TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AGENDA ITEM REQUEST

for State Implementation Plan Revision Adoption

AGENDA REQUESTED: October 5, 2011

DATE OF REQUEST: September 16, 2011

INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED: Joyce Spencer, (512) 239-5017

CAPTION: Docket No. 2010-2074-SIP. Consideration of the adoption of the proposed revisions to the General Conformity State Implementation Plan (SIP) revision.

The adoption would remove the references in the SIP to the now repealed 40 Code of Federal Regulations (CFR) Part 51, Subpart W and would reference the amended 40 CFR Part 93, Subpart B. (Amy Muttoni, John Minter) (Project No. 2011-002-SIP-NR)

Susana M. Hildebrand
Chief Engineer

David Brymer
Division Director

Joyce Spencer
Agenda Coordinator

Copy to CCC Secretary? NO X YES

Texas Commission on Environmental Quality
Interoffice Memorandum

To: Commissioners **Date:** September 16, 2011

Thru: Melissa Chao, Acting Chief Clerk
Mark R. Vickery, P.G., Executive Director

From: Susana M. Hildebrand, P.E, Chief Engineer

Docket No.: 2010-2074-SIP

Subject: Commission Approval for General Conformity State Implementation Plan (SIP) Revision Adoption
General Conformity SIP Revision
Project No. 2011-002-SIP-NR

Background and reason(s) for the SIP revision:
On November 16, 1994, the Texas Natural Resource Conservation Commission, now known as the Texas Commission on Environmental Quality (TCEQ), adopted the General Conformity State Implementation Plan (SIP) revision. The purpose of the SIP revision was to incorporate the federal general conformity regulations in 40 Code of Federal Regulations (CFR) Parts 51 and 93 (58 *Federal Register* 63213, November 30, 1993). The United States Environmental Protection Agency (EPA) approved this revision on March 11, 1998 (63 Fed. Reg. 11833). In August 2005, the United States Congress passed the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) that eliminated the requirement for states to adopt and submit general conformity SIP revisions. On April 5, 2010, the EPA adopted revisions to the general conformity regulations in 40 CFR Parts 51 and 93 (75 *Federal Register* 17254, April 5, 2010). These revisions made the adoption and submittal of general conformity SIP revisions optional for states and deleted all of 40 CFR Part 51, Subpart W except for §51.851. Title 40 CFR §51.851 was revised to clarify that if a state chooses to submit a general conformity SIP revision, it must be consistent with the requirements of 40 CFR Part 93, Subpart B. These changes became effective on July 6, 2010.

The EPA's April 2010 revisions also added four new sections to 40 CFR Part 93: §§93.161, 93.163, 93.164, and 93.165. Under the new 40 CFR §93.161, federal agencies may negotiate a facility-wide emissions budget to be incorporated into the SIP. After the EPA approves the SIP revision, any action at the facility can be presumed to conform if the emissions from the proposed action along with all other emissions at the facility are within the approved facility-wide emissions budget. Therefore, a conformity determination would not be necessary. The new 40 CFR §93.163 allows alternate schedules for mitigating emissions increases. Federal agencies and states can negotiate a program for some emissions mitigation to occur in future years, and states can use this approach to accommodate short-term increases in emissions if the state believes that a substantial long-term reduction in emissions will result from a federal action. The new 40 CFR §93.164 allows the emissions of one precursor of a criteria pollutant to be offset by the

reduction in the emissions of another precursor of that pollutant. Finally, the new 40 CFR §93.165 incorporates the use of early emissions reduction credits into the regulations. This section also provides other federal agencies with regulations and guidance similar to the Airport Early Emissions Reduction Credit program established by the United States Congress in the Federal Aviation Administration Reauthorization Act of 2003.

The current general conformity SIP revision specifically references the now repealed 40 CFR Part 51, Subpart W. The amended 40 CFR Part 93, Subpart B continues to subject certain federal actions to general conformity requirements. Therefore, Appendix H-4-1 of the general conformity SIP revision will be updated to reference 40 CFR Part 93, Subpart B.

Scope of the SIP revision:
The SIP revision will change Appendix H-4-1 of the general conformity SIP to reference 40 CFR Part 93, Subpart B.

A.) Summary of what the SIP revision will do:
The SIP revision will change Appendix H-4-1 of the general conformity SIP to reference 40 CFR Part 93, Subpart B.

B.) Scope required by federal regulations or state statutes:
The now repealed 40 CFR Part 51, Subpart W is specifically referenced in the general conformity SIP. In order to maintain program continuity, the general conformity SIP will be updated to reference 40 CFR Part 93, Subpart B.

C.) Additional staff recommendations that are not required by federal rule or state statute:
None.

Statutory authority:
Texas Clean Air Act, Texas Health and Safety Code (THSC), §382.002, Policy and Purpose, §382.011, General Powers and Duties, §382.013, Air Control Plans, and §382.017, Rules.

Effect on the:

A.) Regulated community:
There will be no effect on the regulated community, because the regulated community will need to comply with the federal rules whether the SIP is revised or not.

B.) Public:
The SIP revision will not have an adverse affect on the public.

C.) Agency programs:
Revising the SIP will have no effect on agency programs.

Re: Docket No. 2010-2074-SIP

Stakeholder meetings:
Stakeholder meetings were not held.

Public comment:
No public comments were received.

Significant changes from proposal:
There are no changes from proposal.

Potential controversial concerns and legislative interest:
None anticipated.

Does this SIP revision affect any current policies or require development of new policies?
No policies are affected by this adopted SIP revision.

What are the consequences if this SIP revision does not go forward? Are there alternatives to the SIP revision?
If the SIP revision does not go forward, the general conformity SIP will continue to reference the now repealed 40 CFR Part 51, Subpart W.

Agency contacts:
Amy Muttoni, Project Manager, 239-6351, Air Quality Division
John Minter, Staff Attorney, 239-0663

Attachments
75 *Federal Register* 17254, April 5, 2010

cc: Chief Clerk, 2 copies
Executive Director's Office
Susana M. Hildebrand, P.E.
Anne Idsal
Curtis Seaton
Ashley Morgan
Office of General Counsel
Amy Muttoni
Patricia Duron

REVISIONS TO THE STATE IMPLEMENTATION PLAN FOR THE DEMONSTRATION OF CONFORMITY REGARDING STATE IMPLENTATION PLAN REVISIONS FOR AREAS THAT ARE IN NONATTAINMENT OR MAINTENANCE STATUS REGARDING THE NATIONAL AMBIENT AIR QUALITY STANDARDS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
P.O. BOX 13087
AUSTIN, TEXAS 78711-3087

TEXAS GENERAL CONFORMITY STATE IMPLEMENTATION PLAN REVISION

Project Number 2011-002-SIP-NR

Adopted October 5, 2011

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EXECUTIVE SUMMARY

On November 16, 1994, the Texas Commission on Environmental Quality (TCEQ) adopted the General Conformity State Implementation Plan (SIP) revision. The purpose of the SIP revision was to incorporate the federal general conformity regulations in 40 Code of Federal Regulations (CFR) Parts 51 and 93 (58 *Federal Register* 63213, November 30, 1993). In August 2005, the United States Congress passed the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) that eliminated the requirement for states to adopt and submit General Conformity SIP revisions. On April 5, 2010, the United States Environmental Protection Agency (EPA) adopted revisions to the general conformity regulations in 40 CFR Parts 51 and 93 (75 *Federal Register* 17254, April 5, 2010). These revisions made the adoption and submittal of the General Conformity SIP revision optional for the state and deleted all of 40 CFR Part 51, Subpart W except for §51.851. 40 CFR §51.851 was revised to clarify that if a state chooses to submit a General Conformity SIP revision, it must be consistent with the requirements of 40 CFR Part 93, Subpart B. These changes became effective on July 6, 2010.

The EPA's April 2010 revisions also added four new sections to 40 CFR Part 93: §§93.161, 93.163, 93.164, and 93.165. Under the new 40 CFR §93.161, federal agencies may negotiate a facility-wide emissions budget to be incorporated into the SIP. After the EPA approves the SIP revision, any action at the facility can be presumed to conform if the emissions from the proposed action along with all other emissions at the facility are within the approved facility-wide emissions budget. Therefore, a conformity determination would not be necessary. The new 40 CFR §93.163 allows alternate schedules for mitigating emissions increases. Federal agencies and states can negotiate a program for some emissions mitigation to occur in future years, and states can use this approach to accommodate short-term increases in emissions if the state believes that a substantial long-term reduction in emissions will result from a federal action. The new 40 CFR §93.164 allows the emissions of one precursor of a criteria pollutant to be offset by the reduction in the emissions of another precursor of that pollutant. Finally, the new 40 CFR §93.165 incorporates the use of early emissions reduction credits into the regulations. This section also provides other federal agencies with regulations and guidance similar to the Airport Early Emissions Reduction Credit program established by the United States Congress in the Federal Aviation Administration Reauthorization Act of 2003.

This General Conformity SIP revision will remove the references, in Appendix A and in Chapter 4, to the now repealed 40 CFR Part 51, subpart W and instead reference the amended 40 CFR Part 93, subpart B.

SECTION V: LEGAL AUTHORITY

A. General

The Texas Commission on Environmental Quality (TCEQ) has the legal authority to implement, maintain, and enforce the National Ambient Air Quality Standards (NAAQS) and to control the quality of the state's air, including maintaining adequate visibility.

The first air pollution control act, known as the Clean Air Act of Texas, was passed by the Texas Legislature in 1965. In 1967, the Clean Air Act of Texas was superseded by a more comprehensive statute, the Texas Clean Air Act (TCAA), found in Article 4477-5, Vernon's Texas Civil Statutes. The legislature amended the TCAA in 1969, 1971, 1973, 1979, 1985, 1987, 1989, 1991, 1993, 1995, 1997, 1999, 2001, 2003, 2005, 2007, and 2009. In 1989, the TCAA was codified as Chapter 382 of the Texas Health and Safety Code.

Originally, the TCAA stated that the Texas Air Control Board (TACB) is the state air pollution control agency and is the principal authority in the state on matters relating to the quality of air resources. In 1991, the legislature abolished the TACB effective September 1, 1993, and its powers, duties, responsibilities, and functions were transferred to the Texas Natural Resource Conservation Commission (TNRCC). With the creation of the TNRCC, the authority over air quality is found in both the Texas Water Code and the TCAA. Specifically, the authority of the TNRCC is found in Chapters 5 and 7. Chapter 5, Subchapters A - F, H - J, and L, include the general provisions, organization, and general powers and duties of the TNRCC, and the responsibilities and authority of the executive director. This chapter also authorizes the TNRCC to implement action when emergency conditions arise and to conduct hearings. Chapter 7 gives the TNRCC enforcement authority. In 2001, the 77th Texas Legislature continued the existence of the TNRCC until September 1, 2013, and changed the name of the TNRCC to the Texas Commission on Environmental Quality (TCEQ). In 2009, the 81st Texas Legislature, during a special session, amended section 5.014 of the Texas Water Code, changing the expiration date of the TCEQ to September 1, 2011, unless continued in existence by the Texas Sunset Act. In 2011, the 82nd Texas Legislature continued the existence of the TCEQ until 2023.

The TCAA specifically authorizes the TCEQ to establish the level of quality to be maintained in the state's air and to control the quality of the state's air by preparing and developing a general, comprehensive plan. The TCAA, Subchapters A - D, also authorize the TCEQ to collect information to enable the commission to develop an inventory of emissions; to conduct research and investigations; to enter property and examine records; to prescribe monitoring requirements; to institute enforcement proceedings; to enter into contracts and execute instruments; to formulate rules; to issue orders taking into consideration factors bearing upon health, welfare, social and economic factors, and practicability and reasonableness; to conduct hearings; to establish air quality control regions; to encourage cooperation with citizens' groups and other agencies and political subdivisions of the state as well as with industries and the federal government; and to establish and operate a system of permits for construction or modification of facilities.

Local government authority is found in Subchapter E of the TCAA. Local governments have the same power as the TCEQ to enter property and make inspections. They also may make recommendations to the commission concerning any action of the TCEQ that affects their territorial jurisdiction, may bring enforcement actions, and may execute cooperative agreements with the TCEQ or other local governments. In addition, a city or town may enact and enforce

ordinances for the control and abatement of air pollution not inconsistent with the provisions of the TCAA and the rules or orders of the commission.

Subchapters G and H of the TCAA authorize the TCEQ to establish vehicle inspection and maintenance programs in certain areas of the state, consistent with the requirements of the Federal Clean Air Act; coordinate with federal, state, and local transportation planning agencies to develop and implement transportation programs and measures necessary to attain and maintain the NAAQS; establish gasoline volatility and low emission diesel standards; and fund and authorize participating counties to implement vehicle repair assistance, retrofit, and accelerated vehicle retirement programs.

B. Applicable Law

The following statutes and rules provide necessary authority to adopt and implement the state implementation plan (SIP). The rules listed below have previously been submitted as part of the SIP.

Statutes

All sections of each subchapter are included, unless otherwise noted.

TEXAS HEALTH & SAFETY CODE, Chapter 382	September 1, 2011
TEXAS WATER CODE	September 1, 2011

Chapter 5: Texas Natural Resource Conservation Commission
- Subchapter A: General Provisions
- Subchapter B: Organization of the Texas Natural Resource Conservation Commission
- Subchapter C: Texas Natural Resource Conservation Commission
- Subchapter D: General Powers and Duties of the Commission
- Subchapter E: Administrative Provisions for Commission
- Subchapter F: Executive Director (except §§5.225, 5.226, 5.227, 5.2275,5.231, 5.232, and 5.236)
- Subchapter H: Delegation of Hearings
- Subchapter I: Judicial Review
- Subchapter J: Consolidated Permit Processing
- Subchapter L: Emergency and Temporary Orders (§§5.514, 5.5145, and 5.515 only)
- Subchapter M: Environmental Permitting Procedures (§5.558 only)

Chapter 7: Enforcement
- Subchapter A: General Provisions (§§7.001, 7.002, 7.0025, 7.004, and 7.005 only)
- Subchapter B: Corrective Action and Injunctive Relief (§7.032 only)
- Subchapter C: Administrative Penalties
- Subchapter D: Civil Penalties (except §7.109)
- Subchapter E: Criminal Offenses and Penalties: §§7.177, 7.179-7.183

Rules

All of the following rules are found in 30, Texas Administrative Code, as of the following latest effective dates:

Chapter 7: Memoranda of Understanding, §§7.110 and 7.119	May 2, 2002
Chapter 19: Electronic Reporting	July 10, 2008

Chapter 35: Subchapters A-C, K: Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions	July 20, 2006
Chapter 39: Public Notice, §§39.201; 39.401; 39.403(a) and (b)(8)-(10); 39.405(f)(1) and (g); 39.409; 39.411 (a), (b)(1)-(6), and (8)-(10) and (c)(1)-(6) and (d); 39.413(9), (11), (12), and (14); 39.418(a) and (b)(3) and (4); 39.419(a), (b), (d), and (e); 39.420(a), (b) and (c)(3) and (4); 39.423 (a) and (b); 39.601-39.605	June 24, 2010
Chapter 55: Requests for Reconsideration and Contested Case Hearings; Public Comment, §§55.1; 55.21(a) - (d), (e)(2), (3), and (12), (f) and (g); 55.101(a), (b), and (c)(6) - (8); 55.103; 55.150; 55.152(a)(1), (2), and (6) and (b); 55.154; 55.156; 55.200; 55.201(a) - (h); 55.203; 55.205; 55.209, and 55.211	June 24, 2010
Chapter 101: General Air Quality Rules	June 24, 2010
Chapter 106: Permits by Rule, Subchapter A	January 26, 2011
Chapter 111: Control of Air Pollution from Visible Emissions and Particulate Matter	July 19, 2006
Chapter 112: Control of Air Pollution from Sulfur Compounds	July 12, 2001
Chapter 113: Standards of Performance for Hazardous Air Pollutants and for Designated Facilities and Pollutants	May 14, 2009
Chapter 114: Control of Air Pollution from Motor Vehicles	December 13, 2010
Chapter 115: Control of Air Pollution from Volatile Organic Compounds	February 17, 2011
Chapter 116: Permits for New Construction or Modification	January 6, 2011
Chapter 117: Control of Air Pollution from Nitrogen Compounds	February 4, 2010
Chapter 118: Control of Air Pollution Episodes	May 14, 2004
Chapter 122: §122.122: Potential to Emit	December 11, 2002
Chapter 122: §122.215: Minor Permit Revisions	June 3, 2001
Chapter 122: §122.216: Applications for Minor Permit Revisions	June 3, 2001
Chapter 122: §122.217: Procedures for Minor Permit Revisions	December 11, 2002
Chapter 122: §122.218 Minor Permit Revision Procedures for Permit Revisions Involving the Use of Economic Incentives, Marketable Permits, and Emissions Trading	June 3, 2001

SECTION VI: CONTROL STRATEGY

A. Introduction (No change)
B. Ozone (No change)
C. Particulate Matter (No change)
D. Carbon Monoxide (No change)
E. Lead (No change)
F. Oxides of Nitrogen (No change)
G. Sulfur Dioxide (No change)
H. Conformity with the National Ambient Air Quality Standards (Revised)
    1. Policy and Purpose (No change)
    2. Summary of the Principal Elements Addressed Within This Plan (No change)
    3. Transportation Conformity (No change)
    4. General Conformity (Revised)
    5. Social and Economic Considerations of the Plan (No change)
    6. Fiscal and Manpower Resources (No change)
    7. Hearing Requirements (Revised)
I. Site Specific (No change)
J. Mobile Sources Strategies (No change)
K. Clean Air Interstate Rule (No change)
L. Transport (No change)
M. Regional Haze (No change)

LIST OF ACRONYMS

CFR	Code of Federal Regulations
CO	Carbon Monoxide
EPA	United States Environmental Protection Agency
FCAA	Federal Clean Air Act
NAAQS	National Ambient Air Quality Standard
NO_2	Nitrogen Dioxide
NO_X	Nitrogen Oxides
$PM_{2.5}$	Particulate Matter with an Aerodynamic Diameter of Less Than or Equal to 2.5 Micrometers
PM_{10}	Particulate Matter with an Aerodynamic Diameter of Less Than or Equal to Ten Micrometers
SIP	State Implementation Plan
SO_2	Sulfur Dioxide
TAC	Texas Administrative Code
TACB	Texas Air Control Board
TCAA	Texas Clean Air Act
TCEQ	Texas Commission on Environmental Quality (commission)
THSC	Texas Health and Safety Code
TIMS	Texas Information Management System
TNRCC	Texas Natural Resource Conservation Commission
TTC	Texas Transportation Code
TWC	Texas Water Code
USC	United States Code
VOC	Volatile Organic Compounds

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Chapter 2: Summary of the Principal Elements Addressed Within This Plan (No revision)

Chapter 3: Transportation Conformity (No revision)

Chapter 4: General Conformity (Revised)

4.1 Introduction (Revised)

4.2 Background Information (Revised)

4.3 Criteria and Procedures (Revised)

Chapter 5: Social and Economic Considerations of the Plan (No revision)

Chapter 6: Fiscal and Manpower Resources (No revision)

Chapter 7: Hearing Requirements (Revised)

7.1 Public Hearings for Transportation Conformity SIP (No revision)

7.2 Public Hearings for General Conformity SIP Revision (Revised)

LIST OF APPENDICES

Appendix	Appendix Name
A	*Federal Register* Part III, United States Environmental Protection Agency, 40 CFR Part 93, subpart B, Revisions to the General Conformity Regulations

CHAPTER 1: POLICY AND PURPOSE

(No revision)

CHAPTER 2: SUMMARY OF THE PRINCIPAL ELEMENTS ADDRESSED WITHIN THIS PLAN

(No revision)

CHAPTER 3: TRANSPORTATION CONFORMITY

(No revision)

CHAPTER 4: GENERAL CONFORMITY

4.1 INTRODUCTION

The Federal Clean Air Act Amendments (FCAA) of 1990 required the Unites States Environmental Protection Agency (EPA) to develop a rule outlining the procedures and criteria for determining whether or not a federal action conforms to the state implementation plan (SIP). The General Conformity rule does not apply to federal actions involving metropolitan transportation plans, transportation improvement programs, and projects funded by the Federal Highway Administration of the Federal Transit Administration. This rule applies in areas designated nonattainment or maintenance for any of the National Ambient Air Quality Standards (NAAQS). The NAAQS pollutants include ozone, carbon monoxide (CO), sulfur dioxide (SO_2), nitrogen dioxide (NO_2), lead, particulate matter with an aerodynamic diameter of less than or equal to 2.5 micrometers ($PM_{2.5}$), and particulate matter with an aerodynamic diameter of less than or equal to ten micrometers (PM_{10}). This rule also applies to the precursors of these pollutants: volatile organic compounds (VOC) and nitrogen oxides (NO_X) in ozone areas; NO_X in NO_2 areas; and SO_2 and NO_X in $PM_{2.5}$ areas.

On November 16, 1994, the Texas Natural Resource Conservation Commission, now known as the Texas Commission on Environmental Quality (TCEQ), adopted the General Conformity SIP revision. The purpose of the SIP revision was to incorporate the federal general conformity regulations in 40 Code of Federal Regulations (CFR) Parts 51 and 93 (58 *Federal Register* 63213, November 30, 1993). The EPA approved the SIP revision on March 11, 1998 (47 *Federal Register* 11833). In August 2005, the United States Congress passed the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) that eliminated the requirement for states to adopt and submit general conformity SIP revisions. On April 5, 2010, the EPA adopted revisions to the general conformity regulations in 40 CFR Parts 51 and 93 (75 *Federal Register* 17254, April 5, 2010). The revisions made the adoption and submittal of the general conformity SIP optional for the state and deleted all of 40 CFR Part 51, Subpart W except for §51.851. 40 CFR §51.851 was revised to clarify that if a state chooses to submit a general conformity SIP, it must be consistent with the requirements of 40 CFR Part 93, Subpart B. These changes became effective on July 6, 2010.

4.2 BACKGROUND INFORMATION

The federal General Conformity rule requires each federal agency to determine whether or not their proposed actions conform to the applicable SIP. The federal General Conformity rule addresses the impacts of pollutant emissions that are caused by the federal action, that are above the de minimis levels or are regionally significant, that are reasonably foreseeable, and that can be controlled by the federal agency through its continuing program responsibility. By requiring federal actions to conform to the SIP, the general conformity rules assure that federal actions do not undermine the state's efforts to achieve clean air. The rule prohibits certain federal actions that would not conform to a SIP and reinforces the state's ability to insure the integrity of their planning decisions and the requirements specified in the SIP.

The General Conformity rule allows the state rule to be more stringent in some areas if the state rule applies to nonfederal as well as federal agencies within the state. The TCEQ does not intend, at this time, to extend the federal de minimis level down to the major modification level for each nonattainment or maintenance area. Nor does the TCEQ intend to require nonfederal entities to comply with the general conformity rules. However, the TCEQ reserves the right to make the rule more stringent as it deems necessary.

4.3 CRITERIA AND PROCEDURES

The FCAA requires states to ensure that criteria and procedures for general conformity are enforceable by rule. The SAFETEA-LU of 2005 revised the FCAA conformity requirements in section 176(c), deleting a requirement that states adopt and submit a General Conformity SIP. The amended General Conformity rule makes submittal of General Conformity SIP revisions optional, at the discretion of the states. The federal rules also deleted Subpart W in 40 CFR Part 51 as duplicative of Part 93. Title 30 Texas Administrative Code §101.30, Conformity of General Federal Actions to State Implementation Plans, of the General Rules (SIP Section XIV, concerning Rules and Regulations) has been repealed to eliminate references in state rules to repealed federal rules and the need for future state rule revisions as a result of amendments to federal regulations. Federal agencies will only need to comply with the EPA General Conformity Rule requirements in 40 CFR Part 93.

CHAPTER 5: SOCIAL AND ECONOMIC CONSIDERATIONS OF THE PLAN

(No revision)

CHAPTER 6: FISCAL AND MANPOWER RESOURCES

(No revision)

CHAPTER 7: HEARING REQUIREMENTS

7.1 PUBLIC HEARINGS FOR TRANSPORTATION CONFORMITY STATE IMPLEMENTATION PLAN (NO REVISION)

7.2 PUBLIC HEARINGS FOR GENERAL CONFORMITY SIP

A public hearing for this proposed General Conformity State Implementation Plan revision and associated rulemaking was offered in Austin on May 31, 2011, at 10:00 a.m. at the Texas Commission on Environmental Quality, Building E, Room 201S, 12100 Park 35 Circle, Austin, TX 78753. A question and answer session was held 30 minutes prior to the hearing. The hearing was not officially opened because no party indicated a desire to give comment.

The comment period opened on May 6, 2011, and closed on June 6, 2011. The commission did not receive any comments.

APPENDIX A: *FEDERAL REGISTER* PART III, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, 40 CFR PART 93, SUBPART B, REVISIONS TO THE GENERAL CONFORMITY REGULATIONS

ORDER ADOPTING REPEALED RULE AND
REVISION TO THE STATE IMPLEMENTATION PLAN

Docket Nos. 2010-2068-RUL, 2010-2074-SIP

On October 5, 2011, the Texas Commission on Environmental Quality (Commission), during a public meeting, considered repeal of § 101.30 - 114.702, 114.706, 114.707, and 114.709. The Commission adopts this repeal, in Chapter 101, Subchapter A, Conformity of General Federal Actions to State Implementation Plans; and a corresponding revision to the state implementation plan (SIP). The repeal removes the General Conformity regulations in state rule that have been rendered unnecessary by passage and implementation of the federal Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) in 2005. Under Tex. Health & Safety Code Ann. §§ 382.011, 382.012, and 382.023 (Vernon 2001), the Commission has the authority to control the quality of the state's air and to issue orders consistent with the policies and purposes of the Texas Clean Air Act, Chapter 382 of the Tex. Health & Safety Code. The proposed rule repeal was published for comment in the May 6, 2011 issue of the *Texas Register* (36 TexReg 3035).

Pursuant to Tex. Health & Safety Code Ann. § 382.017 (Vernon 2001), Tex. Gov't Code Chapter 2001 (Vernon 2000 & Vernon Supp. 2005), and 40 Code of Federal Regulations § 51.102 and after proper notice, the Commission conducted a public hearing to consider the repeal. Proper notice included prominent advertisement in the areas affected at least 30 days prior to the date of the hearing. A public hearing was held in Austin on May 31, 2011.

The Commission circulated hearing notices of its intended action to the public, including interested persons, the Regional Administrator of the EPA, and all applicable local air pollution control agencies. The public was invited to submit data, views, and recommendations on the proposed repeal, either orally or in writing, at the hearing or during the comment period. Prior to the scheduled hearing, copies of the proposed repeal were available for public inspection at the Commission's central office and on the Commission's Web site.

IT IS THEREFORE ORDERED BY THE COMMISSION that the repealed § 101.30 and revision to the SIP incorporated by reference to this Order are hereby adopted. The Commission further authorizes staff to make any non-substantive revisions to the repeal necessary to comply with *Texas Register* requirements. The adopted repealed rule and the preamble to the adopted repealed rule and the revision to the SIP are incorporated by reference in this Order as if set forth at length verbatim in this Order.

IT IS FURTHER ORDERED BY THE COMMISSION that on behalf of the Commission, the Chairman should transmit a copy of this Order, together with the repealed rule and the revision to the SIP, to the Regional Administrator of EPA pursuant to the Federal Clean Air Act, § 110, codified at 42 U.S. Code Ann. §§ 7410 - 7671q, as amended.

This Order constitutes the Order of the Commission required by the Administrative Procedure Act, Tex. Gov't Code, § 2001.033 (Vernon 2000 & Vernon Supp. 2005).

If any portion of this Order is for any reason held to be invalid by a court of competent jurisdiction, the invalidity of any portion shall not affect the validity of the remaining portions.

Date issued:

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

_____
Bryan W. Shaw, Ph.D., Chairman

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

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:

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I. National Technology Transfer Advancement Act
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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