associated with such activities are within the scope of the final conformity determination reported under 20.2.98.110 NMAC.

C. If, after the conformity determination is made, the Federal action is changed so that there is an increase in the total of direct and indirect emissions above the levels in subsection B of 20.2.98.107 NMAC, a new conformity determination is required.

[12/14/94; 08/02/96; 20.2.98.112 NMAC - Rn, 20 NMAC 2.98.112 10/31/02]

20.2.98.113 CRITERIA FOR DETERMINING CONFORMITY OF GENERAL FEDERAL ACTIONS:

A. An action required under 20.2.98.2 NMAC, 20.2.98.107 NMAC or 20.2.98.108 NMAC to have a conformity determination for a specific pollutant, will be determined to conform to the SIP if, for each pollutant that exceeds the rates in subsection B of 20.2.98.107 NMAC or otherwise requires a conformity determination due to the total of direct and indirect emissions from the action, the action meets the requirements of subsection C of 20.2.98.113 NMAC, and meets any of the following requirements:

(1) For any criteria pollutant, the total of direct and indirect emissions from the action are specifically identified and accounted for in the SIP's attainment or maintenance demonstration;

(2) For ozone or nitrogen dioxide, the total of direct and indirect emissions from the action are fully offset within the same nonattainment or maintenance area through a revision to the SIP or a measure similarly enforceable under State and Federal law that effects emission reductions so that there is no net increase in emissions of that pollutant;

(3) For any criteria pollutant, except ozone and nitrogen dioxide, the total of direct and indirect emissions from the action meet the requirements:

(a) specified in subsection B of 20.2.98.113 NMAC, based on areawide air quality modeling analysis and local air quality modeling analysis, or

(b) specified in paragraph (5) of subsection A of 20.2.98.113 NMAC and, for local air quality modeling analysis, the requirement of subsection B of 20.2.98.113 NMAC;

(4) For CO or PM10,

(a) Where the Department determines that an areawide air quality modeling analysis is not needed, the total of direct and indirect emissions from the action meet the requirements specified in subsection B of 20.2.98.113 NMAC based on local air quality modeling analysis, or

(b) Where the Department determines that an areawide air quality modeling analysis is appropriate and that a local air quality modeling analysis is not needed, the total of direct and indirect emissions from the action meet the requirements specified in subsection B of 20.2.98.113 NMAC, based on areawide modeling, or meet the requirements of paragraph (5) of subsection A of 20.2.98.113 NMAC; or

(5) For ozone or nitrogen dioxide, and for purposes of subparagraph (b) of paragraph (3) and subparagraph (b) of paragraph (4) of subsection A of 20.2.98.113 NMAC, each portion of the action or the action as a whole meets any of the following requirements:

(a) Where US EPA has approved a revision to an area's attainment or maintenance demonstration after 1990 and the Department makes a determination as provided in item (i) below or where the Department makes a commitment as provided in item (ii) below.

(i) The total of direct and indirect emissions from the action (or portion thereof) is determined and documented by the Department to result in a level of emissions which, together with all other emissions in the nonattainment (or maintenance) area, would not exceed the emissions budgets specified in the SIP.

~~(ii) The total of direct and indirect emissions from the action (or portion thereof) is determined by the Department to result in a level of emissions which, together with all other emissions in the nonattainment (or maintenance) area, would exceed an emissions budget specified in the SIP and the Governor or, if appropriate, the Governor's designee for SIP actions under State law, makes a written commitment to US EPA which includes the following: a) a specific schedule for adoption and submittal of a revision to the SIP which would achieve the needed emission reductions prior to the time emissions from the Federal action would occur; b) identification of specific measures for incorporation into the SIP which would result in a level of emissions which, together with all other emissions in the nonattainment or maintenance area, would not exceed any emissions budget specified in the SIP; c) a demonstration that all existing SIP requirements are being implemented in the area for the pollutants affected by the Federal action, and that local authority to implement additional requirements has been fully pursued; d) a determination that the responsible Federal agencies have required all reasonable mitigation measures associated with their action (as a matter of Department policy, a commitment will be made only if the Department determines that the project sponsors and responsible Federal agencies have sought all available emissions offsets and made all reasonably available modifications of the action to reduce emissions); and e) written documentation including all air quality analyses supporting the conformity determination.~~

~~(iii) Where a Federal agency made a conformity determination based on a Department commitment under item (ii) above, such a Department commitment is automatically deemed to be a call for an implementation plan revision by US EPA under section 110(k)(5) of the Federal Act, effective on the date of the Federal conformity determination and requiring response within eighteen (18) months or any shorter time within which the Department commits to revise the SIP;~~

~~(b) The action (or portion thereof) as determined by the MPO is specifically included in a current transportation plan and transportation improvement program which have been found to conform to the SIP under 20.2.99 NMAC (Conformity to the State Implementation Plan of Transportation Plans, Programs, and Projects).~~

~~(c) The action (or portion thereof) fully offsets its emissions within the same nonattainment or maintenance area through a revision to the SIP or an equally enforceable measure that effects emission reductions equal to or greater than the total of direct and indirect emissions from the action so that there is no net increase in emissions of that pollutant;~~

~~(d) Where US EPA has not approved a revision to the relevant implementation plan attainment or maintenance demonstration since 1990, the total of direct and indirect emissions from the action for the future years (described in subsection D of 20.2.98.114 NMAC) do not increase emissions with respect to the baseline emissions, and:~~

~~(i) The baseline emissions reflect the historical activity levels that occurred in the geographic area affected by the proposed Federal action during: a) calendar year 1990, b) The calendar year that is the basis for the classification (or, where the classification is based on multiple years, the year that is most representative in terms of the level of activity), if a classification is promulgated in 40 CFR part 81, or c) The year of the baseline inventory in the PM10 SIP,~~

~~(ii) The baseline emissions are the total of direct and indirect emissions calculated for the future years (described in subsection D of 20.2.98.114 NMAC) using the historic activity levels (described in item (i) of subparagraph (d) of paragraph (5) of subsection A of 20.2.98.113 NMAC) and appropriate emission factors for the future years; or~~

~~(e) Where the action involves regional water and/or wastewater projects, such projects are sized to meet only the needs of population projections that are in the SIP, based on assumptions regarding per capita use that are developed or approved in accordance with subsection A of 20.2.98.114 NMAC.~~

~~**B.** Either the areawide or local air quality modeling analyses, or both, must:~~

~~(1) Meet the requirements in 20.2.98.114 NMAC; and~~

~~(2) Show that the action does not:~~

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

~~(ii) Increase the frequency or severity of any existing violation of any standard in any area.~~

~~**C.** Notwithstanding any other requirements of this section (20.2.98.113 NMAC), an action subject to this Part may not be determined to conform to the SIP unless the total of direct and indirect emissions from the action is in compliance with or consistent with all relevant requirements and milestones contained in the SIP, such as elements identified as part of the reasonable further progress schedules, assumptions specified in the attainment or maintenance demonstration, prohibitions, numerical emission limits, and work practice requirements.~~

~~**D.** Any analyses required under this section (20.2.98.113 NMAC) shall be completed, and any mitigation requirements necessary for a finding of conformity must be identified as being in compliance with 20.2.98.115 NMAC, before the determination of conformity is made.~~

~~[12/14/94; 08/02/96; 20.2.98.113 NMAC - Rn, 20 NMAC 2.98.113 10/31/02]~~

20.2.98.114 PROCEDURES FOR MAKING CONFORMITY DETERMINATIONS OF GENERAL FEDERAL ACTIONS:

A. The analyses required under this Part shall be based on the latest planning assumptions.

(1) All planning assumptions shall be derived from the estimates of current and future population, employment, travel, and congestion most recently approved by the MPO or the Department. Planning assumptions may include, but are not limited to, the following: per capita water and sewer use, vehicle miles traveled per capita or per household, trip generation per household, vehicle occupancy, household size, vehicle fleet mix, vehicle ownership, wood stoves per household, the geographic distribution of population growth, and current and future population estimates.

(2) Any revisions to these estimates used as part of the conformity determination, including projected shifts in geographic location or level of population, employment, travel, and congestion, must be approved by the MPO or the Department.

B. The analyses required under this Part must be based on the latest and most accurate emission estimation techniques available as described below, unless such techniques are inappropriate. If such techniques are inappropriate and written approval of the US EPA Region 6 Administrator is obtained for any modification or substitution, they may be modified or another technique substituted on a case-by-case basis or, where appropriate, on a generic basis for a specific Federal agency program.

(1) For motor vehicle emissions, the most current version of the motor vehicle emissions model specified by US EPA for use in the preparation or revision of implementation plans in the State or area must be used for the conformity analysis as specified below:

(a) The US EPA shall publish in the Federal Register a notice of availability of any new motor vehicle emissions model; and

(b) A grace period of three months shall apply during which the motor vehicle emissions model previously specified by US EPA as the most current version may be used. Conformity analyses for which the analysis was begun during the grace period or no more than three (3) years before the Federal Register notice of availability of the latest emission model may continue to use the previous version of the model specified by US EPA.

(2) For non-motor vehicle emissions sources, including stationary and area sources, the latest emission factors specified by US EPA in the "Compilation of Air Pollutant Emission Factors (AP-42)" shall be used for the conformity analysis unless more accurate emission data are available, such as actual stack test data from stationary sources which are part of the conformity analysis.

C. The air quality modeling analyses required under this Part shall be based on the applicable air quality models, data bases, and other requirements specified in the most recent version of the "Guideline on Air Quality Models (Revised)" (1986), including supplements (US EPA publication no. 450/2-78-027 R), unless:

(1) The guideline techniques are inappropriate, in which case the model may be modified or another model substituted on a case-by-case basis or, where appropriate, on a generic basis for a specific Federal agency program; and

(2) Written approval of the US EPA Region 6 Administrator is obtained for any modification or substitution.

D. The analyses required under this Part, except paragraph (1) of subsection A of 20.2.98.113 NMAC, must be based on the total of direct and indirect emissions from the action and must reflect emission scenarios that are expected to occur under each of the following cases:

(1) The Federal Act mandated attainment year or, if applicable, the farthest year for which emissions are projected in the maintenance plan;

(2) The year during which the total of direct and indirect emissions from the action is expected to be the greatest on an annual basis; and

(3) Any year for which the SIP specifies an emissions budget.

[12/14/94; 08/02/96; 20.2.98.114 NMAC - Rn, 20 NMAC 2.98.114 10/31/02]

20.2.98.115 MITIGATION OF AIR QUALITY IMPACTS:

A. Any measures that are intended to mitigate air quality impacts shall be identified (including the identification and quantification of all emission reductions claimed) and the process for implementation (including any necessary funding of such measures and tracking of such emission reductions) and enforcement of such measures shall be described, including an implementation schedule containing explicit timelines for implementation.

B. Prior to determining that a Federal action is in conformity, the Federal agency making the conformity determination shall obtain written commitments from the appropriate persons or agencies to implement any mitigation measures which are identified as conditions for making conformity determinations. Such written

~~commitments shall describe such mitigation measures and the nature of the commitments, in a manner consistent with subsection A of 20.2.98.115 NMAC.~~

~~C. Persons or agencies voluntarily committing to mitigation measures to facilitate positive conformity determinations shall comply with the obligations of such commitments.~~

~~D. In instances where the Federal agency is licensing, permitting or otherwise approving the action of another governmental or private entity, approval by the Federal agency must be conditioned on the other entity meeting the mitigation measures set forth in the conformity determination, as provided in subsection A of 20.2.98.115 NMAC.~~

~~E. When necessary because of changed circumstances, mitigation measures may be modified so long as the new mitigation measures continue to support the conformity determination in accordance with 20.2.98.113 NMAC, 20.2.98.114 NMAC and 20.2.98.115 NMAC. Any proposed change in the mitigation measures is subject to the reporting requirements of 20.2.98.110 NMAC and the public participation requirements of 20.2.98.111 NMAC.~~

~~F. Written commitments to mitigation measures shall be obtained prior to a positive conformity determination and such commitments shall be fulfilled.~~

~~G. After this regulation is approved by US EPA, any agreements, including mitigation measures, necessary for a conformity determination will be both State and federally enforceable. Enforceability through the SIP will apply to all persons who agree to mitigate direct and indirect emissions associated with a Federal action for a conformity determination.~~

~~[12/14/94; 08/02/96; 20.2.98.115 NMAC - Rn, 20 NMAC 2.98.115 10/31/02]~~

~~**20.2.98.116 SAVINGS PROVISION:** The Federal conformity rules under 40 CFR part 51 subpart W, in addition to any existing applicable State requirements, establish the conformity criteria and procedures necessary to meet the requirements of section 176(c)of the Clean Air Act until such time as this conformity implementation plan revision is approved by US EPA. Following US EPA approval of this revision to the SIP (or a portion thereof), the approved (or approved portion of the) State criteria and procedures would govern conformity determinations and the Federal conformity regulations contained in 40 CFR part 93 would apply only for the portion, if any, of the State's conformity provisions that is not approved by US EPA. In addition, any previously applicable SIP requirements relating to conformity remain enforceable until the State revises its SIP to specifically remove them and that revision is approved by US EPA.~~

~~[12/14/94; 08/02/96; 20.2.98.116 NMAC - Rn, 20 NMAC 2.98.116 10/31/02]~~

~~**20.2.98.117 FEDERAL DOCUMENTS:** Federal documents cited in this regulation may be viewed at the New Mexico Environment Department, Air Quality Bureau, Harold Runnels Building, 1190 St. Francis Drive, Santa Fe, New Mexico [2048 Galisteo St., Santa Fe, NM 87505].]~~

HISTORY OF 20.2.98 NMAC:

Pre-NMAC History: None.

History of Repealed Material: ~~[RESERVED]~~

20 NMAC 2.98, Conformity Of General Federal Actions To The State Implementation Plan – repealed, XX/XX/2013

Other History:

20 NMAC 2.98, Conformity Of General Federal Actions To The State Implementation Plan, filed 11/14/94 was replaced by 20 NMAC 2.98, Conformity Of General Federal Actions To The State Implementation Plan, filed 06/19/96.

20 NMAC 2.98, Conformity Of General Federal Actions To The State Implementation Plan, filed 06/19/96 was **renumbered, reformatted and replaced** by 20.2.98 NMAC, Conformity Of General Federal Actions To The State Implementation Plan, effective 10/31/02.

20 NMAC 2.98, Conformity Of General Federal Actions To The State Implementation Plan – repealed, XX/XX/2013

(4) A provider who has collected and not made appropriate refund, or attempts to collect from the beneficiary, any amount in excess of the CHAMPVA-determined allowable amount may be subject to exclusion from Federal benefit programs.

(Authority: 38 U.S.C. 1713)

§ 17.273 Preauthorization.

Preauthorization or advance approval is required for any of the following:

(a) Non-emergent inpatient mental health and substance abuse care including admission of emotionally disturbed children and adolescents to residential treatment centers.

(b) All admissions to a partial hospitalization program (including alcohol rehabilitation).

(c) Outpatient mental health visits in excess of 23 per calendar year and/or more than two (2) sessions per week.

(d) Dental care.

(e) Durable medical equipment with a purchase or total rental price in excess of $300.00.

(f) Organ transplants.

(Authority: 38 U.S.C. 1713)

§ 17.274 Cost sharing.

(a) With the exception of services obtained through VA medical facilities, CHAMPVA is a cost-sharing program in which the cost of covered services is shared with the beneficiary. In addition to the beneficiary cost share, an annual (calendar year) outpatient deductible requirement ($50 per beneficiary or $100 per family) must be satisfied prior to the payment of outpatient benefits. There is no deductible for inpatient services. CHAMPVA pays the CHAMPVA-determined allowable amount less the deductible, if applicable, and less the beneficiary cost share. To provide financial protection against the impact of a long-term illness or injury, an annual cost limit or "catastrophic cap" has been placed on the beneficiary cost-share amount for covered services and supplies. This annual cap on cost sharing is $7,500 per CHAMPVA-eligible family. Credits to the annual catastrophic cap are limited to the applied annual deductible(s) and the beneficiary cost-share amount. Costs above the CHAMPVA-allowable amount, as well as costs associated with noncovered services are not credited to the catastrophic cap computation.

(b) If the CHAMPVA benefit payment is under $1.00, payment will not be issued. Catastrophic cap and deductible will, however, be credited.

(Authority: 38 U.S.C. 1713)

§ 17.275 Claim filing deadline.

(a) Unless an exception is granted under paragraph (b) of this section, claims for medical services and supplies must be filed with the Center no later than:

(1) One year after the date of service; or

(2) In the case of inpatient care, one year after the date of discharge; or

(3) In the case of retroactive approval for medical services/supplies, 180 days following beneficiary notification of authorization; or

(4) In the case of retroactive approval of CHAMPVA eligibility, 180 days following notification to the beneficiary of authorization for services occurring on or after the date of first eligibility.

(b) Requests for an exception to the claim filing deadline must be submitted, in writing, to the Center and include a complete explanation of the circumstances resulting in late filing along with all available supporting documentation. Each request for an exception to the claim filing deadline will be reviewed individually and considered on its own merit. The Center Director may grant exceptions to the requirements in paragraph (a) if he or she determines that there was good cause for missing the filing deadline. For example, when dual coverage exists CHAMPVA payment, if any, cannot be determined until after the primary insurance carrier has adjudicated the claim. In such circumstances an exception may be granted provided that the delay on the part of the primary insurance carrier is not attributable to the beneficiary. Delays due to provider billing procedures do not constitute a valid basis for an exception.

§ 17.276 Appeal/review process.

Notice of the initial determination regarding payment of CHAMPVA benefits will be provided to the beneficiary on a CHAMPVA Explanation of Benefits (EOB) form. The EOB form is generated by the CHAMPVA automated payment processing system. If a beneficiary disagrees with the determination concerning covered services or calculation of benefits, he or she may request reconsideration. Such requests must be submitted to the Center in writing within one year of the date of the initial determination. The request must state why the beneficiary believes the decision is in error and must include any new and relevant information not previously considered. Any request for reconsideration that does not identify the reason for dispute will be returned to the claimant without further consideration. After reviewing the claim and any relevant supporting documentation, a CHAMPVA benefits advisor will issue a written determination to the beneficiary that affirms, reverses or modifies the previous decision. If the beneficiary is still dissatisfied, within 90 days of the date of the decision he or she may make a written request for review by the Center Director. The Director will review the claim, and any relevant supporting documentation, and issue a decision in writing that affirms, reverses or modifies the previous decision. The decision of the Director with respect to benefit coverage and computation of benefits is final.

(Authority: 38 U.S.C. 1713)

Note to § 17.276: Denial of CHAMPVA benefits based on legal eligibility requirements may be appealed to the Board of Veterans' Appeals in accordance with 38 CFR part 20. Medical determinations are not appealable to the Board. 20 CFR 20.101.

§ 17.277 Third-party liability/Medicare cost recovery.

The Center will actively pursue third-party liability/medical care cost recovery in accordance with applicable law.

§ 17.278 Confidentiality of records.

Confidentiality of records will be maintained in accordance with 38 CFR 1.460 through 1.582.

[FR Doc. 98–22857 Filed 9–8–98; 8:45 am]
BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[NM 22–1–7103a; FRL–6152–4]

Approval and Promulgation of Implementation Plan for New Mexico: General Conformity Rules

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This action conditionally approves a revision to the New Mexico State Implementation Plan (SIP) that contains regulations for implementing and enforcing the general conformity rules which the EPA promulgated on November 30, 1993 (58 FR 63214). Specifically, the general conformity rules enable the New Mexico Environment Department to review conformity of all Federal actions (*See* 40 CFR part 51, subpart W—Determining Conformity of General Federal Actions to State or Federal Implementation Plans) with the control strategy SIPs

submitted for the nonattainment and maintenance areas within the State except for actions within the boundaries of Bernalillo County. This approval action is intended to streamline the conformity process and allow direct consultation among agencies at the local levels. The Federal actions by the Federal Highway Administration and Federal Transit Administration (under Title 23 U.S.C. or the Federal Transit Act) are covered by the transportation conformity rules under 40 CFR part 51, subpart T—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 Act. The EPA will act on the New Mexico transportation conformity SIP under a separate action.

The EPA is approving this SIP revision under sections 110(k) and 176 of the Clean Air Act (the Act) on the condition that the agreed-to revision is made. The rationale for the approval and other information are provided in this document.

DATES: This action is effective on October 9, 1998.

ADDRESSES: Copies of the State general conformity SIP and other relevant information are available for inspection during normal business hours at the following locations. Interested persons wanting to examine these documents should make an appointment with the appropriate office at least 24 hours before the visiting day.

Air Planning Section (6PDL), Multimedia Planning and Permitting Division, Environmental Protection Agency, Region 6, 1445 Ross Avenue, Dallas, Texas 75202, Telephone: (214) 665–7214.

Air and Radiation Docket and Information Center, Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460.

Air Quality Bureau, New Mexico Environment Department, 1190 St. Francis Drive, Santa Fe, New Mexico 87502, Telephone: (505) 827–0042.

FOR FURTHER INFORMATION CONTACT: Mr. J. Behnam, P.E., Air Planning Section (6PDL), Multimedia Planning and Permitting Division, Environmental Protection Agency, Region 6, 1445 Ross Avenue, Dallas, Texas 75202, Telephone: (214) 665–7247.

SUPPLEMENTARY INFORMATION:

I. Background

Section 176(c) of the Act requires that all Federal actions conform to an applicable implementation plan. Conformity is defined in section 176(c) of the Act as conformity to the SIP'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 that such activities will not: (1) Cause or contribute to any new violation of any standard in any area, (2) increase the frequency or severity of any existing violation of any standard in any area, or (3) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.

As required by section 176(c) of the Act, EPA published the final general conformity rules on November 30, 1993 (58 FR 63214), which are codified under 40 CFR part 51 subpart W—Determining Conformity of General Federal Actions to State or Federal Implementation Plans. The general conformity rules require the States and local air quality agencies (where applicable) to adopt and submit a general conformity SIP revision to EPA no later than November 30, 1994.

On November 17, 1994, the Governor of New Mexico submitted a SIP revision in accordance with 40 CFR part 51, subpart W that contained the general conformity rule. The SIP revision was adopted by the New Mexico Environmental Improvement Board on November 10, 1994, after appropriate public participation and interagency consultation. The EPA could not approve this submittal because it was not consistent with the requirements of 40 CFR part 51. Subsequently, the Governor of New Mexico submitted a completely revised SIP on July 18, 1996, which revised the rule and included a completely recodified set of general conformity regulations. The revised and recodified SIP revision was adopted by the New Mexico Environmental Board on June 14, 1996.

The EPA published a direct final approval action on March 26, 1997 (62 FR 14332) for approval of the New Mexico general conformity SIP, and EPA concurrently published a proposed action on March 26, 1997 (62 FR 14382), to allow interested parties to submit comments, if any. During the public comment period, EPA received one adverse comment from FAA. Subsequently, EPA withdrew the direct final approval action on May 28, 1997 (62 FR 28806).

II. Response to Public Comments

During the public comment period, EPA received an adverse comment from FAA opposing approval of the New Mexico general conformity SIP without certain revisions to the reporting requirements of the State rule. The following paragraphs present the commenter's remarks and EPA's response.

Comment—The commenter noted that 40 CFR 51.851 allows the State to establish more stringent criteria and procedures only if they apply equally to non-Federal as well as Federal entities. The commenter contended that Section 20 NMAC 2.98.110.C of the State regulation would make the State general conformity rule more stringent than the Federal rule and, as there are not similar reporting requirements or subsequent penalties for non-Federal entities, the section should be removed.

The commenter also noted that the possible reduction of the FAA's emission budget by 50 percent may indirectly impact interstate air carrier services. Therefore, according to the commenter, Section 110.C of the proposed rules is Federally preempted by Section 41713 of Title 49 of the United States Code. Further, the commenter argued, the police powers of the State with respect to aircraft operations are also subject to Federal preemption. The commenter also argued that by its potential to reduce flights into and out of the State of New Mexico, Section 110.C of the proposed rules violates the Commerce Clause of the United States Constitution.

Response: The EPA has reviewed the FAA comments and examined provisions of the Act and general conformity rule pertaining to Section 110.C of the State rule. The EPA did not find any statutory or regulatory provisions similar to Section 110.C. In addition, a review by the State of New Mexico Environment Department indicated that the provisions of Section 110.C would not be appropriate since the State never intended their requirements to be more stringent than the Federal requirements. Subsequently, the State agreed to remove Section 110.C from its general conformity rule, making the State rule consistent with the Federal rule. This action by the State satisfactorily addresses the FAA concerns.

III. Conditions and Commitments

Review of the State rule, the public comment, and the State's evaluation of its rule indicated that Section 110.C of the State rule makes the New Mexico general conformity rule more stringent than the Federal rule. Since the State's original intention was to make the general conformity rule requirements, including the provisions of Section 110.C, applicable to the Federal actions only, EPA has determined that Section 110.C is not consistent with the Federal rule 40 CFR 51.851 that specifies more stringent criteria and procedures must

apply equally to non-Federal as well as Federal entities.

After EPA's consultation with the State, the State has agreed to correct this inconsistency by removing Section 110.C from its general conformity rule. In a letter dated April 22, 1998, from the Chief of the Air Quality Bureau, New Mexico Environment Department, to the EPA Region 6 Office, the State commits to remove Section 110.C from its general conformity rule and submit a SIP revision to EPA within twelve (12) months from the date of this notice, September 9, 1999. The EPA accepted this commitment from the State because EPA believes that the State has shown a good faith effort in complying with the SIP requirements, and this minor inconsistency was not intentionally added to the regulations. The State's commitment letter will allow EPA to proceed with a conditional approval while the State is preparing the appropriate corrections for submission of a SIP revision.

The EPA has determined that New Mexico's general conformity rule meets the Federal requirements except the provisions of Section 110.C as cited above. Therefore, EPA is conditionally approving this SIP revision until the State makes the appropriate corrections and submits a SIP revision before the date specified above. If the State does not submit a SIP revision for removal of Section 110.C by the date specified in this Section of this action, this conditional approval will automatically be converted to a disapproval on the date specified above and as further discussed in Section IV of this action.

IV. Final Action

The EPA is conditionally approving a revision to the New Mexico general conformity SIP revision based on the rationale elaborated in this action. The general conformity rule is applicable to all nonattainment and maintenance areas within the State, outside the boundaries of Bernalillo County. The EPA has evaluated this SIP revision and has determined that the State has fully adopted the provisions of the Federal general conformity rule in accordance with 40 CFR part 51, subpart W, with one exception as noted in Sections II and III of this action. The State has undertaken appropriate public participation and interagency consultations during development and adoption of the rules at the local level.

The EPA is approving this SIP revision, based on the State's April 22, 1998, commitment letter and on the condition that the State will adopt and submit a revised general conformity rule which will contain the corrections detailed in this action (see Sections II and III) within 12 months of this final approval action, but not later than September 9, 1999. If the State fails to submit a SIP revision, as committed in the letter of April 22, 1998, for removal of Section 110.C by September 9, 1999, this conditional approval under section 110(k) of the Act will automatically be converted to a disapproval on that date, and the sanctions clock will begin. If the State does not submit a SIP, and EPA does not approve the SIP on which the disapproval was based within 18 months of the disapproval, EPA must impose the sanctions under section 179 of the Act.

V. Administrative Requirements

A. Executive Orders (E.O.) 12866 and 13045

The Office of Management and Budget has exempted this regulatory action from E.O. 12866, entitled "Regulatory Planning Review." This rule is not subject to E.O. 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks," because it is not an "economically significant" action under E.O. 12866.

B. Regulatory Flexibility

The Regulatory Flexibility Act (RFA), 5 U.S.C. 600 *et seq.*, generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. This rule will not have a significant impact on a substantial number of small entities because conditional approvals of SIP submittals under section 110 and subchapter I, part D of the Act do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not impose any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities. Moreover, due to the nature of the Federal-State relationship under the Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of State action. The Act forbids EPA to base its actions concerning SIPs on such grounds. *See Union Electric Co.*, v. *U.S. EPA*, 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

If the conditional approval is converted to a disapproval under section 110(k) of the Act, based on the State's failure to meet the commitment, it will not affect any existing State requirements applicable to small entities. Federal disapproval of the State submittal does not affect its state-enforceability. Moreover, EPA's disapproval of the submittal does not impose a new Federal requirement. Therefore, I certify that this disapproval action will not have a significant economic impact on a substantial number of small entities because it does not remove existing requirements nor does it substitute a new Federal requirement.

C. Unfunded Mandates

Under section 202 of the Unfunded Mandates Reform Act of 1995, signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

The EPA has determined that this approval action does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves preexisting requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

D. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller

General of the United States prior to publication of the rule in the **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

E. Petitions for Judicial Review

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 9, 1999. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review, nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. See section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, General conformity, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Volatile organic compounds.

Dated: August 14, 1998.

Jerry Clifford,

Acting Regional Administrator, Region 6.

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

1. The authority citation for part 52 continues to read as follows:

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

Subpart GG—New Mexico

2. In § 52.1620(c) the first table is amended by adding a new entry in numerical order to read as follows:

§ 52.1620 Identification of plan.

* * * * *

(c) * * *

EPA APPROVED NEW MEXICO REGULATIONS

State citation	Title/subject	State approval/effective date	EPA approval date	Comments
New Mexico Administrative Code (NMAC) Title 20—Environment Protection Chapter 2—Air Quality				
*	*	*	*	*
Part 98	General Conformity	08/02/96	September 9, 1998	Conditional approval expires on September 9, 1999.

* * * * *

3. Section 52.1623 is added to read as follows:

§ 52.1623 Conditional approval.

(a) *General Conformity.* (1) A letter, dated April 22, 1998, from the Chief of Air Quality Bureau New Mexico Environment Department to the EPA Regional Office, commits the State to remove Section 110.C from its rule for making the State's rule consistent with Federal rule. Specifically, the letter states that:

This letter is regarding our general conformity rule, 20 NMAC 2.98—Conformity of General Federal Actions to the State Implementation Plan. We have been reviewing paragraph 110.C under Section 110—Reporting Requirements. This is the paragraph in which the Federal Aviation Administration (FAA) had submitted a comment of concern to EPA, during EPA's proposed/final approval period for our rule. This comment caused EPA to withdraw its approval. The FAA had commented that New Mexico was more stringent than EPA, since our rule does not apply to non-Federal agencies. Our analysis has determined that our inclusion of this paragraph may make our rule more stringent than EPA, and should not have been included. The paragraph had originally come from a STAPPA/ALAPCO model rule. New Mexico had never intended to be more stringent than EPA with regards to general conformity. Hence, the State commits to putting 20 NMAC 2.98 on our regulatory agenda and plan to delete this paragraph within one year from the **Federal Register** publication of final notice of conditional approval to New Mexico's general conformity SIP.

(2) If the State ultimately fails to meet its commitment to remove this section from its rule within one year of publication of this conditional approval, then EPA's conditional action will automatically convert to a final disapproval.

(b) [Reserved]

[FR Doc. 98–23330 Filed 9–8–98; 8:45 am]

BILLING CODE 6560–50–U

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–300704; FRL–6024–1]

RIN 2070–AB78

Acrylic Acid Terpolymer, Partial Sodium Salts; Tolerance Exemption

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of acrylic acid terpolymer, partial sodium salts when used as inert ingredients (dispersant) in pesticide formulations applied to growing crops, raw agricultural commodities after harvest, and animals. BF Goodrich Specialty Chemicals requested this exemption from the requirement of a tolerance under the Federal Food, Drug and Cosmetic Act, as amended by the Food Quality Protection Act of 1996.

DATES: This regulation is effective September 9, 1998. Objections and requests for hearings must be received by EPA on or before November 9, 1998.

ADDRESSES: Written objections and hearing requests, identified by the docket control number, [OPP–300704], must be submitted to: Hearing Clerk (1900), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460. Fees accompanying objections and hearing requests shall be labeled "Tolerance Petition Fees" and forwarded to: EPA Headquarters Accounting Operations Branch, OPP (Tolerance Fees), P.O. Box 360277M, Pittsburgh, PA 15251. A copy of any objections and hearing requests filed with the Hearing Clerk identified by the docket control number, [OPP–300704], must also be submitted to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW.,

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

Federal Register

Monday,
April 5, 2010

Part III

Environmental Protection Agency

40 CFR Parts 51 and 93
Revisions to the General Conformity Regulations; Final Rule

NMED Exh. 5

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 93

[EPA–HQ–OAR–2006–0669; FRL–9131–7]

RIN 2060–AH93

Revisions to the General Conformity Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is revising its regulations relating to the Clean Air Act (CAA) requirement that Federal actions conform to the appropriate State, tribal or Federal implementation plan (SIP, TIP, or FIP) for attaining clean air ("General Conformity"). EPA and other Federal agencies have gained experience with the implementation of the existing regulations, which were promulgated in 1993 (and underwent minor revisions in 2006), and have identified several issues with their implementation. In addition, in 2004, EPA issued regulations to implement the revised ozone national ambient air quality standards (NAAQS) and in 2007 issued regulations to implement the new fine particulate matter standard. State and other air quality agencies are in the process of developing revised plans to attain the new standards and the revisions to the General Conformity Regulations will be helpful to the State, Tribe, and local agencies in developing, and Federal agencies in commenting, on the proposed SIPs revisions. This rule revision will also facilitate Federal agency compliance with conforming its activities to the SIPs thereby preventing violations of the NAAQS. This rule revision provides for a timely and effective process for Federal agencies and States and Tribes to ensure Federal activities are incorporated in these SIPs. Where that is not possible, it provides an efficient and effective process for Federal agencies to ensure their actions do not cause or contribute to a violation of the NAAQS or interfere with the purpose of a SIP, TIP or FIP to attain or maintain the NAAQS.

DATES: This action is effective on July 6, 2010.

ADDRESSES: EPA has established a docket for this rulemaking under Docket ID No. EPA–HQ–OAR–2006–0669. All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the EPA Docket Center EPA/DC, EPA West, Room 3334, 1301 Constitution Avenue, Northwest, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the EPA Docket Center is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas Coda, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Mail Code C539–02, Research Triangle Park, NC 27711, phone number (919) 541–3037 or by e-mail at *coda.tom@epa.gov* or Mr. H. Lynn Dail, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Mail Code C539–02, Research Triangle Park, NC 27711, phone number (919) 541–2363 or by e-mail at *dail.lynn@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

Entities affected by this rule include Federal agencies and public and private entities that receive approvals or funding from Federal agencies such as airports and seaports.

B. How is this preamble organized?

The information presented in this preamble is organized as follows:

Outline

I. General Information
A. Does this action apply to me?
B. How is this preamble organized?
C. When did EPA propose these revisions to the General Conformity Regulations?
D. Where can I obtain additional information?
II. Background
A. What is General Conformity and how does it affect air quality?
B. Why is EPA revising these regulations at this time?
III. How are the existing regulations implemented?
A. Applicability Analysis
B. Conformity Determination
C. Review Process
IV. Comments Submitted on the Proposed Rule
V. Summary of the Final Revisions and Clarifications of the General Conformity Regulations
A. Overview of Revisions to the General Conformity Regulations
B. What Innovative and Flexible Approaches Are Being Finalized?
C. What Burden Reduction Measures Are Being Finalized?
D. What Revisions Provide Tools and Guidance for Transitioning to New or Revised NAAQS?
E. What Revisions Are Being Finalized at the Request of Other Agencies?
F. What Are Some of the Clarifications to the Existing Regulations That Are Being Finalized?
VI. Detailed Discussion of the Final Revisions to and Clarifications of the General Conformity Regulations
A. 40 CFR Part 51, Subpart W—Determining Conformity of General Federal Actions to State or Federal Implementation Plans
B. 40 CFR 93.150—Prohibition
C. 40 CFR 93.151—SIP Revision
D. 40 CFR 93.152—Definitions
E. 40 CFR 93.153—Applicability Analysis
F. 40 CFR 93.154—Federal Agencies Responsibility for a Conformity Determination
G. 40 CFR 93.155—Reporting Requirements
H. 40 CFR 93.156—Public Participation
I. 40 CFR 93.157—Re-Evaluation of Conformity
J. 40 CFR 93.158—Criteria for Determining Conformity for General Federal Actions
K. 40 CFR 93.159—Procedures for Conformity Determinations for General Federal Actions
L. 40 CFR 93.160—Mitigation of Air Quality Impacts
M. 40 CFR 93.161—Conformity Evaluations for Installations With Facility-Wide Emission Budget
N. 40 CFR 93.162—Emissions Beyond the Time Period Covered by the Applicable SIP or Tribal Implementation Plan (TIP)
O. 40 CFR 93.163—Timing of Offsets and Mitigation Measures
P. 40 CFR 93.164—Inter-Precursor Offsets and Mitigation Measures
Q. 40 CFR 93.165—Early Emission Reduction Credit Program
VII. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer Advancement Act
J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
K. Congressional Review Act
L. Judicial Review
VIII. Statutory Authority

C. When did EPA propose these revisions to the General Conformity Regulations?

The EPA proposed the revised General Conformity Regulations in the **Federal Register** on January 8, 2008 at 73 FR 1402.

D. Where can I obtain additional information?

In addition to being available in the docket, an electronic copy of this final rule is also available on the worldwide web. Following signature by the EPA Administrator, a copy of this notice will be posted at *http://www.epa.gov/oar/genconform/regs.htm.*

II. Background

A. What is General Conformity and how does it affect air quality?

The intent of the General Conformity requirement is to prevent the air quality impacts of Federal actions from causing or contributing to a violation of the NAAQS or interfering with the purpose of a SIP, TIP, or FIP.

In the CAA, Congress recognized that actions taken by Federal agencies could affect State, Tribal, and local agencies' ability to attain and maintain the NAAQS. In section 176(c) (42 U.S.C. 7506) of the CAA, Congress established requirements to ensure Federal agencies proposed actions conform to the applicable SIP, TIP or FIP for attaining and maintaining the NAAQS. That section requires Federal entities to find that the emissions from the Federal action will conform to the purposes of the SIP, TIP or FIP or not otherwise interfere with the State's or Tribe's ability to attain and maintain the NAAQS.

The CAA Amendments of 1990 clarified and strengthened the provisions in section 176(c). Because certain provisions of section 176(c) apply only to highway and mass transit funding and approval actions, EPA published two sets of regulations to implement section 176(c). The Transportation Conformity Regulations, first published on November 24, 1993 (58 FR 62188) and revised on July 1, 2004 at 69 FR 40004, May 6, 2005 at 70 FR 24280 and March 10, 2006 at 71 FR 12468, and January 24, 2008 at 73 FR 4420, address Federal actions related to highway and mass transit funding and approval actions. The General Conformity Regulations, published on November 30, 1993 (58 FR 63214), cover all other Federal actions.

B. Why is EPA revising these regulations at this time?

On July 17, 2006 at 71 FR 40420, EPA revised the General Conformity Regulations to include *de minimis* emission levels for particulate matter with an aerodynamic diameter equal to or less than 2.5 microns ($PM_{2.5}$) and its precursors. Otherwise, EPA has not revised the General Conformity Regulations since they were promulgated in 1993. Since that time, EPA and other Federal agencies have gained experience with the implementation of the existing regulations and have identified several issues with their implementation. To address these issues, EPA initiated a process to review, revise and streamline the regulations. In addition, EPA is in the process of developing regulations to implement the revised ozone standard and regulations to implement the new particulate matter standard. In the near future, State and local air quality agencies will be required to develop revised SIPs to attain these new standards. Knowledge of the revised General Conformity Regulations will be helpful to the State, Tribal, and local agencies in the SIP development process as well as the Federal agencies in commenting on the proposed SIP revisions. This rule revision will also facilitate Federal agency compliance with conforming its activities to the SIPs and thereby preventing violations of the NAAQS.

III. How are the existing regulations implemented?

Federal agencies and other parties involved in the conformity process have found that in implementing the existing General Conformity Regulations their process falls into three phases: (A) Applicability analysis, (B) Conformity determination, and (C) Review process. Besides ensuring that the Federal actions are in conformance with the SIP, the regulations encourage consultation between the Federal agency and the State or local air pollution control agencies before and during the environmental review process.

The existing regulations do not specifically identify the roles of Indian Tribes in the General Conformity process or the connection between the regulations and TIPs. In the revised regulations, EPA has specifically identified tribal agencies as stakeholders in the conformity process such as requiring specific notification for any federally recognized Tribes in the nonattainment or maintenance area where the action is occurring. In addition, the revised regulations also clarify that Federal actions must conform to any applicable TIP.

A. Applicability Analysis

The National Highway System Designation Act of 1995 (Pub. L. 104–59) added section 176(c)(5) to the CAA to limit applicability of the conformity programs only to areas designated as nonattainment under section 107 of the CAA and maintenance areas established under section 175A of the CAA. Therefore, only actions which cause emissions in designated nonattainment and maintenance areas are subject to the regulations. In addition, the regulations recognize that the vast majority of Federal actions do not result in a significant increase in emissions and, therefore, include a number of exemptions such as *de minimis* emission levels based on the type and severity of the nonattainment problem.

In the applicability analysis phase, the Federal agency determines:

1. Whether the action will occur in a nonattainment or maintenance area;
2. Whether one or more of the specific exemptions apply to the action;
3. Whether the Federal agency has included the action on its list of "presumed to conform" actions;
4. Whether the total direct and indirect emissions are below or above the *de minimis* levels; and/or
5. Where the facility has an emission budget approved by the State or Tribe as part of the SIP or TIP, the Federal agency determines if the emissions from the proposed action are within the budget.

If the action will cause emissions above the *de miminis* in any nonattainment or maintenance area and the action is not otherwise exempt, "presumed to conform," or included in the existing emissions budget of the SIP or TIP, the agency must conduct a conformity determination before it takes the action.

B. Conformity Determination

When the applicability analysis shows that the action must undergo a conformity determination, Federal agencies must first show that the action will meet all SIP control requirements such as reasonably available control measures, and the emissions from the action will not cause a new violation of the standard, or interfere with the timely attainment of the standard, the maintenance of the standard, or the area's ability to achieve an interim emission reduction milestone. Federal agencies then must demonstrate conformity by meeting one or more of the methods specified in the regulation for determining conformity:

1. Demonstrating that the total direct and indirect emissions are specifically identified and accounted for in the applicable SIP,

2. Obtaining a written statement from the State, Tribe or local agency responsible for the SIP or TIP documenting that the total direct and indirect emissions from the action along with all other emissions in the area will not exceed the SIP emission budget,

3. Obtaining a written commitment from the State or Tribe to revise the SIP or TIP to include the emissions from the action,

4. Obtaining a statement from the metropolitan planning organization (MPO) for the area documenting that any on-road motor vehicle emissions are included in the current regional emission analysis for the area's transportation plan or transportation improvement program,

5. Fully offsetting the total direct and indirect emissions by reducing emissions of the same pollutant or precursor in the same nonattainment or maintenance area, or

6. Conducting air quality modeling that demonstrates that the emissions will not cause or contribute to new violations of the standards, or increase the frequency or severity of any existing violations of the standards. Air quality modeling cannot be used to demonstrate conformity for emissions of ozone precursors or nitrogen dioxide (NO_2). As stated in EPA's proposal of the 1993 regulations (58 FR 13845), due to the complex interaction of the ozone precursors, the regional nature of the ozone and NO_2 problems, and limitations of current air quality models, it is not generally appropriate to use an air quality model to determine the impact on ozone or NO_2 concentrations from a single emission source or a single Federal action.

C. Review Process

As public bodies, Federal agencies must make their conformity determinations through a public process. The General Conformity Regulations require Federal agencies to provide notice of the draft determination to the applicable EPA Regional Office, the State and local air quality agencies, the local MPO and, where applicable, the Federal Land Manager(s)(FLM). In addition, the regulations require Federal agencies to provide at least a 30-day comment period on the draft determination and make the final determination public. State agencies and the public can appeal the final determination in the U.S. Courts system. Failure by a Federal agency to follow the substantive and procedural General Conformity requirements can result in an adverse court decision if challenged.

IV. Comments Submitted on the Proposed Rule

The proposed rule on the "Revisions to the General Conformity Regulations" was issued on January 8, 2008 (73 FR 1402). The EPA received 65 letters from State and local governments, Federal agencies, environmental groups, and private citizens commenting on the proposed regulations. Some of the comments are discussed in section VI of this notice as they were relevant to the detailed discussion of revisions. The EPA has included a response to comments document which addresses all of the timely comments received on the proposed rule in the docket of this rulemaking action (*See* Docket No. EPA–HQ–OAR–2006–0669).

V. Summary of the Final Revisions and Clarifications of the General Conformity Regulations

A. Overview of Revisions to the General Conformity Regulations

In accordance with the requirements of section 176(c)(4)(C) of the CAA, when EPA promulgated General Conformity Regulations in 1993 in 40 CFR 93 subpart B (sections 150 to 160), it also promulgated regulations at 40 CFR part 51, subpart W (sections 850–860) which required States to adopt and submit SIPs for General Conformity. In August 2005, Congress passed the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) which eliminated the requirement for States to adopt and submit General Conformity SIPs. Therefore, EPA is revising its regulations to make the adoption and submittal of the General Conformity SIP or TIP optional for the State or Tribe.

Because 40 CFR part 51, subpart W (§§ 51.850–51.860) essentially duplicates the regulations promulgated at 40 CFR part 93, subpart B (§§ 93.150–93.160), EPA is deleting all of subpart W except for § 51.851. In the revision to § 51.851, EPA is requiring that if a State or Tribe submits a General Conformity SIP or TIP that it be consistent with the requirements of 40 CFR part 93, subpart B. The EPA added paragraph (f) to 40 CFR 51.851 to allow the States and Tribes to develop their own "presumed to conform" list for actions covered by their conformity SIPs or TIPs.

In 40 CFR part 93, subpart B, EPA is making specific revisions to the regulations which (1) Clarify the process, (2) delete outdated or unnecessary requirements, (3) authorize innovative and flexible approaches, (4) reduce the paperwork burden, (5) provide transition tools for implementing new standards, (6) address issues identified by implementing agencies, and (7) provide a better explanation of regulations and policies.

Several of the revisions encourage both the Federal agencies and the States or Tribes to take actions in advance of the project environmental review. Such advance action should speed the review process for the individual projects and reduce the delays for the project without impairing the environmental review. This is discussed in more detail in section VI below.

B. What Innovative and Flexible Approaches Are Being Finalized?

1. The EPA is adding a new section (40 CFR 93.161) to allow for a facility-wide emission budget approach. Under this voluntary arrangement, Federal agencies, in anticipation of future major actions, may negotiate a facility-wide emission budget with the appropriate State, tribal, or local air quality agency responsible for the SIP or TIP. The State, tribal, or local agency could incorporate the facility-wide emission budget into the applicable SIP or TIP and submit it to EPA for approval. After EPA approves the SIP or TIP, any action at the facility can be "presumed to conform" provided that the emissions from the proposed action along with all other emissions at the facility are within the EPA approved facility-wide emission budget and a conformity determination would not be necessary. Alternatively, a facility with an approved facility-wide emission budget could demonstrate conformity by the conventional methods afforded in the General Conformity Regulations. For example, once approved, minor actions under the control of the facility where an applicability analysis results in a determination that the emissions are below a *de minimis* threshold could proceed with no conformity determination.

2. The EPA is adding a new section (40 CFR 93.165) to explicitly incorporate the use of early emission reduction credits into the regulations. The proposal reflects the provisions established by Congress in Federal Aviation Administration (FAA) Reauthorization Act of 2003 for the Airport Early Emission Reduction Credit (AERC) program and the guidance to implement that program. The revised regulations provide a similar framework for other Federal agencies.

3. The EPA is adding a new section (40 CFR 93.164) to allow, with certain limitations, the emission of one

precursor of a criteria pollutant to be mitigated or offset by the reduction in the emissions of another precursor of that pollutant.

4. The EPA is adding a new section (40 CFR 93.163) to allow alternate schedules for mitigating emissions increases. The mitigation timing approach allows some flexibility for Federal agencies and States or Tribes to negotiate a program for some emissions mitigation to occur in future years. States or Tribes can allow this approach to accommodate short-term increases in emissions if they believe a substantial long-term reduction in emissions will result from a Federal action.

C. What Burden Reduction Measures Are Being Finalized?

1. The EPA is deleting the provision in the existing regulation (40 CFR 93.153) that requires Federal agencies to conduct a conformity determination for regionally significant actions where the direct and indirect emissions of any pollutant represent 10 percent or more of a nonattainment or maintenance area's emissions inventory for that pollutant, even though the total direct and indirect emissions from the actions are below the *de minimis* emission levels or the actions are otherwise "presumed to conform".

2. The EPA is adding in 40 CFR 93.153 new types of actions that Federal agencies can include in their "presumed to conform" lists and EPA is also permitting States or Tribes to establish in their General Conformity SIPs or TIPs "presumed to conform" lists for actions within their State or tribal area.

3. The EPA is finalizing an exemption in 40 CFR 93.153 for the emissions from stationary sources permitted under the minor source New Source Review (NSR) programs similar to the EPA's existing General Conformity regulation which already provides for exemptions for emissions from major NSR sources.

D. What Revisions Provide Tools and Guidance for Transitioning to New or Revised NAAQS?

1. The EPA is adding a definition in the regulation (40 CFR 93.152) for "Take or start the Federal action" to help Federal agencies determine what, if any, conformity requirements apply when an area is designated or re-designated as nonattainment.

2. The EPA is adding requirements (40 CFR 93.153(k)) for the implementation of the statutory grace period for newly designated nonattainment areas.

3. The EPA is adding alternate methods (40 CFR 93.162) to demonstrate conformity for time periods beyond those covered by the SIP or TIP. The EPA is also allowing States or Tribes to include an enforceable commitment in the SIP or TIP to address future emissions from a Federal action.

E. What Revisions Are Being Finalized at the Request of Other Agencies?

1. As part of EPA's efforts to finalize an Air Quality Policy on Wildland and Prescribed Fires, which was undertaken in consultation with FLMs, EPA took comment on two possible approaches: To include a presumption of conformity for (1) prescribed fires conducted in accordance with a State certified smoke management programs (SMPs) which meets the requirements of EPA's Interim Air Quality Policy on Wildland and Prescribed Fires or an equivalent replacement EPA policy, or (2) prescribed fires conducted in accordance with a State certified SMPs which meets the requirements of EPA's Interim Air Quality Policy on Wildland and Prescribed Fires or an equivalent replacement EPA policy or, in the absence of a State certified SMP, where the Federal agency has obtained written assurance from the State prior to the burn that the planned burn employs State approved basic smoke management practices (BSMP). EPA is finalizing option 1 to include a presumption of conformity for prescribed fires that are conducted in compliance with SMPs (40 CFR 93.153(i)(2)), with recognition that prescribed fires employing BSMPs may be able to meet a presumption of conformity if such a presumption is established by an agency following the requirements of 93.153(g) or by a State following the requirements of 51.851(f). In the absence of such SMPs, we encourage States and Federal agencies to work together to develop and finalize SMPs or to include prescribed fires conducted in accordance with BSMPs as presumed to conform actions in the applicable SIP. In addition, Federal agencies could undertake actions in accordance with 40 CFR 93.153(f) and (g) to include prescribed fires conducted in accordance with specific BSMPs as actions that are presumed to conform.

2. The EPA is finalizing the proposal (40 CFR 93.158) to allow Federal agencies to obtain emission offsets for general conformity purposes from another nearby nonattainment or maintenance area of equal or higher nonattainment classification provided the emissions from that area contribute to violation of the NAAQS in the area where the Federal action is located or, in the case of maintenance areas, the emissions from the nearby area contributed in the past to the violations in the area where the Federal action is occurring.

3. At the request of several Federal agencies, EPA is clarifying the language in the regulation that states that nothing in these regulations (40 CFR 93.155 and 40 CFR 93.156) requires the release of materials and other information where disclosure is restricted by law. Also, EPA is including a similar clarification for CBI.

4. Several Federal agencies and others involved in the General Conformity process suggested that EPA should consider exempting construction activity emissions from the conformity regulations requirements (40 CFR 93.153). Although the existing General Conformity Regulations do not specifically mention construction emissions, they implicitly require Federal agencies to include emissions from construction activities in the conformity evaluation.

The EPA understands these concerns and, in the discussion about the revision to the definition of "caused by," has identified a number of ways that Federal agencies can work with the State, Tribe, and local agencies to address construction emissions in the General Conformity assessment. However, EPA is not finalizing an exemption for construction emissions in the revisions and is instead affirming that emissions from construction activities must be considered in a conformity evaluation.

5. At the request of the FAA, EPA is codifying one of the examples contained in the preamble to the existing General Conformity Regulations (58 FR 63229) that stated, "the EPA believes that the following actions are illustrative of *de minimis* actions: * * * Air traffic control activities and adopting approach, departure and enroute procedures for air operations." The FAA conducted a study of ground level concentrations caused by elevated aircraft emissions released above ground level (AGL) using EPA-approved models and conservative assumptions.[1] The study concluded that aircraft operations at or above the average mixing height of 3,000 feet AGL have a very small effect on ground level concentrations and could not directly result in a violation of the NAAQS in a local area. Consequently, this study supports the example provided in EPA's initial preamble language for air traffic control activities and adopting approach,

[1] Wayson, Roger, and Fleming, Gregg, "Consideration of Air Quality Impacts by Airplane Operations at or Above 3000 feet AGL," Volpe National Transportation Systems Center and FAA Office of Environment & Energy, FAA–AEE–00–01–DTS–34, September 2000. *http://www.faa.gov/regulations_policies/policy_guidance/envir_policy/.*

departure and enroute procedures for aircraft operations above the mixing height. As some of the commenters noted, the mixing height for some areas can vary and some SIPs and TIPs identify a specific mixing height to be used. Therefore, EPA's final rule (40 CFR 93.153) exempts as *de minimis* aircraft emissions above the specific mixing height identified in the SIP or TIP. If no mixing height is identified in the SIP or TIP, the Federal agency can use 3,000 feet AGL as a default mixing height. The list of exemptions under 40 CFR 93.153(c)(2)(xxii) has been updated in this final rule to reflect this policy.

F. What are some of the clarifications to the existing regulations that are being finalized?

1. The EPA is clarifying in 40 CFR 93.150 the General Conformity evaluation for treatment of emissions from actions with emissions originating in more than one nonattainment or maintenance area. The emissions in each area would be treated as if they result from a separate action.

2. The EPA is establishing procedures in 40 CFR 93.153 to follow in extending the 6-month conformity exemption for actions taken in response to an emergency.

3. The EPA is revising (40 CFR 93.158) the procedures that can be used to demonstrate conformity with the applicable SIP when the SIP does not contain an attainment demonstration or when the emissions from the Federal action are projected beyond the period of the SIP. In addition, EPA is adding a new section (40 CFR 93.162) to establish procedures for demonstrating conformity beyond the time period covered by the SIP or TIP.

4. The EPA is revising the review process (40 CFR 93.155) to require Federal agencies to notify tribal governments in the nonattainment or maintenance area of General Conformity evaluations.

5. The EPA is clarifying the definition (40 CFR 93.152) of several terms used in the regulations.

6. The EPA is including specific language throughout the regulations to identify the role of Indian Tribes and TIPs in the General Conformity evaluation.

VI. Detailed Discussion of the Final Revisions to and Clarifications of the General Conformity Regulations

A. 40 CFR Part 51, Subpart W—Determining Conformity of General Federal Actions to State or Federal Implementation Plans

In 1990, the CAA was amended to include a provision in section 176(c)(4) that required States to adopt and submit to EPA for approval a SIP to implement the provisions of section 176(c). Section 6011 of SAFETEA–LU revised the conformity requirements in section 176(c) of the CAA. Although most of the revisions affected the Transportation Conformity requirements, section 6011(f) also revised the General Conformity requirements. Specifically, section 6011(f) revised section 176(c)(4)(A) of the CAA by including a requirement that the regulations must be periodically updated and by deleting the requirement for the States to adopt and submit a General Conformity SIP. The EPA does not interpret this provision as prohibiting States or Tribes from voluntarily adopting and submitting General Conformity implementation plans consistent with EPA regulations. Therefore, EPA is revising 40 CFR 51.851 to make the adoption and submittal of the General Conformity SIP optional for the State and eligible federally-recognized tribal governments.

In promulgating the General Conformity Regulations in 1993, EPA published two sets of regulations: 40 CFR Part 51, subpart W (§§ 51.850 through 51.860) directed States to adopt and submit General Conformity SIPs to EPA for approval and 40 CFR Part 93 subpart B (§§ 93.150 through 93.160) provided the requirements for Federal agencies to follow in conducting their conformity evaluations before EPA approved the General Conformity SIP for the area. Section 40 CFR 51.851 directed States to adopt SIPs meeting the requirements of 40 CFR part 51, subpart W. The other sections in subpart W repeated the requirements found in 40 CFR part 93, subpart B. The EPA is deleting 40 CFR 51.850, and §§ 51.852 through 51.860 since those sections merely repeated the language in 40 CFR 93.150 and §§ 93.152 through 93.160 and is including a requirement in 40 CFR 51.851(a) that the General Conformity SIP or TIP, if adopted, must meet the requirements in 40 CFR part 93, subpart B.

In addition, EPA is restructuring § 51.851.

1. The EPA is dividing paragraph (b) of 40 CFR 51.851 into four paragraphs—(b), (c), (d), and (e):

a. Paragraph (b) now states that until EPA approves the General Conformity SIP, Federal agencies must meet the requirements of 40 CFR part 93, subpart B.

b. Paragraph (c) states that after EPA approves a SIP or TIP meeting the requirement of 40 CFR part 93, subpart B, or portion thereof, the Federal agencies must meet the requirements of the SIP or TIP and any other portions of 40 CFR part 93, subpart B if not contained in the approved SIP or TIP. In addition, paragraph (g) states that any conformity requirements in an existing implementation plan remain enforceable until the State submits and EPA approves a revision to the applicable State implementation plan to specifically remove the conformity requirements. Since there is no longer a requirement for SIPs to include conformity requirements and the applicable statutes do not grant EPA additional authorities to condition approval of a State's request to remove the General Conformity requirements from an implementation plan, it is EPA's intent, once requested by a State, to expeditiously review and approve implementation plan revisions that seek to remove General Conformity requirements.

c. Paragraph (d) contains the requirement that the SIP or TIP can be no less stringent than 40 CFR part 93, subpart B.

d. Paragraph (e) contains the requirement that the SIP or TIP can be no more stringent that the requirement in 40 CFR part 93, subpart B unless the provisions apply equally to non-Federal as well as Federal entities.

2. The EPA is adding a new provision in § 51.851(f), which allows States or Tribes to include in their SIP or TIP a list of actions that are "presumed to conform." For example, the State may identify the emissions from a certain type and size of construction activities that it presumes will conform.

Comment: Several commenters supported EPA's proposal to make the adoption and submittal of the General Conformity SIP optional. One commenter believed that the elimination of the conformity SIP requirement in § 93.151 leaves a gap regarding the enforcement of mitigation measures.

The commenter noted that under the language in the new provision, there is no State or Federal enforceability if the State withdraws its conformity SIP or otherwise fails to retain a requirement that written commitments to undertake and implement mitigation measures are obligations of the SIP. Another commenter supported the requirements for States to develop conformity SIPs.

Response: The EPA is revising its regulations to be consistent with the revised requirements of the CAA. In 2005, the CAA was revised to eliminate the requirement that a State must adopt a conformity SIP. If a State does not have a conformity SIP, then Federal agencies must conduct their evaluation under the requirements of 40 CFR

93.150–93.165. These requirements are essentially the same as the requirements contained in the conformity SIPs. Therefore, there would be little difference in the enforceability of the regulations. Mitigation measures are included in the SIP or TIP. A conformity SIP is not needed to include the mitigation measures in the SIP or TIP. They are included in the SIP to attain or maintain the ambient air quality standards. Section 93.160 has been changed by deleting the term "General Conformity Regulations" to ensure this fact is clear.

B. 40 CFR 93.150—Prohibition

Section 93.150 establishes the general prohibition against Federal agencies taking actions that do not conform with the SIP and requirements for the Federal agencies to make the conformity determinations following the procedures of subpart B of part 93. The EPA is making two revisions to § 93.150. First, EPA is deleting the language in paragraph (c) of that section and reserving that paragraph. Second, EPA is adding a new paragraph (e) to the section to State that if an action occurs in more than one nonattainment area, that each area must be evaluated separately.

In paragraph (c) of the 1993 regulations, EPA identified categories of actions that were not subject to the regulations based on environmental review for the action that was either completed or under way at the time the regulations were promulgated. The paragraph was based on the environmental reviews (either the conformity determination or the National Environmental Policy Act (NEPA) analysis) being completed in early 1994. Therefore, paragraph (c) was outdated and not necessary at this time.

In the new paragraph (e) in § 93.150, EPA is clarifying the regulations to State specifically that conformity determinations must be made for each nonattainment or maintenance area in which emissions from the Federal action occur. The emissions from most Federal actions or projects occur within one nonattainment or maintenance area; however, some actions or projects could extend across area boundaries, causing emissions in more than one area. A facility (for example, a national park, military installation or an airport) could be located in multiple counties or in multiple States. Emissions from an action at such facilities could extend across the nonattainment or maintenance area boundaries. Some Federal actions could result in direct or indirect emissions in non-contiguous areas, or even nationwide, that are above the *de minimis* thresholds and affect multiple nonattainment or maintenance areas. The 1993 regulations did not specify how actions or projects affecting multiple areas should be addressed. Therefore, EPA added paragraph (e) to state that an action's emissions in each area would be treated as if they result from separate actions.

The EPA clarified that emissions from actions be treated separately for each nonattainment and maintenance area for the following reasons:

1. Federal agencies demonstrate conformity to a SIP, TIP or FIP that are developed on an area-specific basis and SIP requirements may vary from one area to another.

2. The General Conformity Regulations exemptions are also area-specific. For example, the *de minimis* levels are based upon the type and classification of the nonattainment or maintenance area.

3. Section 176(c)(5) of the CAA limits the applicability of the conformity regulations to actions in nonattainment and maintenance areas. Therefore, actions, which affect broad regions encompassing several nonattainment, maintenance or attainment areas, must be evaluated based only on the portions of the emissions in the nonattainment and maintenance areas.

C. 40 CFR 93.151—SIP Revision

The main purpose of § 93.151 is to specify that the regulations in part 93 subpart B apply to Federal actions unless the State or Tribe adopts and EPA approves a General Conformity SIP or TIP for the area. The EPA did not change the purpose of the section, but is revising the section to clarify its wording. The 1993 regulations included statements about the stringency of the SIP compared to the requirements in subpart B of part 93. The EPA is deleting those statements because they duplicate statements in 40 CFR 51.851 which specifies the requirements for the SIP and TIP.

D. 40 CFR 93.152—Definitions

Section 93.152 provides the definition of terms used in the regulations. The EPA is revising 12 of the definitions, adding 11 new terms, and deleting one term, and clarifying the scope of an existing definition as follows:

Applicability analysis. The EPA is adding this new term to describe the process of determining if the Federal agency must conduct a conformity determination for its action.

Applicable implementation plan or applicable SIP. The EPA is making two minor revisions to the definition. First, EPA is correcting the citation for the SIP approval and second, EPA is clarifying the definition by adding a parenthetical phrase to clarify that the term includes an approved TIP. The requirements for eligible Tribes are found in 40 CFR 49.6.

Area-wide air quality modeling analysis. The EPA is clarifying this definition by making a minor wording change and by including photochemical grid model in the definition. Also, EPA is adding an example of the type of models that could be used for the area-wide air quality modeling analysis.

Caused by. The basic test established by the 1993 regulations' definition of "caused by" is that the emissions would not have occurred in the absence of the Federal action. Since the General Conformity Regulations were promulgated in 1993, EPA has interpreted the regulations to require a Federal agency to include construction emissions in its conformity analysis. The EPA believes that emissions from construction activities initiated, approved, or funded by a Federal agency meets this test and should be included in the conformity evaluation. Therefore, EPA is clarifying that construction emissions are part of the total direct and indirect emissions from an action.

Comment: In the January 8, 2008, proposal, EPA solicited comment on whether construction emissions in general or short-term construction emissions should be exempt from the regulations. In addition, EPA solicited comment on what should be considered short-term construction emissions (1 to 5 years). The majority of commenters on this issue objected to exempting construction emissions. They noted that construction emissions can contribute significantly to particulate matter (PM) exceedances, especially off-road vehicle emissions. Some believed that ignoring these emissions might drop a project below the *de minimis* threshold and result in unmitigated emissions and the exposure of local residents to significant levels of pollutants such as diesel exhaust. However, some commenters thought that construction emissions should be exempted. They noted that construction emissions only peak for a short time and that a disproportionate amount of time in the conformity process is spent on addressing very short-term construction-related emissions. They also pointed out that construction emissions are generally not included in NSR or Transportation Conformity evaluations. Of the commenters that thought construction emissions should be exempt, some thought they should be exempt for 5

years while others thought they should be exempt for only 2 years.

Response: The EPA agrees with the majority of commenters on this issue that construction emissions can contribute significantly to exceedances of the NAAQS, particularly exceedances of the PM standards. Unlike the construction activities associated with Transportation Conformity and NSR projects, construction activities associated with General Conformity actions vary widely in type. For example, General Conformity is concerned about localized impacts of the direct and indirect impacts of particular action or projects, as reflected in case-by-case analysis of emissions from specific actions, while Transportation Conformity is primarily concerned with the regional impacts of long-term use of the roads, as reflected in analysis of regional transportation processes, and secondarily concerned with short-term and localized impacts. Also, NSR specifically does not apply to emissions from mobile sources, which includes most construction equipment—no such restriction is found in General Conformity. Moreover, as explained above, EPA believes that emissions from construction activities initiated, approved, or funded by a Federal agency would not have occurred in the absence of the Federal action and thus meet the "caused by" definition included in the general conformity regulations. For these reasons, EPA believes that it is important that construction emissions should be considered as part of the General Conformity process. EPA also believes that other flexibilities in the revised rule will help with planning for, and addressing, construction emissions in the General Conformity process. These flexibilities include allowing alternative mitigation schedules and including construction emissions in a facility emission budget.

Also, EPA is clarifying that conformity is based on annual emissions. Therefore, Federal agencies should estimate construction emissions on an annual basis and would only have to demonstrate conformity of construction emissions during the years when the emissions occurred.

Confidential business information (CBI). In §§ 93.155 and 93.156, EPA is clarifying how CBI used in the conformity determination is to be handled. To support those provisions, EPA is adding a definition of CBI. The definition is based upon that used to define CBI under the Freedom of Information Act.

Conformity determination. The EPA is adding a new term to describe the decision that a Federal agency official makes in determining that the action will conform with the SIP, TIP or FIP.

Conformity evaluation. The EPA is adding a new definition to describe the entire conformity analysis process from the applicability analysis through the conformity determination, if necessary.

Continuing program responsibility. In the 1993 regulations, EPA used the term "emissions that a Federal agency has a continuing program responsibility for." That term was awkward and confusing. The EPA is shortening the term to the "continuing program responsibility" and reformatting the definition to make it clearer.

Continuous program to implement. This term was used in the 1993 regulations but was not defined. Therefore, EPA is adding a definition for this term. The definition would require the Federal agency to have a program to implement the action. That program can include a number of steps such as preparation of final design plans and can also allow for seasonal shutdowns. The definition includes a requirement that the action does not stop for more than 18 months unless such a delay is included in the original plans for the action.

Direct emissions. The EPA is revising the definition of direct emissions to include a requirement that the emissions must be reasonably foreseeable. This revision reflects EPA's policy as set forth in the July 1994 implementation guidance that direct emissions must be reasonably foreseeable. (General Conformity Guidance: Questions and Answers, USEPA, OAQPS, Page 6, Question 2, July 13, 1994).

Emission Inventory. This term is used but not defined in the 1993 regulations. Therefore, EPA is adding a definition of this term.

EPA. Since some States have Environmental Protection Agencies, EPA is adding "U.S." in the definition to clarify that the regulations refer to the U.S. Environmental Protection Agency.

Indirect emissions. EPA is revising the definition for indirect emissions to clarify that only indirect emissions originating in a nonattainment or maintenance area need to be analyzed for conformity with the applicable SIP. In addition, EPA is revising the definition of "indirect emissions" to clarify what is meant by "the agency can practically control" and "for which the agency has continuing program responsibility." This clarification represents EPA's long standing position that Congress did not intend for conformity to apply to "cases where, although licensing or approving action is a required initial step for a subsequent activity that causes emissions, the agency has no control over that subsequent activity, either because there is no continuing program responsibility or ability to practically control." (58 FR 63.214, 63.221, November 30, 1993). (General Conformity Guidance: Questions and Answers, USEPA, OAQPS, Page 6, Question 2, July 13, 1994).

Comment: One commenter believes that excluding emissions over which the Federal agency does not have continuing program responsibility is unlawful. The commenter believes that the original definition of "caused by" is practical because the conformity determination will be made in the context of an Environmental Impact Statement (EIS) for such major Federal projects and NEPA requires an assessment of the expected development and reasonably foreseeable impacts associated with such development. The commenter noted that if the agency with authority to approve these expansions lacks the continuing programmatic responsibility to control the use of facilities approved by the agency, then the proposed activity should not be approved.

The commenter believes that the proposed rule definition has the potential for allowing massive increases in emissions that is anticipated as a result of port expansions in some of the nation's most polluted metropolitan areas. The commenter also noted that the NEPA may also create authority to adopt environmental mitigation plans as part of an agency's programmatic responsibility.

Response: The exclusion of emissions over which the Federal agency does not have a continuing program responsibility is related to indirect emissions for the General Conformity analysis and does not affect the analysis required for NEPA review. EPA is not changing the requirements of that provision; EPA is only clarifying the language contained in it. Since 1993, the "indirect emissions" definition has been limited to those emissions for which "the Federal agency * * * will maintain control over due to continuing programmatic responsibility." Accordingly, EPA's reformatting of the language in this revision does not change the practical impact of this definition, and the commenter's suggestion that the definition should include emissions over which the Federal agency does not have control would greatly expand the program beyond what EPA believes that the law intended. In any event, since EPA did not propose to expand the program to

include emissions over which a Federal agency does not have control, it cannot go final with such an expansion in this rule.

Local air quality modeling analysis. The EPA is revising the definition to include an example of the type of models that are used in the local air quality modeling analysis.

Maintenance area. The EPA is making a minor wording change to clarify the definition by citing the regulations and the section of the CAA used to identify maintenance areas.

Metropolitan Planning Organization. The EPA is revising its regulatory definition to make it more consistent with the statutory definition in SAFETEA–LU, which was signed into law on August 10, 2005.

Mitigation measure. The 1993 regulations used the term "mitigation measure" and had a section specifying the requirements for a mitigation measure; however the regulations did not define the term. The EPA is defining a mitigation measure as a method of reducing emissions of the pollutant at the location of the action. This definition would distinguish a mitigation measure from an offset.

National ambient air quality standards. In 1997, EPA promulgated new NAAQS for both ozone and for fine particles. The definition in the 1993 regulations is broad enough to cover the new ozone standard, but the definition did not cover the fine particle standard known as $PM_{2.5}$. Therefore, EPA is revising the definition of NAAQS to include $PM_{2.5}$.

Precursors of criteria pollutants. The 1993 regulations define precursors for both ozone and PM–10. Since the $PM_{2.5}$ standard was promulgated after the General Conformity Regulations, the original regulations did not include the precursors for $PM_{2.5}$. EPA recently amended the regulations (July 17, 2006 at 71 FR 40420) to add $PM_{2.5}$ precursors, consistent with the proposed implementation program for the $PM_{2.5}$ standard (70 FR 65984). The EPA defined the precursors of $PM_{2.5}$ as follows:

1. Sulfur dioxide (SO_2) is a regulated pollutant in all $PM_{2.5}$ nonattainment and maintenance areas.[2]

2. Nitrogen oxides (NO_X) are regulated pollutants in all $PM_{2.5}$ nonattainment and maintenance areas unless both the State/Tribe and EPA determine that they are not.

3. Volatile organic compounds (VOC) and ammonia (NH_3) are not regulated pollutants in any $PM_{2.5}$ nonattainment or maintenance area unless either the State/Tribe or EPA determines that they are.

Reasonably foreseeable emissions. As discussed above, under "direct emissions," EPA is revising the term "direct emissions" to limit the emissions to those which can be reasonably foreseeable. Therefore, EPA is revising the term "reasonably foreseeable" to include "direct emissions."

Regionally significant action. As discussed in the revisions to 93.153(i) below, EPA is deleting the requirement that conformity determinations are required for actions that would normally be exempt if those actions are considered regionally significant. Therefore, EPA is deleting the definition of the term.

Restricted information. As discussed in §§ 93.155 and 156 on reporting and public participation, EPA is specifying how restricted information used in the conformity determination is to be handled. To support those revisions, EPA is adding a definition of restricted information. The definition is based upon applicable Executive Orders, regulations and statutes pertaining to materials and other information where disclosure is restricted by law.

Comment: One commenter requested that EPA state that emission data be specifically excluded for the definition of "restricted information."

Response: The EPA agrees that emission data generally can not be considered "restricted information." Under EPA policy emission data cannot be considered as "confidential business information." Only in rare circumstances where data are contained in documents classified as sensitive information to which access is restricted by law or regulation to particular classes of persons and a formal security clearance is required to handle or access the classified data would emission data from a government facility be "restricted information." In the situations where restricted information is used as part of the conformity evaluation, EPA will work with the appropriate Federal, State and tribal agencies to ensure an adequate review of the conformity evaluation.

Take or start the Federal action. The EPA is adding a new term to define the date when an action occurs or starts. This date is important in determining what, if any, conformity requirements apply when an area is designated or re-designated as nonattainment. The EPA is defining this term as the date the decision-maker signs a document such as a grant, permit, license or approval. Otherwise, EPA is defining the term as the date the Federal agency physically starts the action that requires the conformity evaluation.

Tribal implementation plan (TIP). The EPA is adding a definition for TIP to mean plans adopted and submitted by federally recognized Indian Tribes.

E. 40 CFR 93.153—Applicability Analysis

The EPA is clarifying the process of determining if the General Conformity requirements are applicable to a Federal action. Although EPA is providing clarification on actions that are exempt or "presumed to conform" in this regulation, nothing in this regulation is intended to interfere with any exemptions previously established by law.

1. The EPA is revising the title of the section to include the word "analysis." The EPA believes that adding the word would make the title more descriptive of the section's content.

2. The EPA is making technical changes to paragraph (a) of § 93.153. The technical correction in section 93.153(a) is to update the reference to the transportation conformity regulations. Section 93.153(a) currently states that the transportation conformity regulations are codified at 40 CFR part 51 subpart T, but EPA deleted transportation conformity criteria and procedures from 40 CFR part 51 subpart T a number of years ago. (62 FR 43779) Accordingly, section 93.153(a) has been revised to refer to the transportation conformity criteria and procedures now codified at 40 CFR part 93 subpart A.[3]

EPA is not finalizing the proposed changes to paragraph (b). Following proposal of changes to this paragraph EPA realized that the minor wording changes we had proposed (adding the word "criteria" before the word "pollutant" and "or precursor" after the

[2] While sulfur dioxide must be addressed in general conformity determinations for $PM_{2.5}$, sulfur dioxide is not required to be addressed in transportation conformity determinations before a SIP is submitted, unless either the State air agency or EPA regional office makes a finding that on-road emissions of sulfur dioxide are significant contributors to the area's $PM_{2.5}$ problem. Sulfur dioxide would be addressed in transportation conformity after a $PM_{2.5}$ SIP is submitted if the area's SIP contains an adequate or approved sulfur dioxide motor vehicle emissions budget. EPA based its decision regarding treatment of sulfur dioxide in transportation conformity on the *de minimis* amount of on-road emissions of sulfur dioxide now and in the future, and on the implementation of low sulfur gasoline beginning in 2004 and low sulfur diesel fuel beginning in 2006. (70 FR 24283).

[3] While we did not issue a proposal or provide an opportunity for public comment for this minor correction to the rule, we believe such actions are unnecessary because this minor revision in no way changes substantive conformity procedures described in the general conformity rule but merely updates the reference to the proper location of the transportation conformity regulations in the CFR.

word to clarify the paragraph) had been accomplished by changes made to this section in a July 17, 2006 regulatory action (71 FR 40426). Therefore, EPA is making no changes to this paragraph from the current regulatory language.

3. The EPA is revising the table in sub-paragraph (b)(1) to include all nonattainment areas in the Ozone Transport Region. In 1993, when the General Conformity Regulations were promulgated, all nonattainment areas in the Ozone Transport Region were classified pursuant to Table 1 in CAA section 181(a)(1) as marginal or above for the 1-hour ozone NAAQS. When EPA later designated areas for the 8-hour ozone NAAQS, some nonattainment areas were identified as needing to meet only the requirements in subpart 1 of Part D of Title I of the CAA and were not classified pursuant to Table 1. However, the decision to place certain areas only under subpart 1 was vacated by the decision in *South Coast Air Quality Management District* v. *EPA*, 472 F.3d 882 (DC Cir. 2006). Although there are currently no areas classified under subpart 1, the Court left open the door that EPA may be able to justify such action in the future. Accordingly, EPA is revising the table in § 93.153(c)(1) to ensure that the General Conformity requirements would apply to any area placed in the subpart 1 in the future by changing the classification from "Marginal and moderate non-attainment areas inside an ozone transport region" to "other non-attainment areas inside an ozone transport region."

4. The EPA is adding a new sub-paragraph (xxii) to § 93.153(c)(2) to clarify the exemptions for aircraft emissions above the mixing height for the area. Specifically, EPA is exempting aircraft emissions above the mixing height identified in the applicable SIP, TIP or FIP. Where the SIP does not contain a specific mixing height, EPA is establishing a default mixing height of 3000 feet AGL. In the January 2008 proposal, EPA had proposed to exempt all aircraft emissions above 3000 feet AGL.

Comment: Several commenters representing State and local air quality agencies objected to excluding the emissions from aircraft above 3000 feet above ground level. They noted that the mixing height varies and can be as high as 4,500 feet AGL during the ozone season and that pollutants emitted at middle and high altitudes can travel long distances. They also noted that pollution levels were below predicted levels following September 12, 2001 when aircraft were grounded.

Other commenters representing the airports and the airline industry supported the exemption emission from aircraft above 3000 feet AGL. They noted that the FAA study supports the conclusion that aircraft operations at or above 3,000 feet AGL have a minimal effect on ground level pollutant concentrations. The commenters also noted that flights over almost all major U.S. airports must be at least 7000 feet AGL; therefore, any commercial aircraft operating at 3000 feet would most likely either be landing or taking off. The commenters also noted that the FAA study concluded that any increase in ground level concentrations of CO and hydrocarbon (HC) due to mixing was negligible.

A Federal agency commenter believes that the exemption for air traffic control activities should not be restricted by altitude. The commenter noted that the proposal for exempting aircraft operations above 3,000 feet AGL is much narrower than what was presented in the preamble to the 1993 General Conformity rule as an example of an action that is exempt from the General Conformity requirements—"air traffic control activities and adopting approach, departure and enroute procedures for air operations."

Response: EPA agrees that the aircraft emissions above the mixing height do not significantly affect ground level concentrations and acknowledges that the mixing height can vary from one area to another. Accordingly, in those areas where the applicable SIP or TIP specifies a mixing height, EPA is requiring the specified mixing height to be used. However, in those areas where the SIP or TIP does not specify a mixing height, EPA is allowing the Federal agencies to use 3,000 feet AGL as a default mixing height. This conclusion is supported by the FAA study. In addition, 3,000 feet AGL is commonly used as an estimate of the average maximum afternoon mixing height across the country and most air quality models use 3,000 feet AGL as the default mixing height. However, we also note that the FAA study showed that some areas have mixing heights lower than 3,000 feet AGL, so we have added regulatory language to sub-paragraph (xxii) to allow Federal agencies to use a different mixing height if they can demonstrate that emissions at and above that height are *de minimis*. As a general matter, it is in the reasoned discretion of the Federal agency to decide which methods and analysis it will use when determining whether this exemption or any other provision applies to the emissions from its activity, including making an applicability determination under section 93.153(b), finding emissions result in no increase under section 93.153(c)(2), or concluding emissions are presumed to conform under section 93.153(f).

5. The EPA is revising paragraph (d)(1) of § 93.153 to exempt emissions covered by a NSR permit for minor sources. The 1993 regulations exempt emissions covered by a NSR permit for major sources but not for minor sources. EPA concluded at that time that the purposes of the General Conformity review would be adequately met by the major source NSR review, and that additional review would not be necessary. The EPA now believes that minor source NSR provides similar review, and that this approach will reduce the duplicate review of emissions under both minor source NSR and conformity programs and treat all NSR permitted emissions the same way. Accordingly, we are revising § 93.153(d)(1) to also exempt emissions covered by minor source NSR permits issued pursuant to the general permitting authority provided by section 110(a)(2)(c) of the CAA.

Comment: The majority of commenters agreed with the proposal to exempt stationary sources permitted under the NSR program. They believed the review to be redundant and unnecessary.

Some commenters disagreed with exempting minor sources. One commenter thought that EPA should not exempt activities with emissions less than the major source threshold from conformity review unless some basis can be established that the cumulative emissions from such sources are truly *de minimis* with respect to the statutory conformity tests. The commenter suggests that EPA substitute a SIP-based program for establishing a budget for minor sources in place of the regionally significant threshold. Several commenters suggested that only NSR permits which require offsets or are offset on a programmatic basis should be exempt from conformity. A few commenters thought that, if EPA exempts minor sources for the conformity evaluation, it must first clearly demonstrate that such exemptions will not impede States' ability to attain any standard.

Response: The EPA agrees that requiring a conformity analysis for emission covered by a minor source NSR permit would be redundant and provide little environmental benefit. EPA believes that the permitting authority has the responsibility to ensure that the source will not interfere with the SIP or otherwise interfere with the State's ability to attain the

standards. Minor source NSR permits are issued under a SIP-approved program, so there has already been a determination that the permitting program will not contribute to a violation of the NAAQS or delay the attainment or maintenance of the standards. Thus, by issuing a specific permit under that program, the authority is stating that the emissions are accounted for in the SIP, effectively providing the same assurances as a conformity determination since Federal agencies can demonstrate conformity for an action by showing that the actions will not cause a violation or interfere with the SIP.

6. The EPA is deleting "or natural disasters such as hurricanes, earthquakes, etc.," and "or disaster" from paragraph (d)(2) of § 93.153 because they are unnecessary words. In § 93.152 EPA defines an emergency; therefore the words in § 93.153 describing an "emergency" are not necessary and may be confusing since they do not include all types of emergencies.

7. The EPA is amending paragraph (e)(2) of § 93.153 to provide procedures for reviewing an extension of the exemption from making a conformity determination for actions related to responding to an emergency. A Federal agency, in responding to an emergency event such as a natural disaster, terrorist attack, military mobilization, or other situations (such as wildfire responses) that an agency determines fit within the definition of emergency found in § 93.152, may find it impractical to conduct a conformity evaluation on the action before it must take the action. To address this situation, 40 CFR 93.153(d)(2) of the 1993 regulations provides Federal agencies with a 6-month exemption from the requirement to undertake a conformity analysis for actions taken in response to an emergency. The EPA recognizes that in rare situations it may be impractical, even after 6 months, to conduct a conformity evaluation and is amending § 93.153(e) to allow the agencies to extend the exemption for another 6 months. This section requires Federal agencies to make a written determination that it is impractical to conduct an evaluation for the action. The 1993 regulations were not clear about the number of additional extensions permitted under § 93.153(e) nor do those regulations provide any procedures for agencies to follow in deciding on the extension.

The EPA is not revising requirements for the initial exemption for actions in response to emergencies. The initial governmental actions that are typically commenced within hours or days in response to emergencies or disasters would still be exempt from the General Conformity requirements for 6 months after the commencement of the response to the emergency or disaster. However, EPA is adding requirements for Federal agencies that want to extend the exemption beyond the initial 6-month period. First, EPA is requiring the Federal agencies to allow EPA and the State 15 days to review and provide comments on the draft written determination to extend the exemption at the beginning of the extension period. Next, EPA is requiring Federal agencies to publish a notice within 30 days of making the extension decision. The notice must be published in a daily general circulation newspaper for the affected area. Finally, EPA is limiting the maximum number of 6-month extensions an agency may declare without additional documentation on their own to three. Thereafter, the revisions require that the agency must provide additional information concerning the emergency conditions to EPA and the State or Tribe.

8. The EPA is revising paragraphs (f), (g), and (h) of § 93.153 to provide Federal agencies clear guidance in developing their list of actions that are "presumed to conform" and provide requirements for the materials that must be included in the documentation and draft list. Specifically, EPA is adding wording to paragraph (f) to specify when and how more than one "presumed to conform" exception may be taken for a Federal action; adding a new paragraph (g)(3) to specify that Federal agencies can list actions that are for individual areas or SIPs or TIPs; adding a sentence to paragraph (h)(1) to specify the information that must be included in the documentation; and adding a sentence to paragraph (h)(2) to allow the Federal agencies to notify EPA headquarters when the "presumed to conform" actions would have multi-regional or national impacts. In addition, EPA is revising paragraphs (f) and (h) to include a reference to the new paragraph (g)(3).

In promulgating the existing regulations, EPA allowed a number of actions that were "presumed to conform." The regulations also allow Federal agencies to establish their own lists of actions that are "presumed to conform" with applicable SIPs and TIPs. Under the 1993 regulations, Federal agencies must justify the inclusion of the actions on their "presumed to conform" list by either demonstrating: (1) That the actions will not cause or contribute to an air quality problem or otherwise interfere with the SIP, TIP, or FIP, or (2) that the actions will have emissions below the *de minimis* levels. The Federal agencies must provide copies of the proposed list to EPA, affected State and local air quality agencies and MPOs. In addition, the agencies must provide at least a 30-day public comment period and document its response to all comments. The notice of the proposed and final list must be published in the **Federal Register.**

The EPA is adding sub-paragraph (g)(3) to clarify that a presumption could apply to one facility or for facilities in a specified area and does not have to be nationally applicable. For example, if the nonattainment area's SIP includes a sector emission budget for construction activities, a facility in that area may be able to demonstrate that construction activities of a certain size or type fits within the SIP's emission budget. With the concurrence of the State or Tribe, the Federal agencies could publish a "presumed to conform" list that includes the construction activity emissions that are specific to a facility.

9. The EPA is deleting the regionally significant test included in paragraph (i) of § 93.153. The existing regulations in § 93.152 define "regionally significant" as "a federal action for which the direct and indirect emissions of any pollutant represent 10 percent or more of a nonattainment or maintenance area's emissions inventory." 40 CFR 93.153(i) and (j) require conformity determinations for all regionally significant actions, regardless of any exemptions or presumptions of conformity based on other provisions in the regulations.

Comment: Some commenters supported deletion of the regionally significant provision noting that it is unnecessary, not helpful in determining whether a Federal action will conform to the SIP, and is an administrative burden. Other commenters believed that the provision should be retained or strengthened or a more appropriate percentage of the area's inventory be used for the test. Some commenters also pointed out that in light of the new $PM_{2.5}$ and 8-hour ozone standards, certain Federal projects might become "regionally significant" in the near future.

Response: EPA agrees that the determination of whether actions with emissions below the *de minimis* emission levels are regionally significant has been a burden to some Federal agencies with little or no environmental benefit. Analysis discussed in the proposal showed that the emission inventory for most nonattainment and maintenance areas well exceeded the ten times the *de*

minimis emission levels for the area, such that no emissions could actually be regionally significant. Although several commenters question whether the regionally significant test might be important for the new $PM_{2.5}$ and 8-hour ozone standards, they presented no information to show that the *de minimis* emission levels would exceed 10 percent of the inventory for potential nonattainment areas for those standards.

10. In a revised paragraph (i) of § 93.153, EPA allows installations with a facility-wide emission budget to presume that an action at the installation will conform provided that the emissions from that action along with all other emissions from the facility will not exceed the budget. A more detailed discussion of the facility-wide emission budget concept is found in § 93.161.

11. Also in § 93.153(i), EPA identified emissions from a prescribed fire conducted under an approved smoke management program as "presumed to conform." In the January 2008 proposal, EPA asked for comments on two options for allowing a presumption of conformity for prescription fires. Option 1 would have allowed Federal agencies to presume that the emissions from prescribed burns will conform provided the burning is conducted under a State certified approved SMP or an equivalent replacement EPA policy. Option 2 would have also allowed Federal agencies, in the absence of a certified SMP, to presume that emissions from prescribed burns will conform provided they obtain written permission from the State and use BSMP.

Comment: The EPA received many comments in support of the second option, which allows Federal agencies to determine, in absence of a certified SMP, that prescription fires conducted using BSMP are considered "presumed to conform" to the SIP. Some commenters noted that to be consistent with the "Treatment of Data Influenced by Exceptional Events" rule (72 FR 13559, March 22, 2007), if the State does not certify a SMP, the exemption should be for burns using State approved BSMP. Many commenters also supported the first option, noting that it was reasonable to assume that any action conducted in compliance with the certified SMP would be in compliance with the SIP. One commenter thought that the presumption of conformity for burns conducted under BSMP is not acceptable because BSMP are in no way connected to air quality and will not ensure that resulting emissions from a prescribed burn would conform to the SIP. This commenter also noted that the use of SMP may be acceptable, but EPA has not yet issued its final wildland fire policy. Another commenter suggested that if prescribed burns under certified SMP or a BSMP are "presumed to conform," there needs to be a simple way to flag the data from affected monitors. Numerous commenters recommended that the definition of emergency include wildfires.

Response: After considering the various practices and the comments received, the EPA believes option 1 presented in the proposed rule is more protective of the air quality than option 2. However, we also recognize that prescribed fires employing BSMPs may be able to meet a presumption of conformity if such a presumption is established by an agency following the requirements of 93.153(g) or by a State following the requirements of 51.851(f). Under option 1, prescribed fires conducted in compliance with a SMP are "presumed to conform." The purpose of an SMP is to mitigate nuisance smoke and public safety hazards, prevent NAAQS violations, protect public health, and address visibility impacts in Class I areas. EPA also notes that SMPs establish procedures and requirements for minimizing emissions. EPA recognizes that prescribed burns employing BSMPs may be as protective of air quality in areas where no SMP exists. BSMPs can be connected to air quality and may protect air quality as outlined in the "Treatment of Data Influenced by Exceptional Events" rule. In order to assure the adequacy of the BSMPs to meet the legal requirements of the General Conformity program as outlined in section 176, Federal agency developed BSMPs must be publicly and State reviewed as part of a presumed to conform action under section 93.153(g) or 51.851(f) of these regulations to establish such a presumption. Because the EPA chose not to require the certification of the SMP under the final "Treatment of Data Influenced by Exceptional Events" rule, EPA is also removing the term "certified" from this final General Conformity Rule. Finally, EPA has identified wildfire response as an example of an emergency event that may be exempt from General Conformity requirements under 93.153 (d)(2) and (e) if that agency determines it fits within the definition of emergency found in § 93.152.

12. As discussed above, EPA also added a provision in § 93.153(i) to allow a State or Tribe to adopt in their SIP or TIP a list of actions it "presumes to conform."

13. The EPA is revising paragraph (j) of § 93.153 by deleting the reference to regionally significant emissions, by adding a reference to paragraph (i) and by describing the criteria for requiring a conformity determination for an action that otherwise would be "presumed to conform." The 1993 regulations state that an action cannot be "presumed to conform" if it was regionally significant or did not in fact meet the requirements of sub-paragraph (g)(1). As discussed above, EPA has deleted the regionally significant test, therefore reference to it is has been deleted from this paragraph. For clarity, instead of referring to sub-paragraph (g)(1), EPA is repeating the requirements in this paragraph.

14. The EPA is revising paragraph (k) of § 93.153 to incorporate the provisions of section 176(c)(6) of the CAA. (42 U.S.C. 7506(c)(6)). In November 2000, Congress added section 176(c)(6) to the CAA to allow for a conformity grace period for newly designated nonattainment areas (Pub. L. 106–377). That section establishes a 1-year grace period following the effective date of the final nonattainment designation for each new or revised NAAQS before the conformity requirements must be met in the area. If an agency takes or starts the Federal action before the end of the grace period, it must comply with the applicable pre-designation conformity requirements. If an agency takes or starts the Federal action after the end of the grace period, it must comply with the post-designation conformity requirements. As discussed above in describing the new term "take or start the federal action," EPA is defining the term to mean that a Federal agency takes an action when it signs a permit, license, grant or contract or otherwise physically starts the Federal action. From the time that an area is designated as nonattainment, agencies will have a year to take or start the Federal action. If the agency fails to take or start the Federal action during the grace period, then it must re-evaluate conformity for the project based on the requirements for the new designation and classification.

F. 40 CFR 93.154—Federal Agencies Responsibility for a Conformity Determination

1. The EPA is revising the title of this section to clarify the purpose of the section. In the 1993 regulations this section is entitled broadly "Conformity Analysis." Since the short section only discusses the requirement for each Federal agency to make its own determination, EPA is revising the title of the section to more closely describe the section's content.

2. The EPA is adding language to this section to specifically state that the

conformity determination must meet the requirements of this subpart.

G. 40 CFR 93.155—Reporting Requirements

1. Since EPA is adding additional sections to subpart B, it is revising the references to those sections in § 93.155.

2. Consistent with EPA's Tribal Authority Rule (63 FR 7253), EPA is providing federally-recognized Indian tribal governments the same opportunity to comment on draft conformity determinations as given to States. Therefore, EPA is requiring the Federal agencies to notify all the federally-recognized Indian tribal governments in the nonattainment or maintenance area.

3. The EPA is adding an alternative procedure for notifying EPA when the action would result in emissions originating in nonattainment or maintenance areas in three or more EPA regions. Specifically, EPA is allowing agencies to notify the EPA Office of Air Quality Planning and Standards rather than each individual regional office. A single contact point for EPA should be more efficient for the other Federal agencies than notifying up to 10 regional Offices. This final notification provision also corrects an inconsistency between the proposed rule preamble and the proposed regulation, which stated that the EPA Office of Air Quality Planning and Standards could be contacted when the action would result in emissions originating in nonattainment or maintenance areas in two or more EPA regions.

4. The EPA is adding a new paragraph to § 93.155 to describe how restricted information used to support conformity determinations should be handled when provided to EPA, States and Tribal governments. The 1993 General Conformity Regulations do not contain an explicit statement about protecting restricted information from public release. The interagency review and public participation provisions in the 1993 regulations require Federal agencies to make available for review the draft conformity determination with supporting materials that describe the analytical methods and conclusions relied upon in making the determination. Disclosure of classified information by a Federal employee is a criminal offense (18 U.S.C. 1905). In addition, certain unclassified information is privileged or otherwise protected from disclosure. Therefore, several Federal agencies wanted to ensure that the General Conformity Regulations clearly state that no agency or individual was required to release restricted information including, but not limited to, classified materials. Therefore, EPA is revising the regulation to add explicit language concerning the protection of restricted information. In addition, conformity determinations could, in part, be based upon restricted information. The EPA is adding specific language to the regulation to protect restricted information in accordance with each Federal agency's policy and regulations for the handling of restricted information. The regulations would allow State or EPA personnel with the appropriate clearances to be able to view the restricted information.

H. 40 CFR 93.156—Public Participation

1. The EPA is correcting the section referenced in § 93.156. The 1993 regulations refer to § 93.158. The correct reference should be § 93.154. Section 93.158 prescribes the criteria for conducting a conformity analysis, while § 93.154 requires Federal agencies to make the determination and references the requirements in the other sections of subpart B.

2. The EPA is providing an alternative public notification procedure for actions that cause emissions above the *de minimis* levels in three or more EPA regions. This corrects a mistake made in the proposed rule preamble that stated, "EPA is proposing to provide an alternative public notification procedure for actions that cause emissions above the *de minimis* levels in more than three nonattainment or maintenance areas." In addition, this corrects an inconsistency with the proposed regulation, which stated that the alternative public notification procedure is for actions that have multi-regional or national impacts in two or more regions. The 1993 regulations require that the Federal agency publish a notice in a daily newspaper of general circulation in the nonattainment or maintenance area. Some Federal actions affect a large number of nonattainment and maintenance areas. The notification procedure for such an action could be burdensome and inefficient. Therefore, EPA is amending the rules to allow the Federal agencies to publish a notice in the **Federal Register** if the action would cause emissions above the *de minimis* levels in three or more nonattainment or maintenance areas.

3. The EPA is adding a new paragraph to § 93.156 to describe how restricted information and CBI used to support conformity determinations should be handled in providing the information to the public.

I. 40 CFR 93.157—Re-Evaluation of Conformity

1. The EPA is revising the title of this section to more appropriately describe the section's content. The 1993 regulations section is entitled, "Frequency of Conformity Determinations." That title implies that the General Conformity requirements for Federal actions must be reevaluated on a regular basis. However, the section states that conformity must be reevaluated only if the determination lapses or the action is modified, resulting in an increase in emissions.

2. If an action's emissions are below the *de minimis* levels or the action is not located in a nonattainment or maintenance area, a conformity determination is not required. Therefore, the Federal agency would not have a date for the conformity determination to use in determining if reevaluation is required. The EPA is making minor wording changes in paragraphs (a) and (b) to clarify that the date of a completed NEPA analysis, as evidenced by a signed finding of no significant impact (FONSI) for an environmental assessment, a record of decision (ROD) for an environmental impact statement, or a record of a categorical exclusion, can be used when a conformity determination is not required.

3. The EPA is adding a new paragraph (d) to § 93.157 to clarify the requirements for needing to conduct a conformity determination when the action is modified. Paragraph (d) deals with modifying an action for which the Federal agency made a conformity determination. In order to make the original determination, the Federal agency had to demonstrate that all the emissions caused by the initial action conformed to the SIP. Since conformity determinations are only needed for emissions that exceed the *de minimis* levels, EPA has clarified in the rule that the Federal agency does not have to revise its conformity determination unless the modification would result in an increase that equals or exceeded the *de minimis* emission levels for the area. Paragraph (d) also deals with modifying an action that the Federal agency determined had emissions below the *de minimis* level. Since the emissions from the unmodified action were determined to be *de minimis* and not fully evaluated to determine conformity, EPA is requiring Federal agencies to conduct a conformity determination for the modified action if the total emissions (the emissions from the unmodified action plus the increased emissions resulting from the modification) equal

or exceed the *de minimis* levels for the area. Thus, in both situations, all emissions that exceed *de minimis* levels are evaluated for conformity impacts, either initially or after modification.

J. 40 CFR 93.158—Criteria for Determining Conformity for General Federal Actions

1. In § 93.158(a)(1), EPA is adding "or precursor" after "any criteria pollutant" to clarify that Federal agencies must demonstrate conformity for the precursors of the criteria pollutants if the precursor emissions are specifically identified and accounted for in the applicable SIP, TIP or FIP.

2. In § 93.158(a)(2) and (a)(5)(iii), EPA is allowing Federal agencies to obtain emission offsets for the General Conformity requirements from a nearby nonattainment or maintenance area of equal or higher classification, provided that the emissions from the nearby area contribute to the violations of the NAAQS in the area where the Federal action is located or, in the case of a maintenance area, the emissions from the nearby area have contributed in the past to the violations in the area where the Federal action is located. The regulation requires such emissions offsets to be obtained through either an approved SIP revision or an equally enforceable commitment.

Comment: Commenters representing Federal agencies, industry groups and some State air quality agencies supported the provision to allow offsets from nearby nonattainment or maintenance areas. Some of these commenters suggested that additional limits could be imposed on the use of the out-of-area offsets. Several commenters representing State air quality agencies opposed the allowing of offsets from other areas. The commenters noted that EPA regulations and Federal court rulings limit the area from which emissions reductions can be creditable for attainment demonstrations. They also opposed allowing offsets because conformity generally applies to mobile source emissions that are different from stationary source emissions covered by NSR.

Response: The EPA agrees that offsets should be allowed in nearby nonattainment areas in the same manner as they are allowed under the NSR program. We agree with the commenter that EPA regulations and judicial rulings place limits on the area from which emissions reductions can be creditable for attainment demonstrations. The intent of those limits is to ensure that the emissions from the nearby nonattainment area contribute to the violations, or have contributed to violations in the past, in the area in which the Federal action takes place. This is consistent with the overall revisions to this regulation. Therefore, we are also recommending that Federal agencies show that they have met the requirements of § 93.158(a)(2)—that the emission offsets originate from an area that contributes to the violations, or have contributed to violations in the past, in the areas with the Federal action—by using the same techniques EPA has approved by rule or guidance for demonstrating contributing emissions in other SIP-related determinations, such as Reasonable Further Progress, Rate of Progress, or Attainment Demonstrations for a particular pollutant or pollutant precursor. By limiting the offsets to areas that contribute or have contributed to the nonattainment, EPA is narrowing the potential offsets to areas that will result in a benefit to the nonattainment or maintenance area in which the Federal action will take place.

3. In § 93.158(a)(2), (a)(3) and (a)(4), EPA is revising the regulations to address the precursors of $PM_{2.5}$. The EPA does not believe that the current models are adequate to reasonably predict the project level impact of individual precursor sources of ozone or $PM_{2.5}$. Therefore, EPA is allowing Federal agencies to use modeling to demonstrate conformity only for directly emitted pollutants. Precursors of $PM_{2.5}$ will be treated the same as precursors of ozone and direct emissions of $PM_{2.5}$ will be treated the same as CO and PM–10 for purposes of identifying available tests to demonstrate conformity.

4. In § 93.158(a)(3) and (5), EPA is correcting two typographical errors. In sub-paragraph (3), EPA is correcting "meet" to "meets" and in sub-paragraph (5), EPA is changing "paragraph (a)(30)(11)" to "paragraph (a)(3)(ii)."

5. In § 93.158(a)(5)(iv)(A)(1), EPA is deleting the reference to the year 1990 and replacing it with a generic reference to the most current calendar year with a complete emission inventory available before an area is designated unless EPA sets another year. In addition to requiring the conformity regulations, the CAA Amendments of 1990 required the designation of areas as nonattainment based on the existing air quality data. Therefore, when EPA promulgated the 1993 regulations, all the designations were based on a 1990 date. Since EPA promulgated the conformity regulations, it has promulgated new 8-hour ozone and $PM_{2.5}$ standards and designated a number of areas as nonattainment. By changing the regulations to reference the date when the area was designated as nonattainment, EPA is allowing for the General Conformity regulations to address these new designations and any future designations through identification of appropriate inventory levels. In addition, including the option to allow EPA to set another year for the baseline allows EPA and other Federal agencies to work together to determine if another baseline may be appropriate for determining conformity of a particular action, such as determining that an agency can rely on one specific baseline year for an action subject to both the general and transportation conformity regulations when those regulations otherwise indicate application of two different baseline years.

6. Also in § 93.158(a)(5)(i), EPA is revising the paragraph to allow Federal agencies to make conformity determinations based upon a State's or Tribe's determination that the emissions from the action along with all other emissions in the area would not exceed the emission budget in the applicable SIP or TIP. Under the 1993 regulations, States could only make such a determination if they had an approved attainment demonstration or maintenance SIP. This revision would allow the State or Tribe to make its determination based upon a post-designation applicable SIP or TIP even though the plan does not include an attainment demonstration. For example, the State or Tribe could base their determination on an emission budget in an EPA-approved "Reasonable Further Progress" plan. By adopting the budget and submitting it as part of the SIP or TIP, the State or Tribe is treating the Federal action like any other source in the area. When the State or tribal agency adopts the attainment or maintenance SIP or TIP, it will have to consider the emissions from the Federal action, and if necessary require additional controls on the sources as necessary to meet air quality needs.

7. The EPA is revising § 93.158(a)(5)(i)(C) to allow the State or Tribe to commit to including the emissions from the Federal action in future SIPs. Under the 1993 regulations, Federal agencies can demonstrate conformity by having the State commit to revising the applicable SIP to include the emissions. If a State or Tribe agrees to such a commitment, the State or Tribe must submit a SIP revision within 18 months to include the emissions from the action and to make other necessary adjustments in the SIP to accommodate those emissions. However, the existing SIP or TIP (or a SIP or TIP required to be submitted in

18 months) may not cover the same timeframe covered by the conformity determination. For example, a SIP for a nonattainment area that demonstrates attainment may only cover the period until the attainment date while the conformity determination may cover emissions for many years beyond that date. The State or Tribe may be submitting future SIPs or TIPs to address either maintenance of the standard or to address a continuing nonattainment problem that would cover the time period of the emissions. The revision to § 93.158(a)(5)(i)(C) would continue to require States to revise the SIP within 18 months of the conformity determination based upon a State's or Tribe's commitment. However, if the existing SIP or TIP (or a SIP or TIP due within 18 months) does not cover the time period of the emissions, then the State or Tribe will submit a SIP revision that includes an enforceable commitment to account for the emissions in future SIP revisions. This approach will allow States and Tribes flexibility in committing to include the emissions from the Federal action in the SIP covering the relevant time period.

8. The EPA is revising § 93.158(a)(5)(iv) to delete the use of 1990 as the baseline year. As discussed above, when EPA promulgated the existing General Conformity Regulations in 1993, the designations and classifications were based upon the 1990 air quality and emissions. Since 1993, EPA has promulgated new standards and designated additional areas as nonattainment. Therefore, in many cases the 1990 date for the baseline emission inventory is inappropriate. The EPA is setting the baseline year as the most current calendar year with a complete emission inventory available before an area is designated unless EPA sets another year. As noted above, including the option to allow EPA to set another year for the baseline allows EPA and other Federal agencies to work together to determine if another baseline may be appropriate for determining conformity of a particular action.

Finally, EPA is deleting another alternate baseline year that no longer is applicable in PM–10 areas. Specifically, EPA is deleting in § 93.158(a)(5)(iv)(A)(3) the use of the "year of the baseline inventory in the PM–10 applicable SIP." EPA believes that the deletion of this outdated baseline year should not affect current General Conformity determinations in PM–10 nonattainment and maintenance areas.

K. 40 CFR 93.159—Procedures for Conformity Determinations for General Federal Actions

1. EPA is changing § 93.159(b)(1)(ii) to address when new motor vehicle emissions factors models are used in General Conformity determinations. EPA is clarifying that the grace period before such new models are used will be 3 months from EPA's model release, unless a longer grace period is announced in the **Federal Register.** This is more consistent with 40 CFR 93.111 of the transportation conformity rule that allows grace periods for new motor vehicle emissions factor models to be between 3–24 months.

2. The EPA is revising § 93.159(b)(2) and (c) to update the reference to the Compilation of Air Pollutant Emission Factors and the Guideline on Air Quality Modeling. EPA has released updated versions of these documents since it promulgated the existing regulations in 1993.

3. The EPA is revising paragraph (d)(1) to clarify that analysis is first required for the attainment year specified in the SIP. In some cases, such as SIPs for marginal ozone areas, an attainment demonstration date was not required in the SIP. Therefore, EPA is requiring that if the SIP or TIP does not specify an attainment demonstration year then the analysis is conducted for the latest attainment year possible under the CAA. Since the CAA requires the SIP demonstrate attainment as expeditiously as possible but no later than the CAA mandated attainment date, it is possible that a SIP or TIP could have an earlier attainment date. That earlier date if specified in the SIP would be the appropriate year for the conformity analysis.

4. The EPA is making a minor wording revision to paragraph (d)(2) to clarify the paragraph. The EPA is replacing the word "farthest" with "last." The maintenance plans are developed for a 10-year period and revised as necessary for the next 10-year period. The purpose is for conformity to be evaluated for the last year of the maintenance plan. The word "last" conveys that meaning.

L. 40 CFR 93.160—Mitigation of Air Quality Impacts

The EPA is revising paragraph § 93.160(f) to clarify its meaning. The regulations were meant to require that the mitigation measures include a written commitment from the person or organization reducing the emissions and that those commitments must be fulfilled. EPA is adding text to state that those commitments must be fulfilled to clearly provide for enforcement of those commitments under the Federal regulations.

M. 40 CFR 93.161—Conformity Evaluations for Installations With Facility-Wide Emission Budget

The EPA is adding a new section to the regulations to facilitate the use of a facility-wide emission budget in evaluating conformity. Although the existing regulations do not preclude States and Federal agencies from using this approach, the regulations do not specifically authorize its use. This section for developing such a budget would be in conjunction with a new § 93.153(i)(1), which provides a mechanism for demonstrating that the emissions are in conformance with the SIP or TIP. This approach allows States or Tribes and Federal agencies to identify acceptable levels of emissions from the facility for inclusion in the SIP before starting the environmental review for the actions and thereby expedite the review of the Federal actions at the facilities that do not exceed the emission levels.

The EPA believes that this provision would encourage the State, Tribe or local air quality agency and the Federal facilities to develop an upfront emission budget for the facility, and the action or project environmental review would be streamlined as long as the facility remains within an established budget.

The development and use of a facility-wide emission budget would be voluntary on the part of the Federal agency, State, Tribe and local air quality agency. No party would be required to participate. If the parties agreed to participate, an emission budget would be established based upon specific guidance and documented growth projections for the facility, and adoption of that budget into a SIP or TIP would demonstrate that the area could meet its air quality obligations with the identified emission budget.

Comment: The majority of commenters supported the concept of the facility-wide emission budget approach with the appropriate consultation and input from the States. Many noted that it will not interfere with attainment of the NAAQS. However, some commenters disapproved of the budget approach and expressed concern about a Federal agency/airport being allowed to establish their own budget without having to do additional analysis.

While generally agreeing with the approach, many commenters asked EPA for clarifications. Several commenters asked for clarification in the final rule that this is voluntary for both the

Federal agency and the States and the States can opt to use the existing General Conformity approach. In addition, some commenters asked EPA to include provisions requiring such measures as periodic reporting of emissions, anti-backsliding, and a requirement to obtain offsets if the budget is exceeded. Another commenter requested that on-site pollution prevention projects be required to occur contemporaneously with any proposed emission changes at the facility. Many commenters requested that EPA clarify the applicability of this provision to non-Federal facilities (*e.g.*, airports).

Response: The EPA agrees with most of the commenters that the facility-wide emissions budget approach will not interfere with attainment of the NAAQS and will provide flexibility to the facilities in meeting the General Conformity requirements. EPA believes that this approach benefits both the air regulatory agencies and the regulated facilities. State air quality agencies would benefit by having better emission estimates, including growth estimates from the installation and Federal agencies would benefit by having the General Conformity process streamlined, reducing the amount of time it takes to demonstrate conformity. EPA is clarifying in the final rule that this approach is completely voluntary by both the State and the Federal agency. If the State or Tribe agrees to allow the facility to use the emission budget approach, it must ensure that the budget that it approves meets all applicable air quality requirements such as attainment deadlines and reasonable further progress milestones. Thus, in developing and approving such budgets, we encourage the facilities and the State or Tribe to consult with other agencies or authorities as may be appropriate. For example, we encourage consultation with the local MPO if a facility-wide emissions budget includes on-road mobile emissions that might also be included in an MPO's regional emissions analysis.

While the State or Tribe must approve a facility-wide budget into the SIP or TIP, once they have done so they cannot compel an agency to demonstrate conformity with another approach if the Federal agency chooses to show conformity with the approved facility-wide emission budget. Federal agencies may use any approach to demonstrate conformity provided for in the rule. Facilities that are not federally controlled or operated, but are subject to Federal approvals, permits or funding (such as airports and seaports) may work with the State to establish facility-wide emissions budget that can be used by a Federal agency to satisfy its General Conformity responsibilities. The approval by the State of a facility-wide emissions budget into the SIP does not relieve the State of any obligation to meet any SIP or CAA requirements, milestones or deadlines.

N. 40 CFR 93.162—Emissions Beyond the Time Period Covered by the Applicable SIP or TIP

The EPA is adding a new section to address how Federal agencies can demonstrate conformity for an action that causes emissions beyond the time period covered by the SIP or TIP. First, EPA is allowing Federal agencies to demonstrate conformity using the last emission budget in the SIP or TIP. If it is not practicable to demonstrate conformity using that technique, then the Federal agency can request the State or Tribe to provide an enforceable commitment to include the emissions from the Federal action in a current or future SIP or TIP emissions budget. In such a case, the State or Tribe would be required to submit a SIP revision within 18 months to either include the emissions in the current SIP or TIP or a commitment to account for the emissions in future SIPs or TIPs. The emissions included in the future SIP should be based on the latest planning assumptions at the time of the SIP revision. Although a State is committing to include the emissions in the emissions budget for the SIP revisions, this commitment does not prevent the State from requiring the use for the affected sources of reasonably available control technology (RACT), reasonably available control measures (RACM) or any other control measures within the State's authority to ensure timely attainment of the NAAQS.

O. 40 CFR 93.163—Timing of Offsets and Mitigation Measures

Mitigation measures and offsets are used to reduce the impact of emission increases from a project or action. To alleviate the impact of the project's emissions, the emissions reductions from offsets or mitigation measures should occur at the same time as the emission increases from the project. In general, EPA has interpreted the existing regulations to mean that the reductions must occur in the same calendar year as the emission increases caused by the action because the total direct and indirect emissions from an action are collated on an annual basis. Therefore, EPA has decided to include this interpretation in the regulations.

The EPA is adding a new section to address the timing of offset and mitigation measures. First, the section generally requires that the emission reductions for the offset and mitigation measures must occur in the same calendar year as the emission increases caused by the Federal action and that the reductions are equal to the emissions increases. As an alternative, the new section would allow, under special conditions and consistent with CAA requirements, the State or Tribe to approve other schedules for offsets or mitigation measures. EPA is requiring that emissions reductions used over an alternate schedule must be consistent with statutory requirements that new violations are not created, the frequency or severity of existing violations are not increased, and timely attainment or interim milestones are not delayed. Therefore, when a State or Tribe approves an alternative schedule for emissions reductions, it is assuring that the increased emissions that occur during the period of the Federal action do not violate any of the three Clean Air Act requirements described above.

To ensure that these non-contemporaneous emission reductions provide greater environmental benefits in the long term, EPA is requiring that the offset or mitigation ratios for alternative schedules be greater than one-for-one. Therefore, EPA is requiring a ratio that is no less than the applicable NSR offset ratios for the area. These ratios are readily available and already understood to be based on the severity of the nonattainment problem for the area.

Also, EPA believes that the mitigation or offset compensation period should not last indefinitely and is requiring that the period should not exceed two times the period of the under-mitigated emissions. For example, a Federal agency may be supporting a construction project lasting 3 years in a serious nonattainment area and that project will cause 150 tons per year of increased emissions; the State or Tribe can approve mitigation measures or offsets which reduce emissions by less than 150 tons per year provided the total reduction over a 6-year period is equal to or more than 540 tons (150 tons per year times 3 years equals 450 tons times the offset/mitigation ratio of 1.2 to 1 for serious nonattainment areas equals 540 tons).

Agreeing to allow the use of offsets or mitigation measures in later years does not exempt the State or Tribe from timely meeting any of its SIP or TIP obligations, such as reasonable further progress milestones or attainment deadlines. Emissions reductions which accrue beyond the compensation period should be properly reflected in the SIP or TIP, *e.g.*, through a SIP revision.

Comment: Several commenters representing Federal agencies, industry and airports supported the flexibility in the timing of offsets and mitigation measures. The commenters believe that EPA needs to clarify what entity would determine whether the alternative time period for mitigation would trigger the three statutory factors for conformity and how such entity would do so. One commenter recommended that the State or tribal agency responsible for the SIP be the appropriate entity. Another commenter requested that EPA clarify the use of emission reduction credits in such cases. In addition, a commenter urges EPA to reduce the offset ratios to no more than 1.2:1 in extreme nonattainment areas and to provide a fixed period of time for completing the emissions reductions recommending a 5-year compensation period to be included in the rule.

Some commenters representing State and local air quality agencies objected to the alternate schedule provision for offsets. The commenters believe that mitigation measures and offsets must be contemporaneous and occur in the same calendar year as the emission increases. If EPA adopts the provision, the commenters suggested additional limitation on the use of the alternative schedule, such as a 3-year maximum time limit for the schedule and requiring more than a one-for-one offset.

Response: The EPA believes the rule should be finalized as proposed. This will allow Federal agencies to work with States or Tribes to develop an alternative schedule for the emission reductions in cases where a greater environmental benefit can be obtained. The requirement for the additional reductions to meet the ratios in the regulations ensures that the area is receiving at least a minimum environmental benefit consistent with other CAA programs. Since State or tribal approval is required for the alternative schedule, those agencies have the ability to ensure that the alternative schedule not cause or contribute to a violation of the SIP or TIP. In addition, EPA has added additional wording to clarify that the State or Tribe is not compelled to approve a proposed alternate schedule for mitigation measures.

P. 40 CFR 93.164—Inter-Precursor Offsets and Mitigation Measures

The EPA is adding a new section to the regulations to allow the use of inter-precursor offset and mitigation measures where they are allowed by the SIP. For example, some States and local air districts have SIP-approved NSR regulations that allow new or modified stationary sources to offset the increase in emissions of one criteria pollutant precursor by reducing the emissions of another precursor of the same criteria pollutant, provided there is an environmental benefit to such an exchange and an appropriate ratio of precursor reductions has been established. The 1993 General Conformity regulations do not specifically allow or prohibit inter-precursor offsets and mitigation measures. Therefore, EPA is revising the regulations to allow such offsets or mitigation measures if they are allowed by a State or tribal NSR or trading program approved in the SIP, provided they:

1. Are technically justified; and
2. Have a demonstrated environmental benefit.

The ratio for the offsets must be consistent with SIP or TIP requirements and EPA guidance.

Comments: Commenters from a wide range of affiliations supported the provision for inter-precursor offsets with some conditions. The commenters suggested that offsets should be allowed only with adequate technical support and appropriate ratios for inter-pollutant mitigation. Others thought EPA should provide a guidance document on what States may consider as reasonable tradeoffs and procedures for evaluating such tradeoffs at the same time as the final rule publication. Many believed the provisions should only be implemented with the full involvement and approval of the State, local or tribal air quality agency. Some commenters representing State air quality agencies objected to the provision for inter-precursor offsets but gave no reason for the objection.

Response: The EPA believes that allowing inter-precursor offsets will allow facilities flexibility in meeting the General Conformity requirements and agrees to change the regulations to allow for the trading of inter-precursor emissions only if two conditions are met. First, such trades must be allowed by the State or Tribe in a SIP or TIP. The State must already allow for inter-precursor offsets or trading through a SIP-approved NSR program, transportation conformity program, or in the attainment or reasonable further progress (RFP) demonstration to ensure conformance with a SIP or a TIP. Second, the trade must be technically justified and have demonstrated environmental benefits. This technical justification and demonstration should be accomplished by showing that the precursors are area specific and appropriate ratios are identified in the SIP. As needed, EPA will provide guidance on tradeoffs and procedures for evaluating such tradeoffs.

Q. 40 CFR 93.165—Early Emission Reduction Credit Program

The EPA is adding a new section to the regulations to establish an early emission reduction credit program for facilities subject to the General Conformity Regulations. The existing regulations require that the offsets and mitigation measures be in place before the emissions increases caused by the Federal action occur. However, emission reduction programs undertaken before the conformity determination is made could be considered as part of the baseline emissions and not available as offsets or mitigation measures for future actions subject to the General Conformity requirements. To expedite the project level conformity process, EPA believes Federal agencies and project sponsors could benefit from the ability to reduce emissions in advance of the time that the reductions are needed for a conformity evaluation, while at the same time meeting the goals of the SIP and TIP.

The EPA is adding a new section, § 93.165, to the General Conformity Regulations to define the requirements of this program. Under the program, Federal agencies or project proponents (such as airport authorities) could identify emission control measures and present the proposed reduction to the State, Tribe or local air quality agency. If the measure met the criteria for an offset (quantifiable; consistent with the applicable SIP attainment and RFP demonstrations; surplus to the reductions required by and credited to other applicable SIP provisions; enforceable at both the State and Federal levels; and permanent within the timeframe specified by the program) as well as all State, Tribe or local requirements, the State, Tribe or local agency can approve the measure as eligible to produce emission reduction credits. If credits are issued, then a Federal agency will be allowed to use the credits to reduce the total of direct and indirect emissions from a future proposed action. At the time the credits are used, the State, Tribe or local agency must certify that the reductions still meet the criteria listed above. The credits must be used in the same calendar year in which they are generated under this program.

In paragraph (a), EPA establishes the ability for the State or Tribe and Federal agency to create and use the emission reduction credits.

In paragraph (b), EPA identifies the criteria for creating the credits. The

criteria are similar to the requirements that apply to any offset or mitigation measure used to compensate for the increased emissions caused by the action. First, the Federal agency must be able to quantify the reductions using reliable techniques. In some cases, however, it may not be possible to precisely quantify the reductions until after the measure has been implemented. For example, a facility may adopt a strategy calling for the purchase and use of alternate-fueled vehicles. Although the agency could calculate the difference in the emissions between the alternate-fueled vehicle and the standard vehicle, it may not know the amount the vehicles will be used. In this case, the State or Tribe and Federal agency could agree on an emission factor and determine the use at a later time. However, the reductions must be quantified before the credit is used to support a conformity determination.

In paragraph (c), EPA establishes the requirements for the use of the credits. If the emission reduction credits are created at the same facility and in the same nonattainment or maintenance area as the Federal action, the credits can be used to reduce the total emissions from the action. This may allow the Federal agency to determine the action conforms because the total emissions are below the *de minimis* levels for the area. If the strategy is not implemented at the same facility but is in the same nonattainment or maintenance areas as the action, then the credits can be used as offsets or mitigation measures for the emissions caused by the action, but not to determine if the action emissions fall below *de minimis* thresholds. In this context, "same facility" means a contiguous area that a Federal agency manages or exercises control over. Generally, all actions and operations within a fence line of a facility such as an airport would be considered to be at the "same facility." However, military operations at a civilian airport would not be considered to be at the "same facility." Therefore, an airport could install equipment to supply power and conditioned air to airplanes parked at a gate to reduce the use of diesel generators and auxiliary power units at an airport terminal. Those reductions could be considered to be implemented as part of an airport expansion project to improve the terminal and thus would be at the "same facility."

Since the General Conformity program is based on annual emissions, EPA is requiring that the credits be used in the same year as they are generated under the program. Such a restriction would ensure consistency with the other parts of the General Conformity program. This does not mean that an emission reduction strategy cannot produce an annual stream of credits, but does mean that the reduction credits cannot be carried over to another year. Although the emission reduction credits must meet the criteria for use of offsets or other mitigation measures, EPA is not allowing the credits to be combined with other program areas such as the alternate schedules for mitigation measures under § 93.163 or the inter-precursor mitigation offset program under § 93.164. At this time, EPA believes that, because of the newness of the emission reduction credit program and the lack of available implementation data, it is better to take a conservative approach on implementing the program to ensure that it can be effectively implemented and evaluated.

Comment: Most commenters supported EPA's proposal to allow the use of emission reduction credits (ERCs). One commenter thought that EPA should clarify when the ERCs can be used. Several commenters disagreed with the proposal, citing concerns such as violations of conformity, while another was concerned about the additional resources required to certify the ERC and track them over time, and avoidance of formal conformity determinations. Still another commenter thought that under § 93.165(b)(4) there is no ability for States and the public to enforce the measures relied upon to generate emission reduction credits.

Response: The EPA believes that by allowing early ERCs, Federal agencies will be encouraged to develop emission reduction programs before they are needed as offsets for conformity determinations. Since the emissions are accounted for on an annual basis, the unused credits would benefit the environment. The emission reduction programs could be implemented in conjunction with the action requiring the conformity determination. Therefore, the use of ERC would not encourage an agency to violate conformity. In any event, under this provision all Federal actions would need applicable offsetting reductions by the time the conformity determination was made. EPA does not believe States will be required to use more resources since States and Tribes are only required to verify the credits when they are used in a conformity evaluation, while the agency relying upon the credits is required to document that usage.

VII. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action" because it may interfere with actions taken or planned by other Federal agencies. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

This action does not directly impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, on non-Federal entities. The General Conformity Regulations require Federal agencies to determine that their actions conform to the SIPs or TIPs. However, depending upon how Federal agencies implement the regulations, non-Federal entities seeking funding or approval from those Federal agencies may be required to submit information to that agency.

Although the present revisions to the regulations do not establish any specific new information collection burden, it would establish alternative voluntary approaches that may result in a different burden. For example, the proposed facility-wide emission budget would allow Federal agencies or operators of facilities subject to the General Conformity requirements such as commercial service airports to work with the State, Tribe or local air quality agency to develop an emission budget for the facility. The State, Tribe or local agencies and Federal agencies or third party facility operators would incur the burden of developing the budget. However, those entities are not required to implement such a program and would be relieved of the burden of conducting and reviewing some, if not all, of the General Conformity determinations for the facility if they do so. States are not required to implement a program that would increase their burden, and we assume they would not choose to do so.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an Agency to prepare a regulatory flexibility analysis of any regulation subject to notice and comment rulemaking requirements under the Administrative Procedures Act or any other statute unless the

Agency certifies the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

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

After considering the economic impact of this final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This final rule will not impose any significant requirements on small entities, because the General Conformity Regulations set requirements on Federal agencies to show that their actions conform to the appropriate State, tribal or Federal implementation plan for attaining clean air.

D. Unfunded Mandates Reform Act

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

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. The General Conformity Regulations set requirements on Federal agencies to show that their actions conform to the appropriate State, tribal or Federal implementation plan for attaining clean air.

E. Executive Order 13132—Federalism

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The General Conformity Regulations set requirements on Federal agencies to show that their actions conform to the appropriate State, tribal or Federal implementation plan for attaining clean air. Thus, Executive Order 13132 does not apply to this action.

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). They do not have a substantial direct effect on one or more Indian Tribes, since no Tribe has to demonstrate conformity for their actions. Furthermore, except for allowing the Tribes to comment on draft conformity determinations, these regulation revisions do not affect the relationship or distribution of power and responsibilities between the Federal government and Indian Tribes. The CAA and the Tribal Air Rule establish the relationship of the Federal government and Tribes in developing plans to attain the NAAQS, and these revisions to the regulations do nothing to modify that relationship. Thus, Executive Order 13175 does not apply to this action.

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

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

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

This action is not a "significant energy action" as defined in Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The General Conformity Regulations set requirements on Federal agencies to show that their actions conform to the appropriate State, tribal or Federal implementation plan for attaining clean air. Further, we have concluded that this rule is not likely to have any adverse energy effects.

I. National Technology Transfer and Advancement Act

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

This action does not involve technical standards. Therefore, EPA did not consider the use of any VCS.

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

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

The EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. The revisions to the regulations would revise procedures for other Federal agencies to follow and does not relax the progress toward attainment and maintenance for the NAAQS as required by individual SIPs and TIPs As such, they do not affect the health or safety of minority or low income populations. The EPA encourages other agencies to carefully consider and address environmental justice in their implementation of their evaluations and conformity determinations.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement

Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register.** A major rule cannot take effect until 60 days after it is published in the **Federal Register.** This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective July 6, 2010.

VII. Statutory Authority

The statutory authority for this action is provided by section 176(c) of the CAA as amended (42 U.S.C. 7506).

List of Subjects

40 CFR Part 51

Environmental protection, Administrative practice and procedures, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur dioxide, Volatile organic compounds.

40 CFR Part 93

Environmental protection, Administrative practice and procedures, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur dioxide, Volatile organic compounds.

Dated: March 24, 2010.

Lisa P. Jackson,

Administrator.

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

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

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

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

Subpart W—[Amended]

§ 51.850 [Removed and Reserved]

■ 2. Remove and reserve § 51.850.

■ 3. Section 51.851 is revised to read as follows:

§ 51.851 State implementation plan (SIP) or Tribal implementation plan (TIP) revision.

(a) A State or eligible Tribe (a federally recognized tribal government determined to be eligible to submit a TIP under 40 CFR 49.6) may submit to the Environmental Protection Agency (EPA) a revision to its applicable implementation plan which contains criteria and procedures for assessing the conformity of Federal actions to the applicable implementation plan, consistent with this section and 40 CFR part 93, subpart B.

(b) Until EPA approves the conformity implementation plan revision permitted by this section, Federal agencies shall use the provisions of 40 CFR part 93, subpart B in addition to any existing applicable State or tribal requirements, to demonstrate conformity with the applicable SIP or TIP as required by section 176(c) of the CAA (42 U.S.C. 7506).

(c) Following EPA approval of the State or tribal conformity provisions (or a portion thereof) in a revision to the applicable SIP or TIP, conformity determinations shall be governed by the approved (or approved portion of) State or tribal criteria and procedures. The Federal conformity regulations contained in 40 CFR part 93, subpart B would apply only for the portion, if any, of the part 93 requirements not contained in the State or Tribe conformity provisions approved by EPA.

(d) The State or tribal conformity implementation plan criteria and procedures cannot be any less stringent than the requirements in 40 CFR part 93, subpart B.

(e) A State's or Tribe's conformity provisions may contain criteria and procedures more stringent than the requirements described in this subpart and part 93, subpart B, only if the State's or Tribe's conformity provisions apply equally to non-Federal as well as Federal entities.

(f) In its SIP or TIP, the State or Tribe may identify a list of Federal actions or type of emissions that it presumes will conform. The State or Tribe may place whatever limitations on that list that it deems necessary. The State or Tribe must demonstrate that the action will not interfere with timely attainment or maintenance of the standard, meeting the reasonable further progress milestones or other requirements of the Clean Air Act. Federal agencies can rely on the list to determine that their emissions conform with the applicable SIP or TIP.

(g) Any previously applicable SIP or TIP requirements relating to conformity remain enforceable until EPA approves the revision to the SIP or TIP to specifically remove them.

§§ 51.852 through 51.860 [Removed and Reserved]

■ 4. Remove and reserve §§ 51.852 through 51.860.

PART 93—DETERMINING CONFORMITY OF FEDERAL ACTIONS TO STATE TRIBAL OR FEDERAL IMPLEMENTATION PLANS

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

Authority: 42 U.S.C. 7401–7671q.

Subpart B—[Amended]

■ 6. Section 93.150 is amended by removing and reserving paragraph (c) and by adding paragraph (e) to read as follows:

§ 93.150 Prohibition.

* * * * *

(e) If an action would result in emissions originating in more than one nonattainment or maintenance area, the conformity must be evaluated for each area separately.

■ 7. Section 93.151 is revised to read as follows:

§ 93.151 State implementation plan (SIP) revision.

The provisions and requirements of this subpart to demonstrate conformity required under section 176(c) of the Clean Air Act (CAA) apply to all Federal actions in designated nonattainment and maintenance areas where EPA has not approved the General Conformity SIP revision allowed under 40 CFR 51.851. When EPA approves a State's or Tribe's conformity provisions (or a portion thereof) in a revision to an applicable implementation plan, a conformity evaluation is governed by the approved (or approved portion of the) State or Tribe's criteria and procedures. The Federal conformity regulations contained in this subpart apply only for the portions, if any, of the part 93 requirements not contained in the State or Tribe conformity provisions approved by EPA. In addition, any previously applicable implementation plan conformity requirements remain enforceable until the EPA approves the revision to the applicable SIP to specifically include the revised requirements or remove requirements.

■ 8. Section 93.152 is amended as follows:

■ a. Adding in alphabetical order a definition for "Applicability analysis."

■ b. Revising the definition of "Applicable implementation plan or applicable SIP."

■ c. Revising the definition for "Areawide air quality modeling analysis."
■ d. Adding the following definitions in alphabetical order: "Confidential business information (CBI)," "Conformity determination," "Conformity evaluation," "Continuing program responsibility," and "Continuous program to implement."
■ e. Revising the definition of "Direct emissions."
■ f. Adding in alphabetical order a definition for "Emission inventory."
■ g. Removing the definition for "Emissions that a Federal agency has a continuing program responsibility for."
■ h. Revising the definition of "EPA."
■ i. Revising the definition of "Indirect Emissions."
■ j. Revising the definition of "Local air quality modeling analysis."
■ k. Revising the definitions for "Maintenance area" and "Metropolitan Planning Organization (MPO)."
■ l. Adding in alphabetical order a definition for "Mitigation measure."
■ m. Revising the definition for "National ambient air quality standards (NAAQS)."
■ n. In the definitions for "Precursors of a criteria pollutant," revising paragraphs (3)(i), (3)(ii) and (3)(iii).
■ o. Revising the definition for "Reasonably foreseeable emissions."
■ p. Removing the definition for "Regionally significant action."
■ q. Adding the following definitions: "Restricted information."
■ r. Adding in alphabetical order the definitions for "Take or start the Federal action" and "Tribal implementation plan (TIP)."

The additions and revisions read as follows:

§ 93.152 Definitions.

* * * * *

Applicability analysis is the process of determining if your Federal action must be supported by a conformity determination.

Applicable implementation plan or applicable SIP means the portion (or portions) of the SIP or most recent revision thereof, which has been approved under section 110(k) of the Act, a Federal implementation plan promulgated under section 110(c) of the Act, or a plan promulgated or approved pursuant to section 301 (d) of the Act (Tribal implementation plan or TIP) and which implements the relevant requirements of the Act.

Areawide air quality modeling analysis means an assessment on a scale that includes the entire nonattainment or maintenance area using an air quality dispersion model or photochemical grid model to determine the effects of emissions on air quality, for example, an assessment using EPA's community multi-scale air quality (CMAQ) modeling system.

* * * * *

Confidential business information (CBI) means information that has been determined by a Federal agency, in accordance with its applicable regulations, to be a trade secret, or commercial or financial information obtained from a person and privileged or confidential and is exempt from required disclosure under the Freedom of Information Act (5 U.S.C. 552(b)(4)).

Conformity determination is the evaluation (made after an applicability analysis is completed) that a Federal action conforms to the applicable implementation plan and meets the requirements of this subpart.

Conformity evaluation is the entire process from the applicability analysis through the conformity determination that is used to demonstrate that the Federal action conforms to the requirements of this subpart.

Continuing program responsibility means a Federal agency has responsibility for emissions caused by:

(1) Actions it takes itself; or

(2) Actions of non-Federal entities that the Federal agency, in exercising its normal programs and authorities, approves, funds, licenses or permits, provided the agency can impose conditions on any portion of the action that could affect the emissions.

Continuous program to implement means that the Federal agency has started the action identified in the plan and does not stop the actions for more than an 18-month period, unless it can demonstrate that such a stoppage was included in the original plan.

* * * * *

Direct emissions means those emissions of a criteria pollutant or its precursors that are caused or initiated by the Federal action and originate in a nonattainment or maintenance area and occur at the same time and place as the action and are reasonably foreseeable.

* * * * *

Emission Inventory means a listing of information on the location, type of source, type and quantity of pollutant emitted as well as other parameters of the emissions.

* * * * *

EPA means the U.S. Environmental Protection Agency.

* * * * *

Indirect emissions means those emissions of a criteria pollutant or its precursors:

(1) That are caused or initiated by the Federal action and originate in the same nonattainment or maintenance area but occur at a different time or place as the action;

(2) That are reasonably foreseeable;

(3) That the agency can practically control; and

(4) For which the agency has continuing program responsibility.

For the purposes of this definition, even if a Federal licensing, rulemaking or other approving action is a required initial step for a subsequent activity that causes emissions, such initial steps do not mean that a Federal agency can practically control any resulting emissions.

* * * * *

Local air quality modeling analysis means an assessment of localized impacts on a scale smaller than the entire nonattainment or maintenance area, including, for example, congested roadways on a Federal facility, which uses an air quality dispersion model (*e.g.*, Industrial Source Complex Model or Emission and Dispersion Model System) to determine the effects of emissions on air quality.

Maintenance area means an area that was designated as nonattainment and has been re-designated in 40 CFR part 81 to attainment, meeting the provisions of section 107(d)(3)(E) of the Act and has a maintenance plan approved under section 175A of the Act.

* * * * *

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).

* * * * *

Mitigation measure means any method of reducing emissions of the pollutant or its precursor taken at the location of the Federal action and used to reduce the impact of the emissions of that pollutant caused by the action.

National ambient air quality standards (NAAQS) are those standards established pursuant to section 109 of the Act and include standards for carbon monoxide (CO_2), lead (Pb), nitrogen dioxide (NO_2), ozone, particulate matter (PM–10 and PM2.5), and sulfur dioxide (SO_2).

* * * * *

Precursors of a criteria pollutant are:

* * * * *

(3) * * *

(i) Sulfur dioxide (SO_2) in all PM2.5 nonattainment and maintenance areas,

(ii) Nitrogen oxides in all PM2.5 nonattainment and maintenance areas unless both the State and EPA determine that it is not a significant precursor, and

(iii) Volatile organic compounds (VOC) and ammonia (NH3) only in PM2.5 nonattainment or maintenance areas where either the State or EPA determines that they are significant precursors.

Reasonably foreseeable emissions are projected future direct and indirect emissions that are identified at the time the conformity determination is made; the location of such emissions is known and the emissions are quantifiable as described and documented by the Federal agency based on its own information and after reviewing any information presented to the Federal agency.

* * * * *

Restricted Information is information that is privileged or that is otherwise protected from disclosure pursuant to applicable statutes, Executive Orders, or regulations. Such information includes, but is not limited to: Classified national security information, protected critical infrastructure information, sensitive security information, and proprietary business information.

Take or start the Federal action means the date that the Federal agency signs or approves the permit, license, grant or contract or otherwise physically begins the Federal action that requires a conformity evaluation under this subpart.

* * * * *

Tribal implementation plan (TIP) means a plan to implement the national ambient air quality standards adopted and submitted by a federally recognized Indian tribal government determined to be eligible under 40 CFR 49.9 and the plan has been approved by EPA.

■ 9. Section 93.153 is amended as follows:

■ a. By revising the table in paragraph (b)(1).

■ b. By adding paragraph (c)(2)(xxii).

■ c. By revising paragraphs (d)(1) and (d)(2).

■ d. By revising paragraph (e)(2).

■ e. By adding paragraph (e)(3).

■ f. By revising paragraph (f).

■ g. By revising paragraph (g) introductory text.

■ h. By adding paragraph (g)(3).

■ i. By revising paragraphs (h) introductory text, (h)(1), (h)(2), and (h)(4).

■ j. By revising paragraphs (i), (j), and (k).

§ 93.153 Applicability analysis.

* * * * *

(1) * * *

	Tons/year
Ozone (VOC's or NO_X):	
Serious NAA's	50
Severe NAA's	25
Extreme NAA's	10
Other ozone NAA's outside an ozone transport region	100
Other ozone NAA's inside an ozone transport region:	
VOC	50
NO_X	100
Carbon monoxide: All NAA's	100
SO_2 or NO_2: All NAA's	100
PM–10:	
Moderate NAA's	100
Serious NAA's	70
$PM_{2.5}$:	
Direct emissions	100
SO_2	100
NO_X (unless determined not to be significant precursors)	100
VOC or ammonia (if determined to be significant precursors)	100
Pb: All NAA's	25

* * * * *

(c) * * *

(2) * * *

(xxii) Air traffic control activities and adopting approach, departure, and enroute procedures for aircraft operations above the mixing height specified in the applicable SIP or TIP. Where the applicable SIP or TIP does not specify a mixing height, the Federal agency can use the 3,000 feet above ground level as a default mixing height, unless the agency demonstrates that use of a different mixing height is appropriate because the change in emissions at and above that height caused by the Federal action is *de minimis*.

* * * * *

(d) * * *

(1) The portion of an action that includes major or minor new or modified stationary sources that require a permit under the new source review (NSR) program (Section 110(a)(2)(c) and Section 173 of the Act) or the prevention of significant deterioration program (title I, part C of the Act).

(2) Actions in response to emergencies which are typically commenced on the order of hours or days after the emergency and, if applicable, which meet the requirements of paragraph (e) of this section.

* * * * *

(e) * * *

(2) For actions which are to be taken after those actions covered by paragraph (e)(1) of this section, the Federal agency makes a new determination as provided in paragraph (e)(1) of this section and:

(i) Provides a draft copy of the written determinations required to affected EPA Regional office(s), the affected State(s) and/or air pollution control agencies, and any Federal recognized Indian tribal government in the nonattainment or maintenance area. Those organizations must be allowed 15 days from the beginning of the extension period to comment on the draft determination; and

(ii) Within 30 days after making the determination, publish a notice of the determination by placing a prominent advertisement in a daily newspaper of general circulation in the area affected by the action.

(3) If additional actions are necessary in response to an emergency or disaster under paragraph (d)(2) of this section beyond the specified time period in paragraph (e)(2) of this section, a Federal agency can make a new written determination as described in (e)(2) of this section for as many 6-month periods as needed, but in no case shall this exemption extend beyond three 6-month periods except where an agency:

(i) Provides information to EPA and the State or Tribe stating that the conditions that gave rise to the emergency exemption continue to exist and how such conditions effectively prevent the agency from conducting a conformity evaluation.

(ii) [Reserved]

(f) Notwithstanding other requirements of this subpart, actions specified by individual Federal agencies that have met the criteria set forth in either paragraphs (g)(1), (g)(2), or (g)(3) of this section and the procedures set forth in paragraph (h) of this section are "presumed to conform," except as provided in paragraph (j) of this section. Actions specified by individual Federal agencies as "presumed to conform" may not be used in combination with one another when the total direct and indirect emissions from the combination of actions would equal or exceed any of the rates specified in paragraphs (b)(1) or (2) of this section.

(g) The Federal agency must meet the criteria for establishing activities that are "presumed to conform" by fulfilling the requirements set forth in either paragraphs (g)(1), (g)(2), or (g)(3) of this section:

* * * * *

(3) The Federal agency must clearly demonstrate that the emissions from the type or category of actions and the amount of emissions from the action are included in the applicable SIP and the State, local, or tribal air quality agencies responsible for the SIP(s) or TIP(s) provide written concurrence that the emissions from the actions along with all other expected emissions in the area will not exceed the emission budget in the SIP.

(h) In addition to meeting the criteria for establishing exemptions set forth in paragraphs (g)(1), (g)(2), or (g)(3) of this section, the following procedures must also be complied with to presume that activities will conform:

(1) The Federal agency must identify through publication in the **Federal Register** its list of proposed activities that are "presumed to conform" and the basis for the presumptions. The notice must clearly identify the type and size of the action that would be "presumed to conform" and provide criteria for determining if the type and size of action qualifies it for the presumption;

(2) The Federal agency must notify the appropriate EPA Regional Office(s), State, local, and tribal air quality agencies and, where applicable, the agency designated under section 174 of the Act and the MPO and provide at least 30 days for the public to comment on the list of proposed activities "presumed to conform." If the "presumed to conform" action has regional or national application (*e.g.*, the action will cause emission increases in excess of the *de minimis* levels identified in paragraph (b) of this section in more than one of EPA's Regions), the Federal agency, as an alternative to sending it to EPA Regional Offices, can send the draft conformity determination to U.S. EPA, Office of Air Quality Planning and Standards;

* * * * *

(4) The Federal agency must publish the final list of such activities in the **Federal Register.**

(i) Emissions from the following actions are "presumed to conform":

(1) Actions at installations with facility-wide emission budgets meeting the requirements in § 93.161 provided that the State or Tribe has included the emission budget in the EPA-approved SIP and the emissions from the action along with all other emissions from the installation will not exceed the facility-wide emission budget.

(2) Prescribed fires conducted in accordance with a smoke management program (SMP) which meets the requirements of EPA's Interim Air Quality Policy on Wildland and Prescribed Fires or an equivalent replacement EPA policy.

(3) Emissions for actions that the State or Tribe identifies in the EPA-approved SIP or TIP as "presumed to conform."

(j) Even though an action would otherwise be "presumed to conform" under paragraph (f) or (i) of this section, an action shall not be "presumed to conform" and the requirements of § 93.150, § 93.151, §§ 93.154 through 93.160 and §§ 93.162 through 93.164 shall apply to the action if EPA or a third party shows that the action would:

(1) Cause or contribute to any new violation of any standard in any area;

(2) Interfere with provisions in the applicable SIP or TIP for maintenance of any standard;

(3) Increase the frequency or severity of any existing violation of any standard in any area; or

(4) Delay timely attainment of any standard or any required interim emissions reductions or other milestones in any area including, where applicable, emission levels specified in the applicable SIP or TIP for purposes of:

(i) A demonstration of reasonable further progress;

(ii) A demonstration of attainment; or

(iii) A maintenance plan.

(k) The provisions of this subpart shall apply in all nonattainment and maintenance areas except conformity requirements for newly designated nonattainment areas are not applicable until 1 year after the effective date of the final nonattainment designation for each NAAQS and pollutant in accordance with section 176(c)(6) of the Act.

■ 10. Section 93.154 is revised to read as follows:

§ 93.154 Federal agency conformity responsibility.

Any department, agency, or instrumentality of the Federal government taking an action subject to this subpart must make its own conformity determination consistent with the requirements of this subpart. In making its conformity determination, a Federal agency must follow the requirements in §§ 93.155 through 93.160 and §§ 93.162 through 93.165 and must consider comments from any interested parties. Where multiple Federal agencies have jurisdiction for various aspects of a project, a Federal agency may choose to adopt the analysis of another Federal agency or develop its own analysis in order to make its conformity determination.

■ 11. Section 93.155 is revised to read as follows:

§ 93.155 Reporting requirements.

(a) A Federal agency making a conformity determination under §§ 93.154 through 93.160 and §§ 93.162 through 93.164 must provide to the appropriate EPA Regional Office(s), State and local air quality agencies, any federally-recognized Indian tribal government in the nonattainment or maintenance area, and, where applicable, affected Federal land managers, the agency designated under section 174 of the Act and the MPO, a 30-day notice which describes the proposed action and the Federal agency's draft conformity determination on the action. If the action has multi-regional or national impacts (*e.g.*, the action will cause emission increases in excess of the *de minimis* levels identified in § 93.153(b) in three or more of EPA's Regions), the Federal agency, as an alternative to sending it to EPA Regional Offices, can provide the notice to EPA's Office of Air Quality Planning and Standards.

(b) A Federal agency must notify the appropriate EPA Regional Office(s), State and local air quality agencies, any federally-recognized Indian tribal government in the nonattainment or maintenance area, and, where applicable, affected Federal land managers, the agency designated under section 174 of the Clean Air Act and the MPO, within 30 days after making a final conformity determination under this subpart.

(c) The draft and final conformity determination shall exclude any restricted information or confidential business information. The disclosure of restricted information and confidential business information shall be controlled by the applicable laws, regulations, security manuals, or executive orders concerning the use, access, and release of such materials. Subject to applicable procedures to protect restricted information from public disclosure, any information or materials excluded from the draft or final conformity determination or supporting materials may be made available in a restricted information annex to the determination for review by Federal and State representatives who have received appropriate clearances to review the information.

■ 12. Section 93.156 is revised to read as follows:

§ 93.156 Public participation.

(a) Upon request by any person regarding a specific Federal action, a Federal agency must make available, subject to the limitation in paragraph (e) of this section, for review its draft conformity determination under § 93.154 with supporting materials which describe the analytical methods and conclusions relied upon in making the applicability analysis and draft conformity determination.

(b) A Federal agency must make public its draft conformity determination under § 93.154 by placing a notice by prominent advertisement in a daily newspaper of general circulation in the area affected by the action and by providing 30 days for written public comment prior to taking any formal

action on the draft determination. This comment period may be concurrent with any other public involvement, such as occurs in the National Environmental Policy Act (NEPA) process. If the action has multi-regional or national impacts (*e.g.*, the action will cause emission increases in excess of the *de minimis* levels identified in § 93.153(b) in three or more of EPA's Regions), the Federal agency, as an alternative to publishing separate notices, can publish a notice in the **Federal Register.**

(c) A Federal agency must document its response to all the comments received on its draft conformity determination under § 93.154 and make the comments and responses available, subject to the limitation in paragraph (e) of this section, upon request by any person regarding a specific Federal action, within 30 days of the final conformity determination.

(d) A Federal agency must make public its final conformity determination under § 93.154 for a Federal action by placing a notice by prominent advertisement in a daily newspaper of general circulation in the area affected by the action within 30 days of the final conformity determination. If the action would have multi-regional or national impacts, the Federal agency, as an alternative, can publish the notice in the **Federal Register.**

(e) The draft and final conformity determination shall exclude any restricted information or confidential business information. The disclosure of restricted information and confidential business information shall be controlled by the applicable laws, regulations or executive orders concerning the release of such materials.

■ 13. Section 93.157 is revised to read as follows:

§ 93.157 Reevaluation of conformity.

(a) Once a conformity determination is completed by a Federal agency, that determination is not required to be re-evaluated if the agency has maintained a continuous program to implement the action; the determination has not lapsed as specified in paragraph (b) of this section; or any modification to the action does not result in an increase in emissions above the levels specified in § 93.153(b). If a conformity determination is not required for the action at the time NEPA analysis is completed, the date of the finding of no significant impact (FONSI) for an Environmental Assessment, a record of decision (ROD) for an Environmental Impact Statement, or a categorical exclusion determination can be used as a substitute date for the conformity determination date.

(b) The conformity status of a Federal action automatically lapses 5 years from the date a final conformity determination is reported under § 93.155, unless the Federal action has been completed or a continuous program to implement the Federal action has commenced.

(c) Ongoing Federal activities at a given site showing continuous progress are not new actions and do not require periodic re-determinations so long as such activities are within the scope of the final conformity determination reported under § 93.155.

(d) If the Federal agency originally determined through the applicability analysis that a conformity determination was not necessary because the emissions for the action were below the limits in § 93.153(b) and changes to the action would result in the total emissions from the action being above the limits in § 93.153(b), then the Federal agency must make a conformity determination.

■ 14. Section 93.158 is amended as follows:

■ a. Revising paragraphs (a)(1), (a)(2), (a)(3) introductory text and (a)(4) introductory text;

■ b. Revising paragraph (a)(5) introductory text;

■ c. Revising paragraphs (a)(5)(i) introductory text, and (a)(5)(i)(C);

■ d. Adding paragraph (a)(5)(i)(D).

■ e. Revising paragraphs (a)(5)(iii), (a)(5)(iv) introductory text; (a)(5)(iv)(A)(*1*), (a)(5)(iv)(A)(*2*) and paragraph (a)(5)(iv)(B).

§ 93.158 Criteria for determining conformity of general Federal actions.

(a) * * *

(1) For any criteria pollutant or precursor, the total of direct and indirect emissions from the action are specifically identified and accounted for in the applicable SIP's attainment or maintenance demonstration or reasonable further progress milestone or in a facility-wide emission budget included in a SIP in accordance with § 93.161;

(2) For precursors of ozone, nitrogen dioxide, or PM, the total of direct and indirect emissions from the action are fully offset within the same nonattainment or maintenance area (or nearby area of equal or higher classification provided the emissions from that area contribute to the violations, or have contributed to violations in the past, in the area with the Federal action) through a revision to the applicable SIP or a similarly enforceable measure that effects emissions reductions so that there is no net increase in emissions of that pollutant;

(3) For any directly-emitted criteria pollutant, the total of direct and indirect emissions from the action meets the requirements:

* * * * *

(4) For CO or directly emitted PM—

* * * * *

(5) For ozone or nitrogen dioxide, and for purposes of paragraphs (a)(3)(ii) and (a)(4)(ii) of this section, each portion of the action or the action as a whole meets any of the following requirements:

(i) Where EPA has approved a revision to the applicable implementation plan after the area was designated as nonattainment and the State or Tribe makes a determination as provided in paragraph (a)(5)(i)(A) of this section or where the State or Tribe makes a commitment as provided in paragraph (a)(5)(i)(B) of this section:

* * * * *

(C) Where a Federal agency made a conformity determination based on a State's or Tribe's commitment under paragraph (a)(5)(i)(B) of this section and the State has submitted a SIP or TIP to EPA covering the time period during which the emissions will occur or is scheduled to submit such a SIP or TIP within 18 months of the conformity determination, the State commitment is automatically deemed a call for a SIP or TIP revision by EPA under section 110(k)(5) of the Act, effective on the date of the Federal conformity determination and requiring response within 18 months or any shorter time within which the State or Tribe commits to revise the applicable SIP;

(D) Where a Federal agency made a conformity determination based on a State or tribal commitment under paragraph (a)(5)(i)(B) of this section and the State or Tribe has not submitted a SIP covering the time period when the emissions will occur or is not scheduled to submit such a SIP within 18 months of the conformity determination, the State or Tribe must, within 18 months, submit to EPA a revision to the existing SIP committing to include the emissions in the future SIP revision.

* * * * *

(iii) The action (or portion thereof) fully offsets its emissions within the same nonattainment or maintenance area (or nearby area of equal or higher classification provided the emissions from that area contribute to the violations, or have contributed to violation in the past, in the area with the Federal action) through a revision to the applicable SIP or an equally enforceable measure that effects

emissions reductions equal to or greater than the total of direct and indirect emissions from the action so that there is no net increase in emissions of that pollutant;

(iv) Where EPA has not approved a revision to the relevant SIP since the area was designated or reclassified, the total of direct and indirect emissions from the action for the future years (described in § 93.159(d)) do not increase emissions with respect to the baseline emissions:

(A) * * *

(*1*) The most current calendar year with a complete emission inventory available before an area is designated unless EPA sets another year; or

(*2*) The emission budget in the applicable SIP;

* * * * *

(B) The baseline emissions are the total of direct and indirect emissions calculated for the future years (described in § 93.159(d)) using the historic activity levels (described in paragraph (a)(5)(iv)(A) of this section) and appropriate emission factors for the future years; or

* * * * *

■ 15. Section 93.159 is amended as follows:

■ a. Revising paragraphs (b) introductory text and (b)(1)(ii);

■ b. Revising paragraphs (b)(2) and (c) introductory text; and

■ c. Revising paragraph (d).

The revisions and additions read as follows:

§ 93.159 Procedures for conformity determinations of general Federal actions.

* * * * *

(b) The analyses required under this subpart must be based on the latest and most accurate emission estimation techniques available as described below, unless such techniques are inappropriate. If such techniques are inappropriate, the Federal agency may obtain written approval from the appropriate EPA Regional Administrator for a modification or substitution, of another technique on a case-by-case basis or, where appropriate, on a generic basis for a specific Federal agency program.

(1) * * *

(ii) A grace period of 3 months shall apply during which the motor vehicle emissions model previously specified by EPA as the most current version may be used unless EPA announces a longer grace period in the **Federal Register.** Conformity analyses for which the analysis was begun during the grace period or no more than 3 months before the **Federal Register** notice of availability of the latest emission model may continue to use the previous version of the model specified by EPA.

(2) For non-motor vehicle sources, including stationary and area source emissions, the latest emission factors specified by EPA in the "Compilation of Air Pollutant Emission Factors" (AP–42, *http://www.epa.gov/ttn/chiefs/efpac*) must be used for the conformity analysis unless more accurate emission data are available, such as actual stack test data from the stationary sources which are part of the conformity analysis.

(c) The air quality modeling analyses required under this subpart must be based on the applicable air quality models, data bases, and other requirements specified in the most recent version of the "Guideline on Air Quality Models." (Appendix W to 40 CFR part 51).

* * * * *

(d) The analyses required under this subpart must be based on the total of direct and indirect emissions from the action and must reflect emission scenarios that are expected to occur under each of the following cases:

(1) The attainment year specified in the SIP, or if the SIP does not specify an attainment year, the latest attainment year possible under the Act; or

(2) The last year for which emissions are projected in the maintenance plan;

(3) The year during which the total of direct and indirect emissions from the action is expected to be the greatest on an annual basis; and

(4) Any year for which the applicable SIP specifies an emissions budget.

■ 16. Section 93.160 is amended as follows:

■ a. Revising paragraph (e);

■ b. Revising paragraph (f); and

■ c. Revising paragraph (g).

§ 93.160 Mitigation of air quality impacts.

* * * * *

(e) When necessary because of changed circumstances, mitigation measures may be modified so long as the new mitigation measures continue to support the conformity determination. Any proposed change in the mitigation measures is subject to the reporting requirements of § 93.156 and the public participation requirements of § 93.157.

(f) Written commitments to mitigation measures must be obtained prior to a positive conformity determination and such commitments must be fulfilled.

(g) After a State or Tribe revises its SIP or TIP and EPA approves that SIP revision, any agreements, including mitigation measures, necessary for a conformity determination will be both State or tribal and federally enforceable. Enforceability through the applicable SIP or TIP will apply to all persons who agree to mitigate direct and indirect emissions associated with a Federal action for a conformity determination.

■ 17. Subpart B is amended by adding § 93.161 to read as follows:

§ 93.161 Conformity evaluation for Federal installations with facility-wide emission budgets.

(a) The State, local or tribal agency responsible for implementing and enforcing the SIP or TIP can in cooperation with Federal agencies or third parties authorized by the agency that operate installations subject to Federal oversight develop and adopt a facility-wide emission budget to be used for demonstrating conformity under § 93.158(a)(1). The facility-wide budget must meet the following criteria:

(1) Be for a set time period;

(2) Cover the pollutants or precursors of the pollutants for which the area is designated nonattainment or maintenance;

(3) Include specific quantities allowed to be emitted on an annual or seasonal basis;

(4) The emissions from the facility along with all other emissions in the area will not exceed the emission budget for the area;

(5) Include specific measures to ensure compliance with the budget, such as periodic reporting requirements or compliance demonstration, when the Federal agency is taking an action that would otherwise require a conformity determination;

(6) Be submitted to EPA as a SIP revision;

(7) The SIP revision must be approved by EPA.

(b) The facility-wide budget developed and adopted in accordance with paragraph (a) of this section can be revised by following the requirements in paragraph (a) of this section.

(c) Total direct and indirect emissions from Federal actions in conjunction with all other emissions subject to General Conformity from the facility that do not exceed the facility budget adopted pursuant to paragraph (a) of this section are "presumed to conform" to the SIP and do not require a conformity analysis.

(d) If the total direct and indirect emissions from the Federal actions in conjunction with the other emissions subject to General Conformity from the facility exceed the budget adopted pursuant to paragraph (a) of this section, the action must be evaluated for conformity. A Federal agency can use the compliance with the facility-wide

emissions budget as part of the demonstration of conformity, *i.e.*, the agency would have to mitigate or offset the emissions that exceed the emission budget.

(e) If the SIP for the area includes a category for construction emissions, the negotiated budget can exempt construction emissions from further conformity analysis.

■ 18. Subpart B is amended by adding § 93.162 to read as follows:

§ 93.162 Emissions beyond the time period covered by the SIP.

If a Federal action would result in total direct and indirect emissions above the applicable thresholds which would be emitted beyond the time period covered by the SIP, the Federal agency can:

(a) Demonstrate conformity with the last emission budget in the SIP; or

(b) Request the State or Tribe to adopt an emissions budget for the action for inclusion in the SIP. The State or Tribe must submit a SIP or TIP revision to EPA within 18 months either including the emissions in the existing SIP or establishing an enforceable commitment to include the emissions in future SIP revisions based on the latest planning assumptions at the time of the SIP revision. No such commitment by a State or Tribe shall restrict a State's or Tribe's ability to require RACT, RACM or any other control measures within the State's or Tribe's authority to ensure timely attainment of the NAAQS.

■ 19. Subpart B is amended by adding § 193.163 to read as follows:

§ 93.163 Timing of offsets and mitigation measures.

(a) The emissions reductions from an offset or mitigation measure used to demonstrate conformity must occur during the same calendar year as the emission increases from the action except, as provided in paragraph (b) of this section.

(b) The State or Tribe may approve emissions reductions in other years provided:

(1) The reductions are greater than the emission increases by the following ratios:

(i) Extreme nonattainment areas	1.5:1
(ii) Severe nonattainment areas	1.3:1
(iii) Serious nonattainment areas	1.2:1
(iv) Moderate nonattainment areas	1.15:1
(v) All other areas	1.1:1

(2) The time period for completing the emissions reductions must not exceed twice the period of the emissions.

(3) The offset or mitigation measure with emissions reductions in another year will not:

(i) Cause or contribute to a new violation of any air quality standard,

(ii) Increase the frequency or severity of any existing violation of any air quality standard; or

(iii) Delay the timely attainment of any standard or any interim emissions reductions or other milestones in any area.

(c) The approval by the State or Tribe of an offset or mitigation measure with emissions reductions in another year does not relieve the State or Tribe of any obligation to meet any SIP or Clean Air Act milestone or deadline. The approval of an alternate schedule for mitigation measures is at the discretion of the State or Tribe, and they are not required to approve an alternate schedule.

■ 20. Subpart B is amended by adding § 93.164 to read as follows:

§ 93.164 Inter-precursor mitigation measures and offsets.

Federal agencies must reduce the same type of pollutant as being increased by the Federal action except the State or Tribe may approve offsets or mitigation measures of different precursors of the same criteria pollutant, if such trades are allowed by a State or Tribe in a SIP or TIP approved NSR regulation, is technically justified, and has a demonstrated environmental benefit.

■ 21. Subpart B is amended by adding § 93.165 to read as follows:

§ 93.165 Early emission reduction credit programs at Federal facilities and installation subject to Federal oversight.

(a) Federal facilities and installations subject to Federal oversight can, with the approval of the State or tribal agency responsible for the SIP or TIP in that area, create an early emissions reductions credit program. The Federal agency can create the emission reduction credits in accordance with the requirements in paragraph (b) of this section and can use them in accordance with paragraph (c) of this section.

(b) Creation of emission reduction credits.

(1) Emissions reductions must be quantifiable through the use of standard emission factors or measurement techniques. If non-standard factors or techniques to quantify the emissions reductions are used, the Federal agency must receive approval from the State or tribal agency responsible for the implementation of the SIP or TIP and from EPA's Regional Office. The emission reduction credits do not have to be quantified before the reduction strategy is implemented, but must be quantified before the credits are used in the General Conformity evaluation.

(2) The emission reduction methods must be consistent with the applicable SIP or TIP attainment and reasonable further progress demonstrations.

(3) The emissions reductions cannot be required by or credited to other applicable SIP or TIP provisions.

(4) Both the State or Tribe and Federal air quality agencies must be able to take legal action to ensure continued implementation of the emission reduction strategy. In addition, private citizens must also be able to initiate action to ensure compliance with the control requirement.

(5) The emissions reductions must be permanent or the timeframe for the reductions must be specified.

(6) The Federal agency must document the emissions reductions and provide a copy of the document to the State or tribal air quality agency and the EPA regional office for review. The documentation must include a detailed description of the emission reduction strategy and a discussion of how it meets the requirements of paragraphs (b)(1) through (5) of this section.

(c) Use of emission reduction credits. The emission reduction credits created in accordance with paragraph (b) of this section can be used, subject to the following limitations, to reduce the emissions increase from a Federal action at the facility for the conformity evaluation.

(1) If the technique used to create the emission reduction is implemented at the same facility as the Federal action and could have occurred in conjunction with the Federal action, then the credits can be used to reduce the total direct and indirect emissions used to determine the applicability of the regulation as required in § 93.153 and as offsets or mitigation measures required by § 93.158.

(2) If the technique used to create the emission reduction is not implemented at the same facility as the Federal action or could not have occurred in conjunction with the Federal action, then the credits cannot be used to reduce the total direct and indirect emissions used to determine the applicability of the regulation as required in § 93.153, but can be used to offset or mitigate the emissions as required by § 93.158.

(3) Emissions reductions credits must be used in the same year in which they are generated.

(4) Once the emission reduction credits are used, they cannot be used as credits for another conformity evaluation. However, unused credits

from a strategy used for one conformity evaluation can be used for another conformity evaluation as long as the reduction credits are not double counted.

(5) Federal agencies must notify the State or tribal air quality agency responsible for the implementation of the SIP or TIP and EPA Regional Office when the emission reduction credits are being used.

[FR Doc. 2010–7047 Filed 4–2–10; 8:45 am]
BILLING CODE 6560–50–P

(1) DEVELOPMENT.—The Secretary shall develop a nationwide programmatic agreement governing the review of activities that support the deployment of intelligent transportation infrastructure and systems in accordance with section 106 of the National Historic Preservation Act (16 U.S.C. 470f) and the regulations of the Advisory Council on Historic Preservation.

(2) CONSULTATION.—The Secretary shall develop the agreement under paragraph (1) in consultation with the National Conference of State Historic Preservation Officers and the Advisory Council on Historic Preservation established under title II of the National Historic Preservation Act (26 U.S.C. 470i et seq.) and after soliciting the views of other interested parties.

(c) INTELLIGENT TRANSPORTATION INFRASTRUCTURE AND SYSTEMS DEFINED.—In this section, the term "intelligent transportation infrastructure and systems" means intelligent transportation infrastructure and intelligent transportation systems, as such terms are defined in subtitle C of title V of this Act.

SEC. 6011. TRANSPORTATION CONFORMITY.

(a) CONFORMITY REDETERMINATIONS.—Section 176(c)(2) of the Clean Air Act (42 U.S.C. 7506(c)(2)) is amended by adding at the end the following:

"(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.".

(b) FREQUENCY OF CONFORMITY DETERMINATION UPDATES.—Section 176(c)(4)(B)(ii) of the Clean Air Act (42 U.S.C. 7506(c)(4)(B)(ii)) is amended to read as follows:

"(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".

(c) TIME HORIZON FOR CONFORMITY DETERMINATIONS IN NONATTAINMENT AREAS.—Section 176(c) of the Clean Air Act (42 U.S.C. 7506(c)) is amended by adding at the end the following:

"(7) CONFORMITY HORIZON FOR TRANSPORTATION PLANS.—

"(A) IN GENERAL.—Each conformity determination required under this section for a transportation plan under

NMED Exh. 6

section 134(i) of title 23, United States Code, or section 5303(i) of title 49, United States Code, 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 175A(b) 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 solicitation 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 175A(b).

"(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 302(b)) that is responsible for developing plans or controlling air pollution within the area covered by a transportation plan.".

(d) SUBSTITUTION OF TRANSPORTATION CONTROL MEASURES.—Section 176(c) of the Clean Air Act (42 U.S.C. 7506(c)) (as amended by subsection (c)) is amended by inserting after paragraph (7) the following:

"(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

Notice.

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

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

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

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

Deadline.

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

"(C) NO REQUIREMENT FOR EXPRESS PERMISSION.—The substitution or addition of a transportation control measure

in accordance with this paragraph and the funding or approval of such a control measure shall not be contingent on the existence of any provision in the applicable implementation plan that expressly permits such a substitution or addition.

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

"(i) a new conformity determination for the transportation plan; or

"(ii) a revision of the implementation plan.

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

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

(e) LAPSE OF CONFORMITY.—Section 176(c) of the Clean Air Act (42 U.S.C. 7506(c)) (as amended by subsections (c) and (d)) is amended by inserting after paragraph (8) the following:

"(9) LAPSE OF CONFORMITY.—If a conformity determination required under this subsection for a transportation plan under section 134(i) of title 23, United States Code, or section 5303(i) of title 49, United States Code, 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. Deadline.

"(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.".

(f) CONFORMING AMENDMENTS.—Section 176(c)(4) of the Clean Air Act (42 U.S.C. 7506(c)(4)) (as amended by subsection (b)) is amended—

(1) by redesignating subparagraphs (B), (C), and (D) as subparagraphs (D), (E), and (F), respectively;

(2) by striking "(4)(A) No later than one year after the date of enactment of the Clean Air Act Amendments of 1990, the Administrator shall promulgate" and inserting the following:

"(4) CRITERIA AND PROCEDURES FOR DETERMINING CONFORMITY.—

"(A) IN GENERAL.—The Administrator shall promulgate, and periodically update,";

(3) in the second sentence of subparagraph (A)—

(A) by striking "No later than one year after such date of enactment, the Administrator, with the concurrence of the Secretary of Transportation, shall promulgate" and inserting the following:

"(B) TRANSPORTATION PLANS, PROGRAMS, AND PROJECTS.—The Administrator, with the concurrence of the Secretary of Transportation, shall promulgate, and periodically update,"; and

(B) in the third sentence, by striking "A suit" and inserting the following:

"(C) CIVIL ACTION TO COMPEL PROMULGATION.—A civil action"; and

(4) by striking subparagraph (E) (as redesignated by paragraph (1)) and inserting the following:

Deadline.

"(E) INCLUSION OF CRITERIA AND PROCEDURES IN SIP.—Not later than 2 years after the date of enactment of the SAFETEA–LU 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.".

Deadline. 42 USC 7506 note.

(g) REGULATIONS.—Not later than 2 years after the date of enactment of this Act, the Administrator of the Environmental Protection Agency shall promulgate revised regulations to implement the changes made by this section.

SEC. 6012. FEDERAL REFERENCE METHOD.

(a) IN GENERAL.—Section 6102(e) of the Transportation Equity Act for the 21st Century (42 U.S.C. 7407 note; 112 Stat. 464–465) is amended to read as follows:

Deadline.

"(e) FIELD STUDY.—Not later than 2 years after the date of enactment of the SAFETEA–LU, the Administrator shall—

"(1) conduct a field study of the ability of the $PM_{2.5}$ Federal Reference Method to differentiate those particles that are larger than 2.5 micrometers in diameter;

"(2) develop a Federal reference method to measure directly particles that are larger than 2.5 micrometers in diameter without reliance on subtracting from coarse particle measurements those particles that are equal to or smaller than 2.5 micrometers in diameter;

"(3) develop a method of measuring the composition of coarse particles; and

Reports.

"(4) submit a report on the study and responsibilities of the Administrator under paragraphs (1) through (3) to—

"(A) the Committee on Energy and Commerce of the House of Representatives; and

"(B) the Committee on Environment and Public Works of the Senate.".

SEC. 6013. AIR QUALITY MONITORING DATA INFLUENCED BY EXCEPTIONAL EVENTS.

(a) IN GENERAL.—Section 319 of the Clean Air Act (42 U.S.C. 7619) is amended—

(1) by striking the section heading and all that follows through "after notice and opportunity for public hearing" and inserting the following:

§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.

(3) Until such time as the implementation plan revision referred to in paragraph (4)(C) 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)(A) No later than one year after November 15, 1990, the Administrator shall promulgate 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). No later than one year after November 15, 1990, the Administrator, with the concurrence of the Secretary of Transportation, shall promulgate criteria and procedures for demonstrating and assuring conformity in the case of transportation plans, programs, and projects. A suit 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.

(B) 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 in no case shall such determinations for transportation plans and programs be less frequent than every three years; and

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

(C) Such procedures shall also include a requirement that each State shall submit to the Administrator and the Secretary of Transportation within 24 months of November 15, 1990, a revision to its implementation plan that includes criteria and procedures for assessing the conformity of any plan, program, or project subject to the conformity requirements of this subsection.

[NOTE – the above language was deleted by the 2005 SAFETEA-LU amendments to the CAA, along with other changes not shown here]

(D) 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

* * * *

AFFIDAVIT OF PUBLICATION

STATE OF NEW MEXICO
County of Bernalillo SS

Linda MacEachen, being duly sworn, declares and says that she is Classified Advertising Manager of **The Albuquerque Journal**, and that this newspaper is duly qualified to publish legal notices or advertisements within the meaning of Section 3, Chapter 167, Session Laws of 1937, and that payment therefore has been made of assessed as court cost; that the notice, copy of which is hereto attached, was published in said paper in the regular daily edition, for 1 times, the first publication being on the 31 day of July, 2013, and the subsequent consecutive publications on _____, 20____.

Linda C MacEachen

Sworn and subscribed before me, a Notary Public, in and for the County of Bernalillo and State of New Mexico this 31 day of July of 2013.

OFFICIAL SEAL
Sandra B. Gutierrez
NOTARY PUBLIC
STATE OF NEW MEXICO
My Commission Expires: 2-18-17

Sandra B. Gutierrez

PRICE $ 395.02

Statement to come at end of month.

ACCOUNT NUMBER 1007794

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD
NOTICE OF RULEMAKING HEARING

The New Mexico Environmental Improvement Board ("Board") will hold a public hearing on October 8, 2013 at 10:00 a.m. at the Grant County Business and Conference Center, Fort Bayard Room, 3031 Highway 180 East, Silver City, New Mexico. The purpose of the hearing is to consider the matter of No. EIB 13-04(R), proposed revision to the New Mexico State Implementation Plan ("SIP") regarding Air Quality Control Regulation Part 98 of 20.2 New Mexico Administrative Code, Conformity of General Federal Action to the State Implementation Plan, (20.2.98 NMAC).

The proponent of this regulatory adoption and revision is the New Mexico Environment Department ("NMED").

The purpose of the public hearing is to consider and take possible action on a petition from NMED to repeal 20.2.98 NMAC. The proposed repeal is in response to the U.S. Environmental Protection Agency's ("EPA") March 24, 2010 amendments to the federal general conformity rule, 40 CFR Part 93, Subpart B, Determining Conformity of General Federal Actions to State or Federal Implementation Plans. 40 CFR 93 Subpart B was amended to make the adoption and submittal of General Conformity SIPs optional rather than mandatory for states. Upon adoption by the Board, the repeal of 20.2.98 NMAC would be submitted to EPA for incorporation into New Mexico's SIP.

The NMED will host an informational open house on the proposed repeal of 20.2.98 NMAC at the NMED Air Quality Bureau Office, 525 Camino del los Marquez, Suite 1, Santa Fe, New Mexico from 12:00p.m. - 3:00p.m. on September 4, 2013. To attend the informational open house, please contact Gail Cooke at 505-476-4319 or gail.cooke@state.nm.us.

The proposed revised regulation may be reviewed during regular business hours at the NMED Air Quality Bureau office, 525 Camino del los Marquez, Suite 1, Santa Fe, New Mexico. Full text of NMED's proposed revised regulations are available on NMED's web site at www.nmenv.state.nm.us, or by contacting Gail Cooke at (505) 476-4319 or gail.cooke@state.nm.us.

The hearing will be conducted in accordance with 20.1.1 NMAC (Rulemaking Procedures - Environmental Improvement Board), the Environmental Improvement Act, NMSA 1978, Section 74-1-9, the Air Quality Control Act Section, NMSA 1978, 74-2-6, and other applicable procedures.

All interested persons will be given reasonable opportunity at the hearing to submit relevant evidence, data, views and arguments, orally or in writing, to introduce exhibits, and to examine witnesses. Persons wishing to present technical testimony must file with the Board a written notice of intent to do so. The notice of intent shall:

(1) identify the person for whom the witness(es) will testify;
(2) identify each technical witness that the person intends to present and state the qualifications of the witness, including a description of their education and work background;
(3) include a copy of the direct testimony of each technical witness in narrative form;
(4) list and attach each exhibit anticipated to be offered by that person at the hearing; and
(5) attach the text of any recommended modifications to the proposed new and revised regulations.

Attn: Julie Chambers

NMED Exh. 7

APC Fax:5058233368 Sep 4 2013 16:38 P.01

México ("SIP") relativa a la Parte 98 de la Regulación de Control de la Calidad del Aire del Código Administrativo de Nuevo México 20.2 (Conformidad de Acción General Federal al Plan de Implementación del Estado) ("20.2.98 NMAC").

El proponente de esta adopción y revisión reguladora es el Departamento del Medio Ambiente de Nuevo México ("NMED").

La finalidad de la audiencia pública es considerar y posiblemente tomar acción sobre una petición de NMED para revocar 20.2.98 NMAC. La propuesta revocación es en respuesta a las enmiendas del 24 de marzo de 2010 de la Agencia de Protección Ambiental de los EE.UU. ("EPA") a la regla federal de conformidad general, 40 CFR Parte 93, Subparte B - Determinando Conformidad de Acciones Generales Federales a los Planes de Implementación Estatales o Federales. 40 CFR 93 Subparte B fue enmendada para hacer opcional la adopción y sumisión de SIPs de Conformidad General en lugar de obligatorias para los estados. Tras la adopción por la Junta, la revocación de 20.2.98 NMAC sería enviada a la EPA para su incorporación en el SIP de Nuevo México.

El NMED patrocinará una jornada informativa de puertas abiertas sobre la revocación propuesta de 20.2.98 NMAC en la Oficina del Departamento de Calidad del Aire del NMED, 525 Del Camino los Marquez, Suite 1, Santa Fe, Nuevo México de 12:00 p.m. 3:00 p.m. el 04 de septiembre de 2013. Para asistir a la jornada informativa de puertas abiertas, por favor, póngase en contacto con Gail Cooke en el 505 476-4319 o gail.cooke@state.nm.us.

La regulación revisada propuesta podrá ser examinada en horario de oficina en la Oficina de la Agencia de Calidad del Aire del NMED, en 525 Del Camino los Marquez, Suite 1, Santa Fe, Nuevo México. El sitio en la Web del NMED, www.nmenv.state.nm.us ofrece el texto completo de la revisión propuesta; también se puede obtener contactando Gail Cooke, llamando al teléfono (505) 476-4319 o enviándole un correo electrónico a gail.cooke@state.nm.us.

La audiencia se realizará de conformidad con 20.1.1 NMAC (Procedimientos de Reglamentación - Consejo para la Mejora del Medio Ambiente), la Ley de Mejora del Medio Ambiente, Sección 74-1-9 NMSA 1978, la Ley de Control de Calidad del Aire, Sección 74-2-6 NMSA 1978, y otros procedimientos aplicables.

Todas las personas interesadas tendrán oportunidad razonable en la audiencia de presentar pruebas, datos, opiniones y argumentos importantes, ya sea en forma verbal o por escrito, así como de presentar anexos e interrogar testigos. Las personas que deseen entregar testimonios técnicos deben presentar, ante el Consejo una notificación por escrito de su intención. La notificación de intención deberá:

(1) identificar a la persona para quien testificará(n) el(los) testigo(s);
(2) identificar a cada uno de los testigos técnicos que las personas desean presentar y declarar las cualificaciones de los mismos, incluyendo una descripción de sus antecedentes de educación y trabajo;
(3) resumir o incluir una copia del testimonio directo de cada testigo técnico y declarar la duración prevista del testimonio de ese testigo;
(4) enumerar y describir, o adjuntar, cada uno de los anexos que dicha persona prevé ofrecer en la audiencia; y
(5) adjuntar el texto de cualquier modificación recomendada a las regulaciones propuestas nuevas y revisadas.

Las notificaciones de intención para la audiencia deben ser recibidas en la Oficina del Consejo a más tardar a las 5:00 p.m. el 18 de septiembre de 2013, y hacer referencia al número de expediente, EIB 13-04(R), y la fecha de la audiencia. Las notificaciones de intención para presentar testimonios técnicos se deben entregar a:
Pam Castañeda, Administradora de la Junta
Oficina de la Junta de Mejoramiento Ambiental
Harold Runnels Building
P.O. Box 5469
Santa Fe, NM 87502
Teléfono: (505) 827-2425, Fax (505) 827-0310.

Cualquier miembro del público en general puede testificar en la audiencia. No se requiere notificación previa para presentar testimonios no técnicos en la audiencia. Los miembros del público también pueden ofrecer anexos en relación con su testimonio, en tanto no sean repeticiones excesivas de su testimonio.

Los miembros del público en general que deseen presentar una declaración por escrito para el registro, en vez de ofrecer testimonio verbal en la audiencia, presentarán la declaración por escrito antes de la audiencia, o la presentarán en la misma.

Las personas con discapacidad y que necesitan ayuda para ser parte de este proceso de la audiencia deberán contactar a Juan Carlos Borrego de la oficina de recursos humanos NMED por 23 de septiembre, 2013, P.O. Box 26110, 1190 St. Francis Drive, Santa Fe, Nuevo México, 87502, teléfono 505-827-0424 o correo electrónico juancarlos.borrego@state.nm.us. Los usuarios de TDY deben acceder a su número a través de la Red de Difusión de Nuevo México, al 1-800-659-8331.

El Consejo puede tomar la decisión sobre las regulaciones propuestas revisadas a la conclusión de la audiencia, o bien abordar una reunión para una fecha posterior a fin de considerar las acciones sobre la propuesta.

Journal: July 31, 2013

NEW MEXICO REGISTER

New Mexico Commission of Public Records
Administrative Law Division
1205 Camino Carlos Rey
Santa Fe, NM 87507
505-476-7907

Affidavit of Publication in the *New Mexico Register*

I, Art Bransford , certify that the agency noted below has published legal notices or rules in the New Mexico Register, and that payment has been assessed by invoice for said legal notice or publication, which appeared on the date and in the volume and issue number noted below.

Date of Publication: 7/31/2013

Volume: XXIV **Issue # :** 14

Invoice # : *NMR-2014- 15*

Amount: $86.00

Agency:
Environment Department
Contact: Gail Cooke
525 camino de Los Marquez #1
Santa Fe, NM 87505-

Description:

Notice		Notice of Rulemaking Hearing
Other	Other Material	Notice of State Implementation Revision Plan

State of New Mexico, County of Santa Fe
Signed and affirmed before me on Thursday, August 01, 2013
by Art Bransford

Notary Public: Louise Wood
Louise Wood [My commission expires: 5 15 17]

Affiant: Art Bransford
Publisher, *New Mexico Register* **Date:** 8/1/2013

~Copies of the published material documented in this affidavit are enclosed~

(seal)

Form SRC-2002-04 Revised July 2007

Notices of Rulemaking and Proposed Rules

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD
NOTICE OF RULEMAKING HEARING

The New Mexico Environmental Improvement Board ("Board") will hold a public hearing on October 8, 2013 at 10:00 a.m. at the Grant County Business and Conference Center, Fort Bayard Room, 3031 Highway 180 East, Silver City, New Mexico. The purpose of the hearing is to consider the matter of No. EIB 13-04(R), proposed revision to the New Mexico State Implementation Plan ("SIP") regarding Air Quality Control Regulation Part 98 of 20.2 New Mexico Administrative Code (Conformity of General Federal Action to the State Implementation Plan) ("20.2.98 NMAC").

The proponent of this regulatory adoption and revision is the New Mexico Environment Department ("NMED").

The purpose of the public hearing is to consider and take possible action on a petition from NMED to repeal 20.2.98 NMAC. The proposed repeal is in response to the U.S. Environmental Protection Agency's ("EPA") March 24, 2010 amendments to the federal general conformity rule, 40 CFR Part 93, Subpart B – Determining Conformity of General Federal Actions to State or Federal Implementation Plans. 40 CFR 93 Subpart B was amended to make the adoption and submittal of General Conformity SIPs optional rather than mandatory for states. Upon adoption by the Board, the repeal of 20.2.98 NMAC would be submitted to EPA for incorporation into New Mexico's SIP.

The NMED will host an informational open house on the proposed repeal of 20.2.98 NMAC at the NMED Air Quality Bureau Office, 525 Camino del los Marquez, Suite 1, Santa Fe, New Mexico from 12:00p.m.-3:00p.m. on September 4, 2013. To attend the informational open house, please contact Gail Cooke at 505-476-4319 or gail.cooke@state.nm.us.

The proposed revised regulation may be reviewed during regular business hours at the NMED Air Quality Bureau office, 525 Camino del los Marquez, Suite 1, Santa Fe, New Mexico. Full text of NMED's proposed revised regulations are available on NMED's web site at www.nmenv.state.nm.us, or by contacting Gail Cooke at (505) 476-4319 or gail.cooke@state.nm.us.

The hearing will be conducted in accordance with 20.1.1 NMAC (Rulemaking Procedures – Environmental Improvement Board), the Environmental Improvement Act, NMSA 1978,Section 74-1-9, the Air Quality Control Act Section, NMSA 1978,74-2-6, and other applicable procedures.

All interested persons will be given reasonable opportunity at the hearing to submit relevant evidence, data, views and arguments, orally or in writing, to introduce exhibits, and to examine witnesses. Persons wishing to present technical testimony must file with the Board a written notice of intent to do so. The notice of intent shall:

(1) identify the person for whom the witness(es) will testify;
(2) identify each technical witness that the person intends to present and state the qualifications of the witness, including a description of their education and work background;
(3) include a copy of the direct testimony of each technical witness in narrative form;
(4) list and attach each exhibit anticipated to be offered by that person at the hearing; and
(5) attach the text of any recommended modifications to the proposed new and revised regulations.

Notices of intent for the hearing must be received in the Office of the Board not later than 5:00 pm on September 18, 2013 and should reference the docket number, EIB 13-04(R), and the date of the hearing. Notices of intent to present technical testimony should be submitted to:

Pam Castaneda, Board Administrator
Environmental Improvement Board
P.O. Box 5469Santa Fe, NM 87502
Phone: (505) 827-2425, Fax (505) 827-0310

Any member of the general public may testify at the hearing. No prior notification is required to present non-technical testimony at the hearing. Any such member may also offer exhibits in connection with his testimony, so long as the exhibit is not unduly repetitious of the testimony.

A member of the general public who wishes to submit a written statement for the record, in lieu of providing oral testimony at the hearing, shall file the written statement prior to the hearing, or submit it at the hearing.

Persons having a disability and needing help in being a part of this hearing process should contact Juan Carlos Borrego of the NMED Human Resources Bureau by September 23, 2013 at P.O. Box 26110, 1190 St. Francis Drive, Santa Fe, New Mexico, 87502, telephone 505-827-0424 or email juancarlos.borrego@state.nm.us. TDY users please access his number via the New Mexico Relay Network at 1-800-659-8331.

The Board may make a decision on the proposed revised regulations at the conclusion of the hearing, or the Board may convene a meeting at a later date to consider action on the proposal.

NEW MEXICO GAME COMMISSION

STATE GAME COMMISSION PUBLIC MEETING AND RULE MAKING NOTICE

On **Thursday, August 22, 2013,** beginning at 8:00 a.m., in the **Martinez Hall Theatre at New Mexico State University Grants, 1500 3rd Street, Grants, NM 87020,** the State Game Commission will meet in public session to hear and consider action as appropriate on the following: Valles Caldera National Preserve, Recent Wildfire Impacts to Wildlife and Habitat, Fiscal Year 2013 Depredation and Nuisance Abatement Report, Bear and Cougar Harvest Update, Pueblo of Santa Ana Pronghorn Antelope Management, Habitat Stamp Sikes Act Citizen Advisory Committee, San Juan Fisheries Project Update, Hatchery Overview, New Mexico's State Wildlife Action Plan, Vehicle Wildlife Collisions, Department Personnel Overview, Northwest Area Office Update. Additionally they will hear and consider action as appropriate on proposed and final amendments to the following rules: Revocations, Revocation Timeframes for Violators, Reservation of Two Elk Licenses for Non-profit Wish-Granting Organizations, Director's Authority to Accommodate Disability or Medical Impairment, Proposed Amendment to the Scientific and Education Rules 19.35.6 and 19.36.2 NMAC, Wild Turkey Management Update and Objectives 19.31.10 NMAC, Shooting Preserve in Chama, NM, Proposed Amendments to (19.31.12 NMAC) Ibex and Barbary Sheep Management, Migratory Game Birds 19.31.6 NMAC, Fiscal Year 2015 Budget Request, Proposed Amendments to Game and Fish Licenses/ Permits (19.30.9 NMAC) - Vendor Bond Requirement, and Proposed Amendments to the Fisheries Rule, 19.31.4 and Manner and Method Rule 19.31.10 NMAC. They will hear general public comments (comments are limited to three minutes). A closed executive session is planned to discuss

STATE OF NEW MEXICO
ENVIRONMENTAL IMPROVEMENT BOARD

IN THE MATTER OF PROPOSED AMENDMENTS TO 20.2.98 NMAC – CONFORMITY OF GENERAL FEDERAL ACTIONS TO THE STATE IMPLEMENTATION PLAN. **EIB 13-04(R)**

WRITTEN TESTIMONY OF GAIL COOKE

Witness Qualifications:

Gail Cooke is an Environmental Planner in the Control Strategies Section of the Air Quality Bureau. She has worked in the Air Quality Bureau since June 1999. Ms. Cooke holds a bachelor degree in Environmental Design from Texas A&M University and a master degree in Urban and Regional Planning from Virginia Tech. Her resume is attached as Exhibit 1.

I. INTRODUCTION

Madame Chair and Members of the Board, I am here to present the New Mexico Environment Department's ("Department") proposed repeal of 20.2.98 New Mexico Administrative Code ("NMAC") – *Conformity of General Federal Actions to the State Implementation Plan*. Exhibit 3 reflects the Department's proposed repeal in current NMAC format. During my testimony, I will refer to this regulation as Part 98.

A. What is General Conformity?

In November 1993, EPA promulgated two sets of regulations to implement Section 176(c) of the Clean Air Act. First, on November 24, EPA promulgated the Transportation Conformity Regulations, which apply to highways and mass transit. These regulations establish the criteria and procedures for determining whether transportation plans, programs, and projects funded under title 23 U.S.C(the Federal Transit Act) conform with the State Implementation Plan (SIP) (58 Fed. Reg. 62,188). Then, on November 30, EPA promulgated a second set of regulations, known as the General Conformity Rule, which apply to all other federal activities. This includes activities that are federally supported in any way or the Federal government provides financial assistance for licensing or permitting purposes. The Transportation and General Conformity Rules ensured that other federal actions also conformed to the SIPs (58 Fed. Reg. 63,214).

The purpose of the Federal General Conformity Rule is to:

- Ensure that federal activities do not cause or contribute to any new violation of National Ambient Air Quality Standards ("NAAQS");

- Ensure that actions do not cause more frequent or severe violations of the NAAQS in areas where violations already exist; and
- Ensure that attainment of the NAAQSs is not delayed.

B. When is General Conformity Required?

General conformity applies only to areas that have violated (are in nonattainment with) the NAAQS for the six criteria pollutants: carbon monoxide, sulfur dioxide, oxides of nitrogen, particulate matter, ozone, and lead. To ensure that federal actions activities (other than transportation projects) do not worsen air quality in nonattainment areas or interfere with State Implementation Plans (SIPs), which set the requirements for meeting EPA standards for air quality.

According to the CAA§ 176 (c)(1)(B), general federal actions cannot:

- cause or contribute to new violations of the NAAQS;
- increase the frequency or severity of existing violations of the standards; or
- delay attainment of the standards.

C. New Mexico's General Conformity Regulation (Part 98)

States were required to submit their initial general conformity regulation to EPA one year after the federal rule was promulgated in November of 1993 (58 Fed. Reg. 62,188). The State of New Mexico submitted Part 98 for incorporation into the State's SIP to EPA on November 17, 1994; however, this initial SIP was not approved by EPA. The initial SIP revision submitted for general conformity by the State was not approved due to the fact that EPA considered many portions of the regulation to be not consistent with the requirements of 40 CFR 51 – *Requirements for Preparation, Adoption, and Submittal of Implementation Plans.*

On July 18,1996, New Mexico submitted a completely revised general conformity SIP revision that included a completely recodified set of general conformity regulations. EPA published a direct final approval action for New Mexico's general conformity SIP revision on March 26, 1997 (63 Fed. Reg. 14,332). (Exhibit 4). EPA received one comment during the comment period. The commenter expressed concern that a portion of the state's general conformity SIP was more stringent than the federal general conformity rule. EPA concurred, and issued a conditional approval of New Mexico's SIP submittal for Part 98 with the condition that New Mexico revise or remove portion of Part 98. New Mexico removed Paragraph C of Section of 110 of Part 98 and resubmitted the revised Part 99 in September of 1999.

II. PROPOSED REPEAL OF PART 98

The proposed repeal of Part 98 is in response to amendments to the federal general conformity regulation, 40 CFR Part 93, Subpart B (Part 93, Subpart B) on March 24, 2010 (75 Fed. Reg. 17,254). (Exhibit 5). A portion of the amendments to Part 93, Subpart B were in response to revisions made in August 2005, to the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (Exhibit 6) that removed the

requirement for states to adopt and submit general conformity SIPs under the Clean Air Act. Before this revision to SAFETEA-LU, states were required to adopt regulatory SIPs that corresponded to the federal general conformity regulation Part 93, Subpart B. In its March 2010 revisions to Part 93, EPA made the adoption and submittal of general conformity SIPs optional rather than mandatory for states (75 Fed. Reg. 17,258).

The proposed repeal of Part 98 will eliminate the need for the New Mexico Environment Department to continually update the State's general conformity regulation to incorporate any revisions to the federal general conformity rule. Part 98 has also never been utilized in the State of New Mexico. The State currently has only one small particulate matter nonattainment area located in the Southern region of the state in Anthony, New Mexico, and this area does not include any federally funded facilities or lands. Moreover, even if New Mexico had potentially affected nonattainment areas, as a practical matter repeal of Part 98 would not affect any future general conformity determinations. As EPA stated in the preamble to the rule revisions, "If a State does not have a conformity SIP, then federal agencies must conduct their evaluation under the requirements of 40 CFR 93.150 – 93.165. These requirements are essentially the same as the requirements contained in the conformity SIPs. Therefore, there would be little difference in the enforceability of the regulations." 75 Fed. Reg. at 17,258-259.

III. OUTREACH

Outreach was conducted for the proposed repeal of Part 98 in the form of public notices (Exhibit 7) and an open house. The state received no comments from the public notices and no attendance at the open house.

The Department does not foresee that the proposed repeal of Part 98 will have an adverse impact on the citizens or businesses of New Mexico. Due to limited usefulness of Part 98 and the potential resources needed to ensure that the regulation corresponds with the federal general conformity regulation, the New Mexico Environment Department believes it would be the most beneficial to the state to opt out of the general conformity SIP requirement, as allowed by the new EPA regulations, by repealing Part 98.

V. CONCLUSION

This concludes my testimony to the Board on our proposed revisions to Part 98. I respectfully request that the Board adopt this proposed SIP repeal at the conclusion of this hearing.

STATE OF NEW MEXICO
ENVIRONMENTAL IMPROVEMENT BOARD

IN THE MATTER OF PROPOSED AMENDMENTS TO 20.2.98 NMAC – CONFORMITY OF GENERAL FEDERAL ACTIONS TO THE STATE IMPLEMENTATION PLAN.

EIB 13-04(R)

NMED'S PROPOSED
ORDER AND STATEMENT OF REASONS

This matter comes before the New Mexico Environmental Improvement Board ("Board") upon a petition filed by the New Mexico Environment Department ("NMED" or "Department"), proposing repeal of Part 98 of 20.2 NMAC. The Board heard testimony from the Department and admitted exhibits into the record. On October 8, 2013 the Board deliberated and voted to adopt the proposed repeal for the reasons that follow:

STATEMENT OF REASONS

1. The purpose of the "General Conformity" provisions of the federal Clean Air Act ("CAA") is to ensure that federally supported activities (other than transportation projects) will not cause or contribute to, or increase the severity or frequency of, violations of the national ambient air quality standards ("NAAQS").
2. Prior to 2005, CAA § 176 (c) required among other things that states include in their state implementation plans ("SIPs") criteria and procedures to assure the "conformity" of federal activities to the SIP, and to submit this "General Conformity" SIP to the U.S. Environmental Protection Agency ("EPA") for approval.
3. New Mexico's General Conformity provisions are codified at Part 98 of 20.2 NMAC, which was approved as a SIP revision by EPA in 1997.

4. In 2005, Congress enacted legislation entitled the "Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users" ("SAFETEA-LU"), which, among other things deleted the requirement that states adopt and submit General Conformity SIPs to EPA.

5. Pursuant to the SAFETEA-LU amendments, in 2010 EPA revised the regulations governing General Conformity SIPs at 40 C.F.R. Part 51, Subpart W, in order to make adoption of General Conformity SIPs optional.

6. In a state that does not have a General Conformity SIP, the conformity of federal activities to the state's SIP is governed by 40 C.F.R. Part 93, which contains requirements essentially identical to those specified for SIPs in 40 C.F.R. Part 51, Subpart W. The absence of a General Conformity SIP therefore does change the substantive requirements applicable to federal actions.

7. General Conformity requirements apply only in NAAQS non-attainment areas. CAA § 176(c)(5).

8. New Mexico contains only one geographically small non-attainment area, for particulate matter. Application of the General Conformity provisions has not been triggered by any federal actions in that area.

9. Adopting period revisions to Part 98 of 20.2 NMAC to stay current with federal requirements imposes administrative burdens on the Board and the Department but does not result in any increased protection to the environment.

10. Repeal of Part 98 of 20.2 NMAC is in the public interest,

11. Pursuant to 20.1.300.A NMAC, any person may petition the Board for amendment of regulations within the jurisdiction of the Board.

12. On June 24, 2013 NMED filed a petition with the Board for a public hearing in this matter.

13. On July 15, 2013, at a meeting conducted in compliance with the Open Meetings Act and other applicable requirements, the Board granted the Department's request for a hearing.

14. On July 31, 2013, Notice of Hearing was published in the Albuquerque Journal (in English and Spanish), and in the New Mexico Register.

15. NMED filed a Notice of Intent to Present Technical Testimony (NOI) on September 18, 2013, in accordance with 20.1.1.302 NMAC.

16. A hearing was held in this matter on October 8, 2013 in Silver City, New Mexico.

17. The Board has the authority to approve these proposed amendments pursuant to NMSA 1978 § 74-2-5.C.

18. The proposed amendments satisfy the statutory requirements of the Air Quality Control Act, NMSA 1978, Section 74-2-5.E.

19. The notice and hearing requirements of NMSA 1978 Section 74-2-6 and 20.1.1 NMAC were satisfied in this rulemaking process.

20. The proposed amendments are adopted for any or all of the reasons stated above.

ORDER

By majority vote of a quorum of the Board members, the proposed regulatory revisions were approved by the Board on October 8, 2013. The repeal of 20.2.98 NMAC shall be filed with the New Mexico State Records Center, and submitted to the U.S. EPA for appropriate action.

_____ Dated: _____

On Behalf of the Board