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40 CFR Parts 6, 51, and 93

Determining Conformity of General Federal Actions to State or Federal Implementation Plans; Final Rule

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 6, 51, and 93

[FRL–4805–1]

Determining Conformity of General Federal Actions to State or Federal Implementation Plans

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Clean Air Act (Act) requires EPA to promulgate rules to ensure that Federal actions conform to the appropriate State implementation plan (SIP). Conformity to a SIP is defined in the Act as amended in 1990 as meaning conformity to a SIP's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards (NAAQS) and achieving expeditious attainment of such standards. The Federal agency responsible for the action is required to determine if its actions conform to the applicable SIP.

This final rule establishes the criteria and procedures governing the determination of conformity for all Federal actions, except Federal highway and transit actions ("transportation conformity"). Transportation conformity requirements are established in a separate rulemaking action.

EFFECTIVE DATES: The final rules for 40 CFR parts 51 and 93 are effective January 31, 1994. The final rule for 40 CFR part 6 will be effective January 31, 1994 unless notice is received by December 30, 1993, that someone wishes to submit adverse or critical comments. If the effective date is delayed for the 40 CFR part 6 rule due to the need to provide for public comment, timely notice will be published in the **Federal Register**. The information collection requirements contained in 40 CFR part 51, subpart W, and 40 CFR part 93, subpart B, have not been approved by the Office of Management and Budget (OMB) and are not effective until OMB has approved them. A document will be published in the **Federal Register** announcing the effective date.

FOR FURTHER INFORMATION CONTACT: Doug Grano: U.S. EPA, Office of Air Quality Planning and Standards (MD–15), Research Triangle Park, NC 27711, (919) 541–3292.

SUPPLEMENTARY INFORMATION:

Outline

I. Summary of the Final Rule

The purpose of this rule is to implement section 176(c) of the Act, as amended (42 U.S.C. 7401 *et seq.*), which requires that all Federal actions conform to an applicable implementation plan developed pursuant to section 110 and part D of the Act. Section 176(c) of the Act requires EPA to promulgate criteria and procedures for demonstrating and assuring conformity of Federal actions to a SIP. States are required through rule to submit to EPA revisions to th implementation plans establishing conformity criteria and procedures consistent with this rule within 12 months of today's date.

For the purpose of summarizing the general conformity rule, it can be viewed as containing three major parts: applicability, procedure, and analysis. These are briefly described in the next three paragraphs.

The general conformity rule covers direct and indirect emissions of criteria pollutants or their precursors that are caused by a Federal action, are reasonably foreseeable, and can practicably be controlled by the Federal agency through its continuing program responsibility. The rule generally applies to Federal actions except:

(1) Those covered by the transportation conformity rule;

(2) Actions with associated emissions below specified de minimis levels; and

(3) Certain other actions which are exempt or presumed to conform.

The rule also establishes procedural requirements. Federal agencies must make their conformity determinations available for public review. Notice of draft and final conformity determinations must be provided directly to air quality regulatory agencies and to the public by publication in a local newspaper.

The conformity determination examines the impacts of the direct and indirect emissions from the Federal action. The rule provides several options to satisfy air quality criteria and requires the Federal action to also meet any applicable SIP requirements and emission milestones. Each Federal agency must determine that any actions covered by the rule conform to the applicable SIP before the action is taken.

The EPA continues to believe that the statute is ambiguous and that it provides EPA discretionary authority to apply these general conformity procedures to both attainment and nonattainment areas.

However, EPA cannot now apply these rules in attainment areas because it did not propose to do so. The EPA must first complete notice and comment rulemaking on the application of the appropriate criteria and procedures for conformity determinations in attainment areas. Therefore, the criteria and procedures established in this rule apply only in areas that are nonattainment or maintenance with respect to any of the criteria pollutants under the Act:[1] carbon monoxide

[1] Criteria pollutants are those pollutants for wh. EPA has established a NAAQS under section 109 of the Act.

lead (Pb), nitrogen dioxide, ozone, particulate matter (PM–10), and sulfur dioxide (SO_2).

This rule does not apply to Federal procurement actions. The March 15, 1993 proposal was silent on the application of conformity requirements specifically to procurement actions, however, a number of comments were received on procurements. Although the comments generally indicated that procurements should be exempt from the final conformity rule, EPA is inclined to believe that Congress intended for certain procurement actions to be covered by the general conformity provisions. It is impossible at this time to resolve the competing concerns regarding which procurement actions should be covered and which should be exempt since the existing record is inadequate. Therefore, the EPA will propose to cover certain procurements in a future rulemaking, but will take comment on other interpretations.

The EPA will also propose exemptions for certain procurement actions which it believes would fit the de minimis criteria or result in emissions which are not reasonably foreseeable. The EPA believes the majority of procurement actions would be de minimis or not reasonably foreseeable. Given the complexity of Federal procurement and the government's desire to streamline procurement activities, the EPA will seek comment on its proposed exemptions and the process for applying conformity to procurement activities.

II. Background

The general conformity rule was proposed on March 15, 1993 (58 FR 13836). Additional background information can be found in the proposal notice.

Conformity is defined in section 176(c) of the Act as conformity to the SIP's purpose of eliminating or reducing the severity and number of violations of the NAAQS and achieving expeditious attainment of such standards, and that such activities will not:

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

(2) Increase the frequency or severity of any existing violation of any standard in any area, or

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

The Act as amended in 1990 ties conformity to attainment and maintenance of the NAAQS. Thus, a Federal action must not adversely affect the timely attainment and maintenance of the NAAQS or emission reduction progress plans leading to attainment. The Act as amended in 1990 includes a new emphasis of reconciling the emissions from Federal actions with the SIP, rather than simply providing for the implementation of SIP measures. This integration of Federal actions and air quality planning is intended to protect the integrity of the SIP by helping to ensure that SIP growth projections are not exceeded, emissions reduction progress targets are achieved, and air quality attainment and maintenance efforts are not undermined.

The rule amends part 51 of title 40 of the Code of Federal Regulations by adding a new subpart W. Part 51 is entitled: "Requirements for preparation, adoption, and submittal of implementation plans." Amendment to part 51 is necessary to require States to revise their implementation plans to include conformity requirements. Once the State plans are revised, the Federal agencies would be subject to those requirements.

In addition, the rule adds a new subpart B to part 93 of title 40 of the Code of Federal Regulations. This is necessary to make the conformity requirements apply to Federal agencies as soon as the rule is effective and in the interim period before the States revise their implementation plans. The part 93 requirements are identical to the part 51 requirements with one exception: they do not require a State to revise its implementation plan. To avoid duplication, the preamble language cites only the part 51 sections, however, the relevant part 51 discussion also applies to the equivalent part 93 rules.

As noted in the proposal (58 FR 13837), EPA promulgated conformity rules in 1979 and 1985 to implement the conformity provisions for EPA actions at 40 CFR 6.303. Today's final rule applies the conformity provisions of the Act as amended in 1990 to all Federal activities, including EPA activities. Thus, the conformity requirements of 40 CFR 6.303 are superseded by these rules. Accordingly, paragraphs (a) through (f) of 40 CFR 6.303 are replaced with a new paragraph (a) which refers to the conformity rules promulgated today and a new paragraph (b) which retains the requirements of (old) paragraph (g), which addresses other requirements of section 316(b) of the Act. The EPA is taking this action without specifically having proposed to make these changes to 40 CFR 6.303 in the March 15, 1993 proposal because the Agency views this as a noncontroversial action and anticipates no adverse comments. This action will be effective January 31, 1994 unless, by December 30, 1993 notice is received that adverse or critical comments will be submitted regarding the changes to 40 CFR 6.303. If final action on the changes to 40 CFR 6.303 is delayed pending public comment, the requirements of the new part 51 and 93 rules will still supersede the requirements of 40 CFR 6.303.

III. Discussion of Major Issues and Response to Comments

For additional background information on the major issues, the reader should refer to 58 FR 13837–13847, March 15, 1993. Unless otherwise noted, the discussions in Sections III and IV below only address issues where public comments were received. For portions of the proposed rule where comments were not received, the final rule is consistent with the proposed rule for the reasons set forth in the proposal notice. Further discussion of such issues is not addressed in this preamble. Portions of the proposed rule were also changed so that the final rule more clearly states the intended meaning. Sections III and IV address issues in the same order as they were addressed in the proposal which is also consistent with the regulatory portion of this rulemaking notice.

A. Effective Dates

1. Proposal

The effective date of this rule was proposed to be 30 days after the final rulemaking notice is published. At that time, however, some projects that are dependent on Federal actions will have already commenced or completed planning activities, perhaps including their environmental assessment. Such projects would then be faced with the uncertainty of new conformity requirements that could not have been anticipated prior to the final rules being published. This uncertainty could threaten the viability of projects for which considerable time and funds already have been or are about to be invested.

The preamble to the proposal specifically invited comments on transition (or grandfathering) provisions for on-going projects that are dependent on Federal actions (58 FR 13837). Two options were proposed which would allow grandfathering based on activities that will have either already commenced or completed their environmental assessment by the time the final rulemaking notice is published.

2. Comment

The EPA received comments on this issue which recommended a variety of

approaches. The comments included the following recommendations, among others:

(1) Exempt Federal actions where the environmental analysis has been "commenced" prior to the effective date of the final rules.

(2) Base the exemption on the "completion" of the environmental analysis prior to the effective date of the final rules. One commenter suggested the following definition of "complete:" Projects where there has been sufficient environmental analysis for the agency to determine that the project is in conformity with the purposes of the SIP pursuant to the agency's affirmative obligation under Act section 176(c), or where a written determination of conformity under section 176(c) of the Act has been made.

(3) The rule should apply retroactively to November 15, 1991, the deadline set by Congress for promulgation of the rules by EPA.

(4) The final conformity rule should take effect only after a State revises its SIP to meet the new Act conformity requirements and the revision is approved by EPA.

(5) Exempt only projects that have received funding prior to the effective date of the conformity rules.

(6) Exempt projects that have completed an environmental analysis which included public participation.

(7) Phase-in review by focusing first on environmental impact statements (EIS's) and then later extend to other actions or exempt projects completed prior to 1 year after the rules are final.

3. Response

This final rule does not require a new conformity determination for Federal actions where the Federal agency completed its conformity determination by March 15, 1994 or National Environmental Policy Act (NEPA) analysis prior to the effective date of this rule. If a conformity determination has been "completed" it means the responsible Federal agency made a final determination that a specific action conforms, pursuant to section 176(c) of the Act. In such cases, the Federal actions must have conformity determinations pursuant to section 176(c) of the Act, but they would not be subject to the specific rules published today. Alternatively, if the Federal agency had completed its environmental analysis for a Federal action under the NEPA prior to the effective date of this rule, as evidenced by an EIS, environmental assessment (EA), or finding of no significant impact (FONSI), then such an action is also not subject to the specific rules published today, although it would have been subject to applicable conformity requirements at the time the environmental analysis was completed.

In determining whether to apply rules immediately, EPA generally considers the following factors:

(1) Whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law.

(2) The extent to which the party against whom the new rule is applied relied on the former rule.

(3) The degree of burden which immediate application of a rule imposes on a party, and

(4) The statutory interest in applying a new rule despite the reliance of a party on the old standard.

The EPA considered all options contained in the comments and determined that the grandfathering provision in the final rule is appropriate for the reasons described below.

(1) The general conformity rule represents an abrupt departure from the previous conformity requirements EPA published in 40 CFR 6.303, which applied only to EPA actions (and which are being replaced by this rulemaking). Although staff working drafts of the new rule existed as early as November 1991, the final rule is considerably changed from all of the early drafts, which also had very limited circulation.

(2) Considering the general absence of conformity determinations by Federal agencies prior to the 1990 amendments to the Act, most parties appear to have relied on the NEPA requirements or on 40 CFR 6.303 to mean that specific general conformity requirements did not apply for Federal agencies other than EPA.

(3) Prior to this final rulemaking, many Federal actions will have already completed their environmental analysis pursuant to NEPA. Such projects would then be faced with the uncertainty of the new conformity requirements that were not anticipated prior to the final rules being published. This uncertainty could threaten the viability of projects for which considerable time and funds already have been or are about to be invested.

(4) The statutory interest in applying the new requirements during this interim period is preserved where the Federal action specifically considered the conformity requirements of the Act and completed such an analysis or fulfilled the NEPA requirements, since such actions would provide for an environmental analysis focusing on air quality as envisioned by Congress even though the analysis might not meet all the details contained in the new rules.

After determining that some form of grandfathering is appropriate, EPA selected a hybrid of the commencement and completion dates of a conformity determination or where a NEPA analysis has been completed. That is, the final rule grandfathers actions where: (1) The NEPA analysis is completed by the effective date of this rule, or (2) the environmental analysis was commenced prior to the effective date of this rule, sufficient environmental analysis is completed, and the conformity determination is completed by March 15, 1994 (1 year after the date of the proposed rulemaking). This approach is supported by the following reasons:

(1) The completion date can be well defined, as described above.

(2) The commencement date and phase-in approaches are valid concepts but, by themselves, are subject to too much uncertainty. These concepts have less well defined dates than the completion date. In many cases, the conformity analysis could have been recently started and the new rules could be incorporated into the analysis without hardship. The commencement date is likely to exceed the 5-year timeframe for conformity reanalysis in many cases. The EPA believes that it is reasonable to expect that a conformity determination could be developed in parallel with the ongoing environmental analysis and/or rely on any previous environmental analyses to the degree they are complete; in this manner the conformity determination should not require extensive, new analyses nor prolong the environmental review process in most cases.

(3) The date after EPA approval of the State conformity rules is an unjustifiably lengthy delay and is not consistent with the statutory intent to have the Federal rules in place and the States later follow with their own conformity rules.

(4) The funding date may be difficult to define since it could be based on a variety of steps within an overall grant process or based in some way on the actual expenditure of funds.

(5) Grandfathering based on previous public participation and/or the commencement of an environmental analysis would not assure that the analysis was completed and also would require EPA to define what level of previous public participation would be considered adequate—an issue not addressed in the proposal.

As described in § 51.857(a), a conformity determination automatically lapses 5 years from the date of the determination unless the Federal action has been completed or a continuous program has been commenced to

implement that Federal action within a reasonable time. This 5-year provision also applies with respect to conformity determinations grandfathered as described above.

The information collection requirements in 40 CFR parts 51 and 93 have not yet been approved by the OMB and are not effective until OMB approves them.

B. SIP Revisions—State Authority

1. Proposal

As described in the March 15, 1993 preamble, EPA proposed that States may adopt criteria and procedures more stringent than the requirements in the EPA rules (58 FR 13838).

2. Comment

Several commenters supported EPA's view. These commenters stated that Federal agencies are to be afforded no special privileges and that the Act in no way prevents the imposition of more stringent control measures in instances where public health and welfare may be at risk.

Other commenters, however, stated that Federal agencies should not be held to a higher standard by State regulations than adjacent or nearby private or State activities. These comments suggest that this provision may be inconsistent with section 118 of the Act. Section 118 of the Act states that Federal agencies are to comply with State air pollution requirements "in the same manner and to the same extent as any nongovernmental entity." Since the general conformity requirement is not imposed on any non-Federal entity, these agencies argue that there is not a waiver of sovereign immunity which would allow State regulation of Federal activities in either sections 118 or 176 of the Act; therefore, these agencies argue, the Act does not permit States to set more stringent conformity requirements than those set by EPA. Some commented that multiple State rules would cause confusion to Federal agencies trying to meet the conformity requirements.

One comment stated that only areas designated "extreme" should be allowed to require more stringent State or regional general conformity rules in its SIP.

3. Response

In considering the comments received on this issue, EPA has taken the provisions of sections 116, 118 and 176(c) of the Act into account. The new language added to section 176(c) by the 1990 amendments to the Act makes it clear that the purpose of section 176(c) is to make emissions from Federal actions consistent with the Act's air quality planning goals. The conformity requirement is different from most other requirements of the Act because it is imposed solely on Federal agencies, and is not required of nongovernmental entities. Therefore it is appropriate for EPA to establish the criteria and procedures for the conformity of Federal actions as specified by section 176(c)(4)(A) of the Act. It is also required that States adopt a SIP revision that includes these criteria and procedures, as indicated by section 176(c)(4)(C) of the Act. Furthermore, EPA interprets the requirements imposed by section 116 of the Act to mean that the criteria and procedures set by State conformity rules may not be any less stringent than those established by this rulemaking.

The EPA interprets the section 118 requirement that Federal agencies comply with air pollution requirements "in the same manner and to the same extent as any nongovernmental entity" to mean only that Federal agencies must comply with any air pollution rule established under the Act to no less an extent than nongovernmental entities. The general conformity rule and State rules adopted pursuant to it are rules established under the Act with which, under section 118, Federal agencies must comply. Consequently, EPA does not agree that there is no waiver of sovereign immunity at all in section 176(c). The EPA concludes that section 176(c)(4)(c) requires State conformity SIP's that would regulate Federal activities.

However, the language of the relevant sections does leave unclear the extent to which the waiver of sovereign immunity may limit the manner in which a State's section 116 authority is applied to Federal agencies. After careful consideration of the legal and policy arguments presented to EPA after the March 15, 1993 notice of proposed rulemaking (NPR), EPA has concluded that State conformity rules which do not apply to non-Federal entities and which apply more stringent requirements than the EPA general conformity rule to federally-assisted facilities would be inconsistent with the waiver of sovereign immunity provided by section 118 of the Act. Applying such rules exclusively to federally-assisted facilities, which could be the case with any more stringent conformity requirements since conformity requirements do not apply statutorily to nongovernment entities, would have an unjustifiably discriminatory effect. Under current case law, a reviewing court would construe waivers of sovereign immunity, like that in section 118, narrowly. See *Department of Energy* v. *Ohio*, 112 S.CT. 1627, 1633 (1992); *McMahon* v. *United States*, 342 U.S. 25, 26, 72 S.CT. 17, 18 (1951). The EPA believes that such purely discriminatory more-stringent State programs would be prohibited under such case law.

The EPA recognizes that States have historically developed their own conformity requirements despite the absence of any Federal rules. Further, States have frequently adopted requirements that differ from State to State, both with respect to conformity and general air quality management, in order to address different air quality needs and regulatory authorities. There are several statements excerpted below from the congressional Record which support the conclusion that States may adopt conformity rules that are more stringent than the rules promulgated by EPA.

> Such [Federal] regulations will provide guidance to the states for the adoption of conformity requirements in each SIP and will govern the conformity decisions of federal agencies and metropolitan planning organizations (MPOs) required to make conformity determinations. Federal agencies will also have to comply with applicable provisions of the SIP if stronger than the underlying basic federal regulations. Cong. Rec., S16958 (October 27, 1990) (Statement of Senator Chafee).
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> States are also free under section 116 to continue to apply any more stringent project review criteria in effect under state or local law. The criteria in section 176(c)(3) are merely the additional federal criteria that must be met to qualify for federal approval or funding of transportation projects, programs, and plans prior to the date when a revised implementation plan takes effect under these amendments. Cong. Rec., S16973 (October 27, 1990) (Statement of Senator Baucus).
>
> Such regulations will provide guidance to the states for the adoption of conformity requirements in each SIP and will govern the conformity decisions of federal agencies and MPOs required to make conformity decisions. Federal agencies will also have to comply with applicable provisions of the SIP if stronger than the underlying basic federal regulations." Cong. Rec., S16973 (October 27, 1990) (Statement of Senator Baucus).

Consequently, the EPA believes that if a State wishes to apply more stringent conformity rules for the purpose of attaining air quality, it may do so, but only if the same conformity requirements are imposed on non-Federal as well as Federal actions. States adopting more stringent conformity rules may not cause a more significant or unusual obstacle to Federal agencies than non-Federal agencies for the same type of action.

Therefore, if a State decides to adopt more stringent conformity criteria and procedures, these requirements must be imposed on all similar actions whether the sponsoring agency is a Federal or non-Federal entity; non-Federal entities include State and local agencies and private sponsors. Sections 51.851 and 51.853 have been revised accordingly in the final rule.

If a State elects to impose more stringent conformity requirements, they must not be so narrowly construed as to apply in practical effect only to Federal actions. For example, if a State decides that actions of employers with more than 500 employees require conformity determinations, and the Federal government is the only employer of this size in a particular jurisdiction, then this rule would be viewed as discriminatory and would not be permitted. Consequently, more stringent State conformity rules must not only be written to apply similarly to all Federal and non-Federal entities, but they must be able to be implemented so that they apply in a nondiscriminatory way in practice.

Moreover, when EPA approves State conformity rules, the Agency should determine that more stringent State conformity requirements are directly related to the attainment of air quality in the State.

C. Indirect Emissions—Inclusive/ Exclusive Definition

1. Proposal

The proposal indicated that the Act expressly prohibits Federal actions that would "support in any way" activity which does not conform to a SIP. Given this language, EPA concluded that indirect emissions must be included in any conformity determination, under either subpart T or W. The EPA proposed two different definitions of indirect emissions—"inclusive" and "exclusive"—and invited comment on both versions. The inclusive and exclusive definitions are identical except the phrase "and which the Federal agency has and will continue to maintain some authority to control" appears only in the exclusive definition. As described in the preamble to the proposal (58 FR 13840), the exclusive version of indirect emissions excluded emissions that may be attributable to a Federal action but that the Federal agency has no authority to control. The inclusive version (58 FR 13839) includes all emissions attributable to the Federal action, whether or not they are under the control of the Federal agency. The terms "caused by" and "reasonably foreseeable" are common to both definitions and are discussed elsewhere in this notice.

2. Comment

The EPA received substantial and diverse comments from air regulatory agencies, the building industry, various Federal agencies, environmental groups, and individuals. The "inclusive" definition of indirect emissions is supported primarily by the air regulatory agencies and environmental groups. The "inclusive" version, however, is viewed as unnecessarily broad by many of the other groups. Many individuals and building industry representatives objected to the inclusion of indirect emissions in either approach.

Commenters supporting the inclusive definition pointed out that this approach provides the greatest opportunity for States to prevent Federal actions that could violate the NAAQS. They indicated that to prevent actions that could cause new or worsen existing air quality violations, it is necessary to consider not only the Federal action, but all reasonably foreseeable emissions caused by the Federal action, whether or not they are under the Federal agency's control.

Commenters supporting the exclusive version of indirect emissions argued that it is unreasonable to include emissions that may be attributable to a Federal action, but that the Federal agency has no authority to control. As stated in the March 15, 1993 preamble, many of the Federal agencies reiterated that this approach might require the Federal agency to impose conditions on the project (e.g., mitigation) to demonstrate conformity that would be meaningless since there would be no effective Federal enforcement mechanism.

A third group of commenters stated that there should be no consideration of indirect sources in the general conformity rule. They cited section 110 of the Act as limiting Federal authority to conduct indirect source review to major federally-funded and federally-sponsored actions. These comments are addressed in section III.E of this notice.

3. Response

a. General—indirect emissions. As described in the proposal, the Act expressly prohibits Federal actions that would "support in any way" activity which does not conform to a SIP. Because this language is very broad, EPA believes indirect emissions must be included in any conformity determination, under either subpart T (transportation conformity) or W (general conformity). As described below, congressional guidance is much clearer for transportation conformity than for general conformity. In fact, there is virtually no information in the Congressional Record specifically directed at general conformity. Therefore, in interpreting the statutory intent for the general conformity rule, EPA believes it is helpful to consider the guidance provided by Congress on transportation conformity in section 176(c) of the Act.

Congress clearly intended the transportation conformity rule to cover the indirect emissions from vehicles that would travel to and on highways constructed with Federal support. Thus, the conformity review does not focus on emissions associated with only the construction of the highway project, but includes emissions from vehicles that later travel to and on that highway. The general conformity rule originates from the same statutory language and so must meet the same congressional intent.

As described above, the transportation treatment provisions of the Act clearly require consideration of indirect emissions. Therefore, EPA concludes that the general conformity rule must also cover indirect emissions.

On March 15, 1993, EPA proposed that as a legal matter, the statute could be interpreted to support either the inclusive or exclusive definition and both definitions were offered for public comment. As a result of the public comments and consultation with other Federal agencies, the final rule incorporates the exclusive definition of indirect emissions. The exclusive definition is selected because it meets the requirements of section 176(c) of the Act, and it:

(1) Is consistent with the manner indirect emissions are covered in the transportation conformity rule,

(2) Can be reasonably implemented, and

(3) Best fits within the overall framework of the Act.

As commenters noted, the inclusive definition would require the review of more Federal actions, as described in this rule, than the exclusive definition and, thus, could identify more cases where an air quality violation is possibly associated with a Federal action. The inclusive definition, however, is not selected for the following reasons:

(1) Mitigation measures required under this approach may not be enforced,

(2) It is not consistent with the manner in which indirect emissions ar covered in the transportation rule,

(3) It would impose an unreasonable burden due to the large number of affected Federal actions, and

(4) It establishes an overly broad role for the Federal government in attaining the NAAQS.

b. Inclusive definition—enforcement. The EPA sees no value to the environment in promulgating a rule that is unenforceable. The EPA agrees with the point made by some commenters that it is unreasonable to expect Federal agencies to control indirect emissions over which they have no continuing authority to control. As stated in the March 15, 1993 preamble, this approach might result in a Federal agency imposing conditions on the project (e.g., mitigation) to demonstrate conformity that would be meaningless since there would be no effective Federal enforcement mechanism.

For example, the inclusive approach could require a Federal agency to impose restrictions on the title to land that is being sold or developed. In such cases these deed restrictions might remain forever with the land. Enforcement of these types of restrictions is very difficult and is not likely to be an effective approach. Further, it is not reasonable to attach a restriction to a deed forever, since the land use might change over time and, certainly, the environment will change over time—both of which may remove or alter the need for the deed restriction, which would nonetheless remain in place since there is no mechanism to remove it. In this example, EPA believes that it is impractical to use deed restrictions to control emissions and that the Federal agency would not maintain control since there is no continuing program responsibility for that Federal agency to control future emissions associated with that land.

c. Inclusive definition—transportation. In the inclusive approach, the Federal agency is made responsible for emissions that are reasonably foreseeable. This would include emissions from on-site or off-site facilities. Assume, for example, that the Federal Aviation Administration (FAA) approves an airport expansion project which would require a general conformity determination. The airport expansion also includes a highway interchange construction project needing a project level transportation conformity approval. Additionally, it is known that a cargo handling facility will be constructed near that interchange due to the airport expansion. The project level transportation conformity review would cover emissions from vehicle activity to and on the highway interchange, but would not cover indirect emissions possibly associated with the airport or cargo facility. Thus, the project level transportation conformity review covers direct and certain indirect emissions associated with the highway interchange action itself.

The general conformity inclusive approach could rely on the transportation conformity review with respect to vehicle activity to and on the highway interchange. In addition, the general conformity inclusive approach would specifically consider direct and indirect emissions at the airport itself and at the cargo facility. In contrast, the exclusive approach, similar to the project level transportation conformity approach, covers direct and certain indirect emissions associated with the airport expansion action itself, but does not specifically consider additional indirect emissions (i.e., the cargo facility). Thus, the exclusive approach appears to be more consistent with the transportation conformity approach.

d. Inclusive definition—unreasonable burden. The inclusive definition could be interpreted to include virtually all Federal activities, since all Federal activities could be argued to give rise to, at least in some remote way, an action that ultimately emits pollution. This broadest interpretation of the statute could impose an unreasonable burden on the Federal agencies and private entities that would have been affected by that definition. For example, since the Federal government issues licenses for any export activities, an inclusive definition approach could go so far as to require the manufacture of the export material and the transportation of the same material to be subject to a conformity review. Such an approach, however, is very burdensome due to the large number of export activities, the fact that the licensing process is not a factor in any SIP, and that the vast majority of these manufacturing and transportation activities may have little to no impact on air quality. Thus, the inclusive approach goes far beyond the set of Federal activities reasonably related to the SIP.

The many Federal agencies subject to the inclusive approach would have been required to document air quality impacts from tens of thousands of public and private business activities each year, even where the associated Federal action is extremely minor. For example, the Army Corps of Engineers (COE) estimates that 65,000 of their regulatory actions would have required a conformity review in 1992 under the inclusive definition. The COE permits are often limited to a small portion of a much larger project and, thus, may not be the best mechanism to review the larger project: e.g., one river crossing for a 500 mile gas pipeline or a half-acre wetland fill for a twenty acre shopping mall.

The Federal agencies might also have been required to expend substantial resources in an attempt to enforce mitigation measures for actions that are outside their jurisdiction. Some delay to these public and private activities would have been expected as the conformity requirements were carried out. In some cases these Federal actions would not take place at all as a result of conformity consideration. In addition, the threat of litigation over this expansive list of actions would have been significant. That is, projects could have been delayed through litigation simply due to arguments over application of the conformity rule to the project, even where the air quality impacts were very minor.

Through public comments and by communication with other Federal agencies, the EPA received a large number of examples of Federal activities, a few of which are listed below, that are not normally considered in SIP's, but could not clearly be said to have absolutely no ties to actions that result in emissions of pollutants.

(1) COE permit actions.

(2) The sale of Federal land.

(3) National Pollutant Discharge Elimination System (NPDES) permit issuance.

(4) Transmission of electrical power.

(5) Export license actions.

(6) Bank failures.

(7) Mortgage insurance.

Based on the public comments and consultation with the other Federal agencies, EPA believes that Congress did not intend the general conformity rule to affect innumerable Federal actions, impose analytical requirements on activities that are very minor in terms of Federal involvement and air quality impacts, and result in the significant expense and delay that is likely in an inclusive definition. Thus, adopting the inclusive definition approach could have imposed an unreasonable burden on these public and private activities.

The Federal agencies would, in many cases, be unable to reduce emissions from sources that they cannot practicably control. This would result in the Federal action having to be prohibited because a positive conformity determination could not be made. The EPA believes that the Act does not intend to unreasonably restrict Federal actions so that they are generally prohibited in areas with air quality problems. Instead, the Federal agencies are required to control emissions in a reasonable manner and

States must develop general air quality plans to achieve the NAAQS.

As commenters noted, the inclusive definition would require the review of more Federal actions, as described in this rule, than the exclusive definition and, thus, could identify more cases where an air quality violation is possibly associated with a Federal action. Even with an approach that relied heavily on air quality modeling, however, there would still not be an absolute assurance that a new violation would not occur since there is considerable uncertainty associated with air quality modeling itself, due to uncertainties in emissions and meteorological data which drive the models. In fact, neither the inclusive nor exclusive definition approach would absolutely assure that all possible violations would be prevented since neither proposed approach requires air quality modeling for all Federal actions.

e. Inclusive definition—Federal role. Section 176(c) of the Act covers Federal actions that support in any way actions which could cause new or worsen existing air quality violations, delay attainment, or otherwise not conform with the applicable SIP and the purpose of the SIP. Clearly, Congress intended Federal agencies to do their part in achieving clean air. It is unlikely, however, that Congress intended Federal agencies to be responsible for emissions that are not practicably under their control and regarding which the Federal agency has no continuing program responsibility. The EPA does not believe that it is reasonable to conclude that a Federal agency "supports" an activity by third persons over whom the agency has no practicable control—or "supports" emissions over which the agency has no practicable control—based on the mere fact that, if one inspects the "causal" chain of events, the activity or emissions can be described as being a "reasonably foreseeable" result of the agency's actions.

In fact, achievement of the clean air goals is not primarily the responsibility of the Federal government. Instead, Congress assigned that responsibility to the State and local agencies in section 101(a)(3) of the Act: "air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments." Similar to NEPA, section 176(c) of the Act requires Federal agencies to consider the environmental consequences of their actions. Neither statutory requirement, however, requires the Federal agencies to unilaterally solve local air quality problems. Instead, the conformity rule should be viewed in a manner that fits within a broader view including NEPA activities by the Federal agencies and State and local air quality planning and regulatory actions. Together, these activities provide the framework to attain and maintain the NAAQS.

It is possible that a Federal action could be taken which, together with other reasonably foreseeable emissions caused by the Federal action, could cause or contribute to a violation of an air quality standard or otherwise not conform with the applicable SIP. The exclusive definition is adequate to cover Federal actions and meet the goals of section 176(c) where the resultant emissions are practicably under the control of the Federal agency, and are subject to a continuing agency programmatic responsibility. Where the Federal control over the resultant emissions is relatively minor, the problem is likely caused by multiple pollution sources and a solution may be impossible unless it is directed at all the contributing sources. This role is given to the State and local agencies by Congress and should not be interpreted as the Federal agencies' role under section 176(c).

In a case where, through a NEPA analysis, a violation is projected to occur at a proposed private housing development that receives a NPDES permit or private shopping mall that receives a COE permit, the projected violation is the result of the new projected emissions from the independent private actions not subject to Federal permit or approval and the background concentrations, due to existing local and areawide emission sources. The appropriate solution to the problem is for the Federal agency to ensure conformity of Federal actions to the SIP by minimizing new emissions from the Federal activities in a reasonable manner and for the State and local agencies to control the local and areawide emissions under the SIP to the extent needed to attain the NAAQS. The Federal agencies' responsibility should be to assure that only those emissions that the Federal agency can practicably control, and that are subject to the agency's continuing program responsibility, will be reasonably controlled, not to attempt to limit other sources' emissions, which would infringe on the air quality and land use planning roles of the State or local agency.

f. Exclusive definition—reasonable implementation. In the exclusive version, indirect emissions include only emissions over which the Federal agency can practicably control, and ha continuing program responsibility to control. Unlike the inclusive definition, the exclusive definition does not require Federal agencies to adopt and enforce mitigation measures that the agency cannot practicably control and that the agency has no continuing program responsibility to control. As described below, the exclusive definition does not cover innumerable Federal actions, does not require an agency to leverage their authority, and does not generally prohibit Federal actions in areas with air quality problems.

Consistent with the above discussion, and in order to clarify the scope of the term "indirect emissions," that term is revised in the final rule. Specifically, the meaning of the phrase in the proposed definition regarding emissions "which the Federal agency has and will continue to maintain some authority to control," is clarified in the final rule. In the final rule, the definition of "indirect emissions" is limited to emissions "the Federal agency can practicably control and will maintain control over due to a continuing program responsibility of the Federal agency." The meaning of the words "practicably control" is discussed elsewhere in this notice and through examples contained in the notice. The meaning of "continuing program responsibility" is described in the examples below.

Assume, for example, the Army Corps of Engineers (COE) issues a permit authorizing dredging by a nonfederal entity. In one case, the COE might require the permittee to transport and dispose of the dredged material at a specific location. In another case, the COE might allow the permittee to dispose of the dredged material at a suitable upland disposal site. In the first case, the COE has a continuing program responsibility for air emissions associated with the dredging and disposal activities. In the second case, the COE's program responsibility is limited to emissions associated with the permitted dredging and does not include the disposal activity. However, if the COE were to impose conditions on the operation and management of the dredged material disposal site or regarding subsequent development activities on that site, mandating the use of practices which would result in air pollutant emissions, then these added emissions would be a continuing program responsibility of the COE.

In another case, assume the Forest Service permits a ski resort and impc conditions regarding the construction and operation of the resort. Also assume that housing development will occur

nearby but on privately-owned land. In this case, emissions from the construction and operation of the resort are a continuing program responsibility of the Forest Service and emissions from the housing activities are not. Again, if the Forest Service had authority to impose conditions on activities at the housing development and chose to exercise that authority to impose conditions that would result in air pollutant emissions, air emissions from those conditions imposed would be within the Forest Service's continuing program responsibility.

With respect to the issue of indirect emissions, the proposal pointed to the language in section 176(c)(1) of the Act which prohibits a Federal agency from providing "support in any way * * * [for] any activity which does not conform to an implementation plan." "Conformity to an implementation plan" is defined to mean that an activity "will not—cause or contribute to any new violation * * *; increase the frequency or severity of any existing violation * * *; or delay timely attainment of any standard. * * *"

Given the "support in any way" language, EPA has, in this rule, interpreted section 176(c) of the Act as requiring Federal agencies, in making their conformity determinations, to consider both the direct and indirect emissions resulting from their own actions or from actions that they support. However, nothing in those words serves to clarify a precise congressional intent regarding the scope of coverage of indirect emissions [a term which is not expressly referred to in section 176(c)(1) of the Act]. In other words, the words "support in any way" do not, in themselves, dictate a congressional preference between the inclusive or exclusive definition of indirect emissions proposed by EPA. The exclusive definition, which this final conformity rule adopts, requires that Federal agencies take into account only those indirect emissions that the Federal action would support, that the Federal agency can practicably control, and are under the continuing program responsibility of the agency. The EPA believes this interpretation is the most reasonable because it assures that Congress' primary intent under section 176(c) of the Act is met, namely, that Federal agencies advance the purpose of the SIP by controlling emissions from those actions which they support, over which they can practicably exercise control, and for which they retain continuing program responsibility.

The Clean Air Act does not define "support" for the purposes of section 176(c) of the Act.[2] If read in the broadest conceivable manner, the "support in any way" prohibition might be interpreted to include virtually all Federal activities, since all Federal activities could be argued to support, at least in some remote way, an action that ultimately emits pollution. The EPA does not believe that Congress intended the "support in any way" prohibition to be interpreted in a manner that would lead to such egregious or absurd applications of section 176(c) of the Act. Where the language of a statute is ambiguous, as is the case here, an agency has the discretion to adopt an interpretation that is reasonable.[3]

One possible approach in determining how far the "support in any way prohibition" extends is to examine the word "support" itself. Section 176(c)(1) of the Act, by its terms, prohibits Federal agencies from "support[ing]" an activity which itself "does not conform to an implementation plan."[4] Thus, the support prohibition cannot be triggered unless and until a Federal agency's actions constitute support of a particular activity. In the absence of a statutory definition for a word, courts typically turn to the word's everyday meaning. The dictionary defines "support" to mean (among other things):

- "to uphold by aid, countenance, or adherence: actively promote the interests or cause of";
- "to uphold or defend as valid, right, just, or authoritative";
- "to provide means, force, or strength that is secondary to: back up";
- "to pay the costs of";
- "to supply with the means of maintenance * * * or to earn or furnish funds for maintaining"; and
- "to provide a basis for the existence or subsistence: serve as the source of material or immaterial supply * * *"

Webster's Third New International Dictionary. As the above list makes evident, the everyday meaning of "support" could range from activity that is merely facilitation or encouragement to activity wherein the actor assumes an ongoing responsibility and provides continuing assistance in order for the subsequent endeavor to be realized. Applying the dictionary definition of "support" in the context of the conformity rule, it is apparent that Federal actions that might be said to "support" subsequent projects similarly could range from mere facilitation to continuing responsibility. The EPA does not believe that Congress intended the term "support in any way" to encompass each and every one of these separate definitions, including those where the relationship between the Federal agency's action and the subsequent activity is attenuated. Thus, EPA believes it is reasonable to select a definition of "support" that focuses on the extent to which the Federal agency has continuing program responsibilities, and whether it can practicably control emissions from its own and other party activities. The exclusive definition requires Federal agencies to consider only those direct and indirect emissions over which, under their legal authorities, they can exercise and maintain practicable control and over which they have continuing program responsibilities. As noted previously, this approach is consistent with the purposes of section 176(c) of the Act. That section places certain prohibitions and responsibilities on Federal agencies. The EPA does not believe that Congress intended to extend the prohibitions and responsibilities 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 practicably control. For that reason, EPA believes it is not reasonable to conclude that the Federal agency "supports" that later activity, within the meaning of section 176(c) of the Act.

As implemented by this rule, section 176(c) of the Act requires that a Federal agency ensure conformity with an approved state SIP for those air emissions that would be brought about by agency action, and that the agency can practicably control, and that are subject to a continuing program responsibility of that agency. A Federal agency has no responsibility to attempt to limit emissions that do not meet those tests, or that are outside the Federal agency's legal control. Moreover, neither section 176(c) of the Act nor this regulation requires that a Federal agency attempt to "leverage" its legal authority to influence or control nonfederal activities that it cannot practicably control, or that are not subject to a continuing program responsibility, or that lie outside the agency's legal authority.

For example, neither section 176(c) of the Act nor this regulation requires a Federal agency to withhold a Federal grant of financial assistance to a grant applicant that otherwise satisfies legal

[2] The general definitions section for part D of title I, section 171 (42 U.S.C. 7501), also does not define "support."

[3] *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–3 (1984).

[4] Of course, section 176(c)(1) also prohibits Federal agencies from engaging in, providing financial assistance for, licensing or permitting, or approving, such activities.

requirements in order to obtain assurances from the applicant with respect to that applicant's activities that the agency cannot practicably control, or that are beyond the agency's continuing program responsibilities, or that fall outside the Federal agency's jurisdiction.

As described in the proposal, development that is related to the Federal action only in a manner that provides daily services such as restaurants, schools, and banks and which are located off Federal property, may be considered incidental rather than indirect emissions. Such activities and emissions are expected to be small relative to other emissions from the Federal action and are difficult or impossible to precisely locate and quantify. Thus, an accurate air quality and/or emissions analysis is not possible. Therefore, emissions from the daily services activities should be considered incidental and would not be included as indirect emissions in the conformity analysis even under the inclusive definition. Under the exclusive definition, incidental emissions are generally not covered for the additional reason that they are generally not under the Federal agency's control and continuing program responsibility.

g. Exclusive definition—Federal role. The exclusive definition isolates certain types of Federal actions where the role and responsibility of the Federal agency itself is major. For example, in Federal construction projects such as buildings or laboratories, the Federal agency has substantial and continuing authority and responsibility to manage that activity. Thus, the Federal contract manager should also be responsible for assuring that the construction activities conform to the applicable SIP.

By focusing on such major Federal actions, this approach would not require a conformity analysis for certain Federal actions that are necessary for, but incidental to, subsequent development by private parties. For example, the exclusive definition does not generally require that a COE fill permit needed for a relatively small part, portion, or phase of a twenty acre development on private land would somehow require the COE to evaluate all emissions from the construction, operation, and use of that larger development.

The exclusive definition, in effect, includes an examination of the duties, continuing program responsibilities, and controls that a Federal agency can practicably implement. When the Federal agency owns or operates a facility, Federal responsibility for the direct and indirect emissions from that facility is clear. However, farther down the spectrum of "assistance," where less and less Federal control and program responsibility may be found, a point is reached where the Federal agency should not have the same degree of responsibility for assuring the conformity of subsequent privately generated emissions, especially the indirect emissions from that action.

By controlling the direct and indirect emissions under the practicable control and continuing program responsibility of the Federal agency, the conformity rule assures that Federal agencies take appropriate and reasonable actions to support the purpose of the SIP, to meet all specific SIP requirements, and to assure that the SIP is not undermined by Federal actions. The exclusive definition assures that Federal actions will meet the intent of section 176(c) and that States will retain the primary responsibility to attain and maintain the air quality standards.

In support of the "exclusive" version, many Federal agencies have stated that it is unreasonable to withhold a conformity determination where it is impracticable for the Federal agency to remedy the situation. In such cases, they argue that the State and/or local jurisdictions should regulate the activities outside the Federal agency's jurisdiction. On the other hand, some commenters have argued that reliance on State or local action to control these off-site activities could be viewed as requiring the State to amend the applicable SIP to conform to the Federal action, rather than a rule that requires the Federal action to conform to the applicable SIP with respect to all subsequent emissions. For the reasons described above, EPA concludes that it would be unreasonable to interpret section 176(c) of the Act as requiring Federal agencies to take responsibility for emissions that they cannot practicably control and for which they have no continuing program responsibility.

The conclusion that the exclusive definition best fits with the balance that Congress established in the Act between Federal and State/local responsibility is supported by the Supreme Court's analysis in its 1989 decision in *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989). In that case, the Court addressed the question," (w)hether the Forest Service may issue a special use permit for a recreational use of national forest land in the absence of a fully developed plan to mitigate environmental harm." Id. at 336. In that case, the imposition of such a mitigation plan was within the jurisdiction of State and local agencies, not the Forest Service. The Court held that the Forest Service's authority to issue the permit was not contingent upon the State and local agencies taking action. As the Court explained, "(i)n this case, the off-site effects on air quality and on the mule deer herd cannot be mitigated unless non-Federal government agencies take appropriate action. Since it is those state and local governmental bodies that have jurisdiction over the area in which the adverse effects need be addressed and since they have the authority to mitigate them, it would be incongruous to conclude that the Forest Service has no power to act until the local agencies have reached a final conclusion on what mitigation measures they consider necessary." Id. at 352–53 (footnote omitted). For the same reasons, EPA has concluded that it would be "incongruous" to read section 176(c) of the Act as rendering the ability of Federal agencies to perform their congressionally-assigned missions contingent upon State and local agencies imposing mitigation measures over activities that they and not the Federal agencies, can practicably control, and have a continuing program responsibility to control. Since the inclusive definition would, in many cases, require Federal agencies to withhold action unless and until a State/local agency imposes mitigation measures over activities that are outside the Federal agencies' control, the inclusive definition would upset the balance between Federal and State/local responsibilities for achieving clean air, and would unjustifiably frustrate Federal agencies from performing their congressionally-assigned statutory responsibilities.

The person's activities that fall outside the Federal agency's continuing program responsibility to control are subject to control by State and local agencies. In sum, expanding the Federal agencies' responsibilities to extend to emissions that are outside their continuing program responsibility to control (which the inclusive definition would have done) would upset the balance between Federal and State/local roles that Congress established in the Act and would infringe on the air quality roles of the State or local agency.

h. Exclusive definition—examples.

Example 1:

Assume that the FAA is considering approval of an airport expansion in a serious ozone nonattainment area and that adjacent development of an industrial park is known to depend on the FAA approval. Assume: (1) The airport expansion would result in an increase in emissions of 50 tons/year of

volatile organic compounds (VOC) due to vehicle and airport related emissions, and (2) assume that the adjacent industrial park would emit 200 tons/year of VOC.

Under the exclusive definition, the FAA must show that the 50 tons/year of VOC from the airport related activities conforms to the SIP. The FAA, however, is not responsible for the 200 tons/year of VOC from the industrial park. The conformity rule provides several ways to show that the 50 tons/year of VOC conforms to the SIP:

(1) The airport expansion is specifically included in the applicable SIP's attainment demonstration,

(2) The 50 tons are offset by reductions obtained elsewhere by the FAA,

(3) The 50 tons are determined to be consistent with the SIP emission budget by the State air quality agency,

(4) The State commits to revise the SIP to accommodate the 50 tons,

(5) The airport expansion is included in the conforming transportation plan, or

(6) In some cases, it is demonstrated that there is no increase in emissions in a build/no build scenario. (Note that project-specific modeling for ozone is not generally considered an option since, as a technical matter, ozone models are not sufficiently precise to show such impacts unless the project is a large portion of the total area inventory.)

Example 2: In another case, the same airport expansion might be in a CO or PM–10 nonattainment area where a local scale modeling analysis is determined to be needed by the State agency primarily responsible for the SIP. In such cases, the modeling analysis must consider emissions due to the airport activity and emissions due to any existing sources, including background concentrations. Emissions from the future industrial park would not, however, be required as part of the modeling analysis since such emissions are not covered by the conformity rule.

Example 3: A Federal action to lease land to a private developer does not in itself have any immediate direct or indirect air pollution emissions. The lease does, however, allow future activities by the private developer on the leased Federal land that could result in indirect air pollution emissions. This can be seen clearly in cases where the leasing action is accompanied by a description of future activities that the developer plans to undertake on the leased Federal land which would result in emissions and where the lease contains emission limits imposed on the use of the leased Federal land. Where the Federal agency has the authority to impose lease conditions controlling future activities on the leased Federal land, these emissions must be analyzed in the conformity determination.

Example 4: Where a COE permit is needed to fill a wetland so that a shopping center can be built on the fill, generally speaking, the COE could not practicably maintain control over and would not have a continuing program responsibility to control indirect emissions from subsequent construction, operation, or use of that shopping center. Therefore, only those emissions from the equipment and motor vehicles used in the filling operation, support equipment, and emissions from movement of the fill material itself would be included in the analysis. If such emissions are below the de minimis levels described below for applicability purposes (section 51.853), no conformity determination (section 51.858) would be required for the issuance of the dredge and fill permit.

i. Exclusive definition—types of Federal actions covered. The following types of Federal actions, among others, are likely to be subject to conformity review under the exclusive definition. Some of these actions are likely to be above the de minimis levels, controllable currently by the Federal agency, and the Federal agency will maintain an ability to control the emissions in the future through oversight activities.

(1) Prescribed burning activities by Federal agencies or on Federal lands: The burning is conducted by the Federal agency itself or is approved by the Federal agency, consistent with a Federal land management plan, and the Federal land manager maintains an oversight role in either case.

(2) Private actions taking place on Federal land under an approval, permit, or leasing agreement, such as mineral extraction, timber harvesting, or ski resort construction: A lease agreement, for example, may be subject to mitigation conditions as needed to show conformity and the Federal land manager will maintain an oversight role, including the enforcement of lease agreements. The conditions needed to show conformity would also be enforceable by the State and EPA through the SIP (as described elsewhere in this notice).

(3) Direct emissions from COE permit actions: The COE will evaluate the direct emissions from the activity involving the discharge of dredged or fill material. If these direct emissions were to exceed the de minimis level, the COE has legal authority to impose permit conditions to control those emissions.

(4) Wastewater treatment plant construction or expansion actions: Construction projects funded by EPA may be conditioned so that the new treatment capacity conforms to growth assumptions in the SIP. The EPA maintains a continuing control authority since future expansion would need a new approval action. Emissions from this activity can be quantified and located only on a regional scale; they cannot be located in a precise manner and subject to a microscale analysis. Such emissions are nevertheless considered reasonably foreseeable, if only on a regional scale. The SIP planning generally takes into account the growth limiting effects of wastewater treatment capacity and, thus, changes to the capacity must be shown to conform to the SIP. This is an area where Congress clearly desires a conformity review, as evidenced by section 316 of the Act.

(5) Federal construction projects such as buildings, laboratories, and reservoirs on Federal land: Contracts to complete construction projects funded by GSA or other Federal agencies may be conditioned so that the new construction meets mitigation measures as needed to show conformity. The Federal contract manager would maintain an oversight role to assure that all the contract agreements are met.

(6) Project level minerals management leasing activities: The lease agreement may be structured as described in item b above.

(7) New airports or airport expansion actions: Grants to fund projects or approval by the FAA to build projects may be conditioned so that the new projects meet mitigation measures as needed to show conformity. Under FAA's funding statute, grants for new airports, new runways, and major runway extensions must include such conditions. The grant conditions are enforceable through the grant agreements. Failure of the airport owner/operator to comply with grant conditions may result in suspension or termination of Federal assistance.

(8) Actions taking place on Federal lands or in Federal facilities: The Federal agency has and will maintain the ability to control emissions in many other activities, such as activities in National Parks, on military bases, and in Federal office buildings.

j. Exclusive definition—types of Federal actions not covered. The following types of Federal actions, among others, are not covered by the conformity rule under the exclusive definition approach.

(1) Activities associated with property disposal at military closure and realignment bases through sale or other transfer of title. This includes transactions where there is an enforceable contract for the sale or other transfer of title that requires delivery of the deed promptly after the requirements of Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (42 U.S.C. 9620(h)(3)) have been met whether or not the property is occupied before closing of title under the contract or a related instrument. In this case, the military does not retain continuing authority to control emissions other than those associated with the CERCLA cleanup.

(2) Leasing agreements associated with military base closure and realignment, where transfer of title is required to be conveyed upon satisfaction of the CERCLA requirements, and where the military service leases the property without retaining continuing authority to control the property except as necessary to assure satisfaction of CERCLA requirements.

(3) Certain indirect emissions related to a COE permit for the discharge of dredged or fill material. The indirect emissions from development activities related to COE permit actions are not covered where such emissions are not subject to the continuing program responsibility of the COE, or cannot be practicably controlled by the COE.

(4) NPDES permit actions: Many of these actions are taken under State rules and, as such, are not Federal actions. The issuance of the Federal permit has no direct emissions, but may have considerable indirect emissions from future development of permitted facilities. However, where EPA issues a NPDES permit, for example, to an industrial or housing development, the EPA does not maintain an authority to control emissions from the development and, thus, the indirect emissions from the development are not subject to the conformity rule.

D. Indirect Emissions—Definition of "Caused By"

1. Proposal

During the course of discussing the inclusive approach, the proposal offered examples of what emissions would be considered "caused by" a Federal action. The proposal stated that inclusive indirect emissions that would be considered "caused by" the Federal action are those emissions from sources which are dependent upon the Federal action and would only be constructed and/or operated because of that Federal action. Such emissions would include emissions from any on-site or off-site support facility which would not be constructed or increase its emissions except as a result of the Federal action. The proposal stated that indirect emissions include emissions from mobile sources that are attracted to a facility, building, structure, or installation; for example, indirect emissions resulting from roads, parking facilities, retail, commercial and industrial facilities, airports, maritime ports, sports centers, and office buildings.

Where mobile sources contribute indirect emissions, the proposal noted that the Federal agency should attribute only those emissions that are caused by the Federal action. For example, not all the emissions from trips to and from a workplace or retail site are likely to be fully "caused" by the site itself. The road to and from the site, the origin and ultimate destination points of the trip, and other factors can be used to determine the portion of indirect emissions caused by the Federal action.

2. Comment

One commenter requested clarification that EPA's intention is to use a "but for" test concerning indirect emissions caused by a Federal action.

3. Response

The EPA agrees with this comment, as discussed in the proposal and includes a definition of "caused by" in the final rule to address this concern. Since the term "caused by" is used in both the definitions of "direct emissions" and "indirect emissions," the definition in the final rule also applies to both.

As a result of EPA adopting the exclusive approach, a Federal agency will need to address the "caused by" issue only with respect to those activities which the Federal agency controls. Therefore, many of the activities that would have been covered under the inclusive definition only by reason of the "caused by" requirement will not be covered under the exclusive definition due to lack of Federal agency control. This would be true generally for the examples in the "proposal" discussion immediately above, which were offered in the context of the inclusive definition.

E. Indirect Emissions—Sections 110(a)(5)(A) and 131 of the Act

1. Proposal

Section 110(a)(5)(A) of the Act prohibits the Administrator from requiring a State to adopt a general indirect source review program. Section 131 of the Act indicates that land use control authority resides with the cities and counties. As noted in the proposal, this language could be interpreted to restrict EPA's authority to regulate indirect emissions as part of the conformity rule. However, for certain federally assisted indirect sources, section 110(a)(5)(B) of the Act expressly allows the Administrator to promulgate, implement, and enforce indirect source review programs under section 110(c) of the Act. The EPA believes that this language in section 110 of the Act is consistent with the broad mandate in section 176(c) of the Act to prohibit Federal agencies from taking actions which "support in any way" any activity which does not conform to an applicable SIP.

2. Comment

Several commenters disagreed with EPA's interpretation and argued that sections 110 and 131 prohibit EPA from promulgating a rule, such as the March 15, 1993 proposal, that covers indirect emissions. These commenters point to the legislative history of the 1977 amendments to the Act, which added section 110(a)(5) and an earlier version of section 176(c), as evidence that Congress has explicitly prohibited EPA from seeking to regulate private development or land use by Federal review of indirect sources. By rejecting efforts by EPA in the mid-1970's to restrict parking spaces and require preconstruction review of parking structures associated with indirect sources through regulation, and by adopting the explicit prohibition in section 110(a)(5), they argue, Congress clearly intended that Federal agencies not involve themselves in controlling indirect sources or interfering in local land use decisions. In addition, they find it significant that Congress did not revise or delete section 110(a)(5) even when it added arguably stricter language to section 176(c) in 1990. Moreover, to the extent that section 110(a)(5)(B) does permit Federal review of certain indirect sources, these commenters contend that such review is restricted to "major" federally-assisted indirect sources and federally-owned or operated indirect sources only.

3. Response

For the reasons described in the preamble to the proposal and as discussed above regarding the inclusive/exclusive issue and further below, EPA disagrees with these comments. The EPA has noted that section 110(a)(5)(B) expressly allows the Administrator to promulgate, implement, and enforce

indirect source review programs under section 110(c) for certain federally assisted indirect sources. However, the EPA also believes that section 176(c) provides independent authority for EPA to require SIP revisions concerning conformity requirements that include provisions addressing indirect emissions resulting from Federal actions. Such provisions are necessary to prevent Federal actions, as required by section 176(c)(1)(B), from causing or contributing to NAAQS violations.

The EPA believes that the comments do not fully reflect the legislative history of the 1977 amendments to the Act regarding the congressional concerns that prompted adoption of section 110(a)(5)(A). The congressional Conference Committee report does indeed discuss attempts by EPA to promulgate measures controlling parking supply, but, unlike the commenters' statements, points out that these efforts came only after the EPA Administrator had determined that all the SIP's submitted to meet the 1970 Act requirements had failed to ensure maintenance of the NAAQS, especially those for motor vehicle-related pollutants. Congress objected to EPA's proposed parking restrictions, not simply because they were intended to control indirect sources, but primarily because Congress believed it was a misdirected attempt to reduce motor vehicle traffic that only succeeded in shifting the air pollution control emphasis away from the major source of the problem, namely the cars themselves.

> [The EPA's] efforts based on indirect control of the use of automobiles through restrictions on parking lots, shopping centers and other indirect sources, rather than full and prompt controls for new autos, trucks, buses, and motorcycles are inherently inequitable. It transfers from the motor vehicle manufacturers to the public and to indirect source owners and operators the burden of protecting public health from dangerous vehicle emissions. H.R. Rep. No. 1975, 94th Cong., 2d Sess. 221 (1976).

So, while it is true that Congress sought to reverse these specific indirect source measures and, thereby, reallocate the regulatory burdens, it also acknowledged that even after new car emissions requirements were adopted, additional control measures would be needed by many nonattainment areas if the NAAQS were to be attained and maintained, and such measures could include regulation of indirect sources, such as "new facilities which attract heavy automobile traffic." *Id.* at 222. Consequently, although Congress restricted the Administrator's authority to require States to adopt an indirect source review program, it purposely did not remove that authority completely. Again, as stated in the Conference report: "The Committee believes that its proposal meets the specifications * * * of an acceptable and workable program. It tightly restricts the Administrator's authority with respect to indirect sources by assuring that necessary review programs for non-federally assisted indirect sources will be designed and implemented by local and State governments." *Id.* at 227. And, as the report notes elsewhere: "Of course, the prohibitions on the Administrator's implementation and enforcement of a review program* * *are not applicable with respect to federally-owned or federally-assisted indirect sources." *Id.* at 224. Nothing in section 176(c), which is only concerned with federally-assisted actions, is inconsistent with this expression of Congress' intent with respect to section 110(a)(5). Moreover, the fact that the section 110(a)(5) prohibition and the requirement that Federal actions conform to the SIP under section 176(c) were both added when the Act was amended in 1977 does nothing to further the commenters' argument since it supports EPA's position as well. Given the thorough and detailed consideration Congress expended when it limited EPA's authority to review indirect sources, it would have been easy for Congress to add language in section 176(c) stating, for example, that the section 110(a)(5) restriction on indirect source review applied there also. Not only has Congress not limited this provision, but on the two separate occasions it has addressed section 176(c) of the Act it has consistently stated the scope of the provision's coverage requires a determination of conformity for "any activity" that a Federal agency "supports in any way." Indeed, EPA's view is consistent with the exception to the prohibition in section 110(a)(5) for federally-assisted, operated, or owned indirect sources, since section 176(c) of the Act applies only to actions supported or undertaken by Federal agencies. The EPA, therefore, concludes that the prohibition in section 110(a)(5) of the Act does not limit EPA's independent authority under section 176(c) of the Act.

The EPA also does not agree with the comment that the authority provided EPA under section 110(a)(5)(B) to control certain indirect sources is limited only to major indirect sources, such as the ones enumerated therein. The discussion in the legislative history strongly suggests that the use of the word "major" was not intended to denote a limitation on the type of indirect sources EPA may review. Rather, the term as used merely describes certain large-scale, hence "major," projects of the type which, like the ones listed, normally qualify for Federal funding assistance. For example, the Conference Committee report states: "An exception to this [section 110(a)(5)] prohibition is made for major Federally funded public works projects such as highways and airports. . ." S. Rep. No. 16, Vol. 3, 95th Cong., 2d Sess. 506 (1978). But other statements in the report show that EPA's review is not limited to such projects only: "The Administrator is prohibited from promulgating regulations relating to indirect source reviews except with respect to Federally assisted highways, airports *or other indirect sources assisted, owned or operated by the Federal government.*" *Id.* at 4382 (Vol. 5)(emphasis added).

Moreover, the conformity rules regulate emissions, not local land use or zoning requirements. These rules do not infringe on the authority of local governments to control land use; rather, they restrain the ability of Federal agencies to support projects that cause certain air quality problems. Nothing in these rules inhibits the ability of local governments to set their own requirements with respect to such projects. Thus the conformity rules are not inconsistent with section 131 of the Act.

F. Indirect Emissions—Reasonably Foreseeable Emissions

1. Proposal

As described in the preamble to the March 15, 1993 proposal, the indirect emissions that are "reasonably foreseeable" must be identified at the time the conformity determination is required, though this would include emissions that would occur later in time and/or at a place other than the action itself. The proposal stated that an agency is not required to speculate or guess at potential future indirect emissions which are conceivable but not identifiable. In addition, the proposal indicated that descriptions of emissions contained in documents such as employment and financial forecasts and NEPA documents should be considered reasonably foreseeable emissions.

As described in the proposal, certain types of Federal actions occur on the programmatic level rather than on a project level, and the specific air quality and emissions impacts associated with individual projects under such programs may not be known. In instances where a Federal action is on

a programmatic level and it is impossible to accurately locate and quantify emissions and, therefore, impossible to accurately complete the air quality and emissions analysis specified in § 51.858, such emissions should not be considered reasonably foreseeable.

The proposal also stated that, for purposes of defining "indirect emissions," development that is related to the Federal action only in a manner that provides daily services such as restaurants and banks and which are located off Federal property, may be considered incidental rather than indirect emissions under certain circumstances. In such cases, specific emissions from the daily services activities should be considered not reasonably foreseeable and not included as indirect emissions in the conformity analysis.

2. Comment

The EPA received comments requesting clarification of the phrase "reasonably foreseeable emissions." Several commenters requested EPA to incorporate a definition of this term in the rule. One commenter stated that EPA's definition of reasonably foreseeable emissions would require private developers to account for, assess, and if necessary, mitigate the impacts of completely unrelated projects developed by other private parties. The commenter also objected to certain environmental analyses that rely on worst-case assumptions and exaggerate the impacts due to possible, but unlikely, future growth scenarios and where it is impossible to assess local air quality impacts.

3. Response

a. *Documentation.* In order to clarify the term, EPA has: (1) Added a definition of "reasonably foreseeable emissions" in the regulatory portion of the rule; (2) added the discussion below; and (3) listed certain Federal actions that are not considered reasonably foreseeable in § 51.853(c)(3) and, therefore, exempt from conformity requirements. The definition is similar to the discussion in the proposal, however, there are some differences as described below:

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

Unlike the proposal, the final definition does not require a Federal agency to use all emissions scenarios contained in financial documents or environmental analyses. That approach could not in many cases be implemented since the various documents contain quite different scenarios and a single document sometimes contains multiple emissions scenarios. In addition, some scenarios could be based on speculation. The definition does not require the use of worst-case assumptions, unlikely growth scenarios, or analyses where it is impossible to assess local air quality impacts. Further, under an exclusive definition, the conformity review may be covering a smaller set of indirect emissions than, for example, the emissions scenarios contained in an environmental impact statement.

The final rule requires the Federal agency to review all of its own information and all information presented to the Federal agency. Selection and documentation of the relevant emissions scenarios for conformity review is the responsibility of the Federal agency and should be based on reasonable expectations of future activity resulting from the Federal action.

b. Actions not reasonably foreseeable. In order to provide further clarification, EPA listed some Federal actions that are not considered reasonably foreseeable in § 51.853(c)(3) and are, therefore, exempt from conformity requirements. This list is intended to provide examples and is not intended to be a complete listing of such activities. Additionally, actions for which emissions cannot be accurately quantified, such as the implementation of trade laws and export trade promotional activities, are not considered reasonably foreseeable. As discussed below, these actions include program scale leasing actions and electric power marketing activities that involve the acquisition, sale, and transmission of electric energy.

(1) F gram Level Leasing Actions

In ..tions such as outer continental shelf lease sales, it will often be difficult or impossible to locate and quantify emissions early in the Federal agency review process. Thus, the emissions may not be reasonably foreseeable. Further, a conformity review is unnecessary at that time since the Federal agency must take future actions related to the lease sale which are subject to conformity review. That is, the exploration and development actions at the project level would be subject to conformity review prior to any action that would actually result in emissions. In such cases, the EPA believes that a conformity review is n. required prior to the project level analysis.

On the other hand, where a conformity review, such as a lease sale, can be and is made on the program level rather than the project level, subsequent project level actions which implement the conforming program do not require new conformity reviews. This approach is consistent with language in the preamble to the proposal. For clarification, EPA added this concept in the final rule: § 51.853(c)(4) exempts actions that merely implement a decision to conduct or carry out a policy, plan, program, or project where the policy, plan, program, or project conforms.

(2) Electric Power Marketing

Federal activities in the marketing of electric power are exempt from conformity review for several reasons. In many cases, the resulting emissions from the use of the electric power cannot be precisely located or quantified and, thus, are not reasonably foreseeable. The marketing agreements would also be exempt since customers of the Federal agency could obtain electric power from other public (nor Federal) or private electric utilities e\ if it were not provided by the Federal agency. Thus, emissions from these customers are not "caused by" the Federal action because they would occur in the absence of the Federal action. Further, SIP's assume electric power will be available in future growth projections. Thus, the delivery of electric power would not be inconsistent with the SIP.

c. Unrelated projects. The definitions of "reasonably foreseeable emissions," "indirect emissions (exclusive)," and "caused by" make it clear that "completely unrelated projects," as stated by a commenter, are not subject to the applicability analysis. However, where an air quality modeling analysis is the basis of a conformity determination, the modeling analysis should account for emissions due to existing sources together with covered emissions from the Federal action, consistent with EPA modeling guidance.

G. Indirect Emissions—Definition of Federal Activity

1. Proposal

Although EPA included a definition of "Federal action" in the proposal, ' definition merely repeated language from section 176(c) of the Act and did not clarify the meaning of the statutory language. The preamble to the proposal,

however, made it clear that EPA intended the concept to include future development activities associated with a Federal action, under either definition of indirect emissions. Under the exclusive definition, EPA proposed that consideration of such emissions would be limited to those future development activities which the Federal agency could control and would continue to maintain some authority to control.

2. Comment

The building industry commented that under *Atlantic Terminal Urban Renewal Area Coalition* v. *New York City Department of Environmental Protection*, 705 F. Supp. 988 (S.D.N.Y. 1989), the definition of Federal activity should be limited to the immediate Federal action, in that case a Department of Commerce (DOC) grant for demolition, and should not include any subsequent activities even where they are facilitated by the Federal action, in that case a subsequent housing development built on the site of the demolition. Several commenters also requested that EPA clarify which activities are covered under the conformity rule.

3. Response

The EPA does not agree that Federal actions should always be interpreted so narrowly. The EPA acknowledges that the court in *Atlantic Terminal* indicated in dicta that, in that case, the Federal activity under consideration should be limited to the demolition activity. However, that assessment was made in the context of a factual situation in which the subsequent development activity was being funded by a Department of Housing and Urban Development (HUD) block grant. The court based its decision on the unreasonable burden and duplicative efforts that would be placed on the Federal government should both DOC and HUD be required to analyze the same subsequent development. The court did not address the situation where only one Federal agency had jurisdiction over a project, and was not presented with the statutory language nor legislative history concerning transportation activities under the 1990 amendments to section 176(c) nor EPA's interpretation of Federal actions and indirect emissions (described below).

If it were the case that through an agency's approval of a demolition grant an agency were able to practicably control construction of the housing development, and had continuing program responsibility over such development, then EPA believes that the agency would have "supported" the housing development by making the grant. For these reasons, EPA believes that a court specifically addressing the issue of the definition of Federal activity under such circumstances would not reach the same decision as in *Atlantic Terminal*.

In order to clarify which activities are covered under the general conformity rule, the final rule incorporates changes in the definitions of "Indirect emissions" (discussed in section III.C.) and "Federal action" (discussed below and in section IV.D.). The definition of "Federal action" is revised by adding the following sentence to the end of the definition in the proposal: Where the Federal action is a permit, license, or other approval for some aspect of a nonfederal undertaking, the relevant activity is the part, portion, or phase of the nonfederal undertaking that requires the Federal permit, license, or approval. The following examples illustrate the meaning of the revised definition.

Assume, for example, that the COE issues a permit and that permitted fill activity represents one phase of a larger nonfederal undertaking; i.e., the construction of an office building by a nonfederal entity. Under the conformity rule, the COE would be responsible for addressing all emissions from that one phase of the overall office development undertaking that the COE permits; i.e., the fill activity at the wetland site. However, the COE is not responsible for evaluating all emissions from later phases of the overall office development (the construction, operation, and use of the office building itself), because later phases generally are not within the COE's continuing program responsibility and generally cannot be practicably controlled by the COE.

In another case, assume the Forest Service permits a ski resort and imposes conditions on the construction and operation of the ski resort. Also assume that housing development will occur nearby but on privately-owned land. In this case, the conformity review might cover emissions due to construction and operation of the ski resort since they are activities permitted by the Forest Service. Emissions from the housing activities, however, would not generally be covered since the Forest Service does not generally take actions covering the portion of the overall development that is on privately-owned land and not subject to a Forest Service permit, license, or approve action.

H. Applicability—Attainment Areas

1. Proposal

As discussed in the preamble, EPA proposed to interpret the statute such that the conformity rules apply only to nonattainment areas and those attainment areas subject to the maintenance plans required by section 175A of the Act (58 FR 13841).

2. Comment

The EPA received many comments which agreed with the proposal and many other comments stating that the statute should be read such that conformity requirements would apply in all or portions of attainment and unclassified areas as well. Similar comments were received arguing that conformity should not apply in attainment areas.

One commenter noted that development in attainment areas on the fringe of nonattainment areas is likely to increase the size of the nonattainment areas, increasing the impact on public health and welfare and necessitating more costly pollution control measures to retrofit sources. The commenter also stated that development in rural attainment areas, even many miles away from urban nonattainment areas, may delay timely attainment of the NAAQS or emission milestones in nonattainment areas. Another commenter cited an example of a conformity analysis in an attainment area which showed a Federal action would cause a new violation of the NAAQS unless mitigation measures were implemented and/or planning provisions were revised.

3. Response

In the proposal, EPA indicated that the statute was ambiguous with respect to whether conformity applied only in nonattainment areas, or in attainment areas as well. As noted above, EPA received significant public comment arguing that the statute should be read to apply conformity also in attainment areas, based on the wording of Act section 176(c)(1) and the policy merits of such applicability. Similar comments were received arguing that conformity did not apply in attainment areas.

The EPA continues to believe that the statute is ambiguous, and that it provides EPA discretionary authority to apply these general conformity procedures to both attainment and nonattainment areas. The EPA plans to carry out a separate rulemaking proposing to apply general conformity procedures to certain attainment areas. The EPA sees strong policy reasons not to apply conformity in all attainment areas, given the significant burden associated with making conformity determinations relative to the risk of NAAQS violations in clean areas. Thus, EPA believes that it would be

reasonable to propose applying conformity in attainment areas for which air quality is close to nonattainment levels, for example at 85 percent of nonattainment levels (see discussion below).

The EPA intends to take comment on the basic proposal to apply conformity in attainment areas. The EPA will also seek comment on the specific application of conformity in certain categories of attainment areas.

Therefore, EPA intends to issue in the near future a supplemental notice of proposed rulemaking dealing with conformity requirements in attainment areas.[5] The requirements of this final rule will apply only in nonattainment and maintenance areas, as proposed.

While EPA will solicit comments on other options, the supplemental notice of proposed rulemaking on general conformity will propose to require conformity determinations only in the portion of attainment areas which have exceeded 85 percent of the NAAQS. These areas will be identified by using the most recently available, quality-assured air quality data covering the period appropriate for making designations of air quality status in 40 CFR part 81. Federal activities in attainment areas below 85 percent of the NAAQS and areas where representative monitoring data are not available would be exempt from the obligation to conduct a general conformity analysis based on the de minimis impact on air quality that would result for general conformity activities in such areas. Because the merit of exempting certain areas from conformity requirements will vary depending on the activities being regulated, the transportation conformity rule may propose different exemptions for applicability of conformity requirements in attainment areas than those for general conformity.

I. Applicability—De Minimis Emission Levels

1. Proposal

The proposed de minimis emission levels to be used for determining applicability of conformity requirements were pollutant specific and varied according to the severity of the nonattainment area. They ranged from 0.6 tons/year (for lead) to 100 tons/year (for carbon monoxide) (§ 51.853). These levels generally were derived from the "significance levels" established for preconstruction review of modifications to existing major stationary sources. The significance levels were taken from the Act itself, where provided, or from EPA's regulations for SIP's (40 CFR part 51) where the Act did not provide them. For ozone (VOC) and nitrogen oxides (NO_x), a sliding scale was proposed, ranging from 10 tons/year (for extreme ozone nonattainment areas) to 40 tons/year (for marginal and moderate ozone nonattainment areas).[6]

Most Federal actions result in little or no direct or indirect air emissions. The EPA intends such actions to be exempted under the de minimis levels specified in the rule and, thus, no further analysis by the Federal agency is required to demonstrate that such actions conform. Additionally, paragraph (d) of § 51.853 allows a Federal agency to establish categories of actions which would be presumed to conform due to minimal air quality impact. These provisions are intended to assure that these rules are not overly burdensome and Federal agencies would not spend undue time assessing actions that have little or no impact on air quality. Such actions include, for example, personnel actions, continuing activities with no substantial, adverse change from previous conditions that are associated with an on-going program or operation (including certain permit renewal actions), and routine monitoring.

2. Comments

Several commenters supported the concept of de minimis levels as a means of focusing conformity requirements on those Federal actions with the potential to have significant air quality impacts. Many agreed with the de minimis levels proposed in the NPR. Some commenters thought the levels should be lower so that more actions would be considered, while others wanted the de minimis levels to be raised to lessen the administrative burden on Federal agencies and avoid conformity requirements for smaller projects. A few commenters indicated that too many of their activities would be subject to a conformity review based on the de minimis cutoffs proposed in the NPR if they were used with the inclusive definition of indirect emissions.

One commenter stated that the proposed de minimis levels are arbitrary and capricious. Another commenter stated that there should be only one de minimis level rather than the pollutant- and classification-specific levels proposed.

Several comments objected to the provision that would automatically lower the de minimis levels to that of the stationary source level established by the local air quality agency. The commenters pointed out that certain air agencies have a zero threshold level, which would not be appropriate for conformity.

The EPA also received comments stating that the applicability determinations for conformity would be overly burdensome because they could be interpreted to apply to even the smallest of Federal actions. That is, the proposed rule could be interpreted to call for virtually all Federal actions, even purely administrative ones, to make a positive conformity determination before the agency is allowed to proceed with the action.

Several commenters requested EPA to specifically list types of Federal actions that would be de minimis and, thus, exempt from the conformity review requirements.

3. Response

Given the need to choose a threshold based on air quality criteria and one that avoids coverage of less significant projects, and in response to certain comments, the de minimis levels for conformity analyses in the final rule are based on the Act's major stationary source definitions—not the significance levels as proposed—for the various pollutants. Use of the de minimis levels assures that the conformity rule covers only major Federal actions. Under the major source definition, for example, the levels for ozone would range from 10 tons/year (VOC or NO_x) for an extreme ozone nonattainment area to 100 tons/year for marginal and moderate areas, not from 10 tons/year to 40 tons/year as proposed. In areas that are close to attainment, smaller projects, such as those that result in strip shopping centers, would not be subject to review. In areas with more severe air quality problems, such smaller projects would be subject to review. Larger projects, such as an airport expansion or the redevelopment of a military base, would require a conformity review under all of these de minimis levels.

[5] For PM–10, the areas which would be addressed in the supplemental notice are designated "unclassifiable." The amendments to the 1990 Act designated areas meeting certain qualifications as nonattainment for PM–10 by operation of law, while all other areas were designated unclassifiable. In the future, as appropriate, the Act provides for additional unclassifiable areas to be redesignated to attainment. This rule refers to areas redesignated to attainment as "maintenance areas."

[6] The actual significance level for VOC and NO_x established by the Act as amended in 1990 for an extreme ozone nonattainment area is zero (i.e., any increase in emissions from a modification of a major source triggers new source review). The 10 tons/year proposed for a conformity review threshold was chosen because EPA determined that a de minimis level is needed, a zero threshold does not provide a de minimis level, and sources with emissions above 10 tons/year are defined as "major stationary sources" under title I, part D, subpart 2 of the Act.

The de minimis level for lead is 25 tons/year in the final rule. The definition of major stationary source for lead is 100 tons/year. Relatively small increases in lead emissions, however (compared to other criteria pollutants) may threaten the lead standard; also, the level proposed for lead (0.6 tons/year) was proportionately much smaller than 100 tons/year. Therefore, a 100 ton/year level appears unprotective of the conformity requirement. The 25 ton/year value is based on the source size in 40 CFR part 51 that triggers an attainment demonstration requiring dispersion modeling.

The de minimis levels proposed were generally those used to define when modifications to existing stationary sources require preconstruction review. It was pointed out to EPA in comments on the proposal that these thresholds would result in the need to perform a conformity analysis and determination for projects that constituted a "modification" to an existing source but not a "major" source in some cases. The EPA agrees that conformity applies more appropriately to "major" sources and after careful consideration has decided to revise its original proposal in the final rule to use the emissions levels that define a major source, except as described above for lead. The definition of a major source under the amended Act is explained in more detail in the April 16, 1992 Federal Register in the EPA's General Preamble to Title I (57 FR 13498). Section 51.853(b)(3) of the rule has also been revised to remove the provision that would automatically lower the de minimis levels to that established for stationary sources by the local air quality agency. In keeping with its conclusion that only major sources should be subject to conformity review, EPA agrees that a zero emissions threshold, as established by some local agencies, should not be required by this rule.

Further, the EPA believes that Federal actions which are de minimis should not be required by this rule to make an applicability analysis. A different interpretation could result in an extremely wasteful process which generates vast numbers of useless conformity statements. Paragraphs (c)(1) and (2) of § 51.853 are added to the final rule to provide that de minimis actions are exempt from the requirements of this rule. Therefore, it is not necessary for a Federal agency to document emissions levels for a de minimis action. Actions that a Federal agency recognizes as clearly de minimis, such as actions that do not cause an increase in emissions, do not require a positive conformity determination. Instead, such actions are exempt from the rule as provided in § 51.853(c)(1).

In order to illustrate and clarify that the de minimis levels exempt certain types of Federal actions, several de minimis exemptions are listed in § 51.853(c)(2). There are too many Federal actions that are de minimis to completely list in either the rule or this preamble. In addition to the list in the rule, the EPA believes that the following actions are illustrative of de minimis actions:

(1) Routine monitoring and/or sampling of air, water, soils, effluent, etc.

(2) Air traffic control activities and adopting approach, departure and enroute procedures for air operations.

(3) Acquisition of properties through foreclosure and similar means.

(4) Assistance or subsidy for social services such as health care, day care, or nutrition services, as well as payments under public assistance.

(5) Deposit or account insurance for customers of financial institutions and flood insurance.

(6) Routine installation and operation of aviation and maritime navigation aids.

(7) Participating in "air shows" and "fly-overs" by military aircraft.

(8) Educational and informational programs and activities.

(9) Advisory and consultative activities, such as legal counseling and representation.

(10) Construction of hiking trails.

(11) Regeneration of an area to native tree species

(12) Timber stand and/or habitat improvement activities which do not include the use of herbicides, prescribed fire or do not require more than one mile of low standard road construction.

As noted above, the provisions in § 51.853(c) (or in § 51.853(d)–(e)) are not rebuttable presumptions and not subject to documentation since they are exemptions to the rule. The EPA believes that the nature of the exemptions listed in the rule, taken in context of the definitions of a Federal action and indirect emissions, which are limited to those actions over which the Federal agency has a continuing program responsibility and can practicably control, renders these actions truly de minimis and therefore exempt from conformity requirements.

The exemptions listed in § 51.853(d) are for actions that may be above the de minimis levels listed in § 51.853(b). The rationale for the exemptions listed in § 51.853(d)(1) for new source review (NSR) and prevention of significant deterioration (PSD) and § 51.853(d)(2) for emergencies is explained below. The activities listed in § 51.853(d) (3) and (4) are related to air quality and necessary environmental regulations and, therefore, EPA believes they should be exempt. The exemption for certain CERCLA activities is discussed in the following section.

In contrast, the provisions of § 51.853(f) are presumptions of conformity that must be supported by documentation as provided in § 51.853, paragraphs (g) and (h) (which establish criteria and procedures for Federal agencies to develop additional categories of actions which would then be presumed to conform), and that they may be rebutted as provided in § 51.853(j).

J. Applicability—Exemptions and Presumptions of Conformity

1. Proposal

In addition to Federal actions with de minimis emission levels that do not require conformity determinations, EPA identified several types of Federal actions where EPA believed that conformity of such activities or a portion of such activities can be presumed. The NPR provided several cases where conformity is presumed (§ 51.853 (c) and (d)), including the following:

(1) Actions subject to preconstruction NSR or PSD programs under the Act;

(2) Wastewater treatment works projects funded by the State Revolving Fund (SRF) under the Clean Water Act;

(3) Superfund activities under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA);

(4) Federal land transfers; and

(5) National emergencies.

The proposal indicated that Federal actions identified under § 51.853, paragraph (c), are presumed to conform because the required air quality analyses that would be conducted under a conformity review must be completed to comply with other statutory requirements. That is, air quality analyses are required in the NSR programs under the Act and the applicable or relevant and appropriate standards process under the CERCLA. The EPA believes these analyses are adequate for purposes of conformity.

2. Comment

A number of commenters supported these provisions in the proposal, while others objected to them. Some commenters felt that the following actions should be subject to conformity review or that the proposed presumptions of conformity were too vague and need greater clarification:

CERCLA actions, sewage treatment works projects funded under the Clean Water Act, and the Federal sale of land. Other commenters supported these presumptions and suggested many others, including procurement actions and projects with one-time only emissions. Some commenters also argued that EPA should establish exemptions for certain actions and presumptions for other actions.

Some commenters recommended that, if a wastewater agency's proposed facilities, or other water management activities, are consistent with the applicable SIP population projections, then the indirect emissions attributable to the proposed facilities should be considered to conform. In such cases the indirect emissions would already be accounted for in the SIP through a growth management element (population forecasts) adopted in the SIP.

3. Response

a. General. As discussed in the previous section, EPA determined that certain actions should be exempt from the rule and other actions should be presumed to conform, with the presumption being rebuttable. Paragraphs (c)–(f) of § 51.853 have been reorganized to indicate which Federal actions are exempt and which are presumed to conform.

b. Sources subject to NSR or PSD. Actions subject to review under the NSR or PSD programs are exempt under the final rule. As explained in the NPR, such actions undergo procedures and criteria, including air quality analyses, equivalent to those required by the conformity rule. Thus, additional review under conformity is not necessary.

c. Water management activities. A separate exemption or presumption of conformity for direct emissions from water management activities is not needed where the emissions exceed the de minimis levels as they would be subject to NSR or PSD and such emissions are exempt as described immediately above. Indirect emissions—and direct emissions that are less than the de minimis levels for NSR or PSD—from water management activities are not covered under NSR or PSD and, therefore, are not exempt.

The final rule is, however, revised to deal with the uncertainty of indirect emissions that may result from water management activities. Generally, it will be unclear what type of growth will result from expanded water management activities. It will, thus, be very difficult to assess the air quality and emissions impact of specific water management activities. Nevertheless, such activities could have a substantial effect on the SIP and it can be determined if the emissions from such actions are consistent with the SIP by comparing the growth scenarios supporting the water management actions with the growth scenario in the applicable SIP. Therefore, the final rule includes a provision in § 51.858((a)(5)(v) which allows a positive conformity determination where the growth projections for the water management actions are consistent with and do not clearly exceed those used in the applicable SIP. Where the growth anticipated from a wastewater project is consistent with that accounted for in the applicable SIP, EPA believes that further analysis of the impacts of the indirect emissions of the wastewater project is unnecessary since all such emissions are already addressed by the SIP.

The EPA agrees that the conformity rule provisions for wastewater treatment plants under the SRF should also extend to other water management activities such as drinking water treatment plants and water conveyances (e.g., pipelines and pumps), and the final rule reflects this concern. The term "regional water and/or wastewater projects" is defined and used (§ 51.858(a)(5)(v)) in the final rule to address the above concerns.

d. Superfund projects under CERCLA. Under the exclusive definition of indirect emissions, superfund projects are unlikely to be covered since the Federal agency will not maintain authority over reuse activities on that land. The presumption of conformity, thus, no longer is relevant for such actions and is not contained in the final rule.

The final rule is revised to incorporate the changes described below:

The CERCLA and related regulations require on-site remedial actions to meet, or obtain waivers from, applicable or relevant and appropriate requirements. Since these requirements include NSR and PSD, and since Clean Air Act requirements have never been waived, the direct emissions from on-site remedial actions would not violate the NAAQS because they are subject to NSR and PSD review. Therefore, these actions are exempt.

The CERCLA and related regulations require off-site remedial actions to obtain Federal, State and local permits. Since this includes NSR and PSD, the direct emissions from off-site remedial actions would also not violate the NAAQS as described above. Therefore, these actions are exempt.

Direct emissions from removal actions are exempted from other environmental requirements by section 121(d)(2) of CERCLA, and therefore we are exempting them from conformity review. The EPA's long-standing interpretation of the Superfund statute has been that actions not specifically listed in section 121(d)(2) of CERCLA do not have to comply with any other Federal environmental laws. Removal actions are exempt generally, although by regulation EPA has required them to comply with the substantive requirements of such laws to the extent practicable. CERCLA allows EPA to make the judgment that implementing a CERCLA response may outweigh the need to comply strictly with other environmental requirements. To be consistent with this interpretation, EPA is exempting such CERCLA removal actions from the conformity requirements in those situations where EPA determines that compliance is not practicable based on the urgency or limited scope of the removal.

e. Federal land transfers. (1) Proposal. The proposal stated that the sale of land from a Federal agency was presumed to conform, § 51.853(d)(4). The EPA argued that land sales do not "support" subsequent emissions activity since they do not specifically approve, authorize or permit that activity. Furthermore, it was pointed out that imposing conditions or land sales could restrict the ability of State and local agencies to determine the land use for future activities which may follow in subsequent years.

(2) *Comments.* Many commenters objected to the presumption of conformity for Federal land transfers. Several groups indicated that Federal agencies must consider reasonably foreseeable use on the property to be transferred to ensure that known emissions will not endanger air quality. It was pointed out that most Federal agency land sales are accompanied by NEPA review and it is, therefore, appropriate to require conformity review for these actions. Specifically, it was said that EPA cannot argue that land sales do not cause subsequent emissions activities as a general matter, since it has already been illustrated by the proposed sale of Pease Air Force Base for commercial airport and development use that specific reuse activities can be identified and facilitated by a Federal land transfer.

On the other hand, support for the presumption of conformity for Federal land transfers was provided by several commenters. The main arguments were put forth by the Department of Defense (DOD), specifically as it related to military base closures and long-term leases. It was indicated that military departments do not "approve" reuse of the property. The sale of property

removes the action from the province of "Federal action" and the Federal agency has no continuing authority to control the private entities' future activities. The DOD stated that, "Although [they] will analyze the impacts from reasonably foreseeable reuse proposals, the zoning of the property that allows the specific proposed reuse is determined by the local zoning authority." Furthermore, they said:

> The purpose of the conformity requirement is to assure Federal agencies consult with state and local air quality districts to assure these regulatory authorities know about the expected impacts of Federal decisionmaking and can include expected emissions in their SIP emission budget. In a closure and reuse scenario, the future development plans of the community reuse group are known, approved, and supported by the local air regulators, subject of course to the reuse group meeting local air regulations for permits, mitigation, and so forth. When a community, working with local air regulators, has decided it desires to implement an economic recovery plan with associated air emissions and will adjust its emission budget to allow for such a plan, the rationale for locking DoD into conformity limitations is absent. Reuse is most appropriately a local decision, rather than a Federal decision, with local authorities evaluating the type of growth they want or need and adjusting their SIP allocations for new growth accordingly.

(3) *Response.* Under the exclusive definition of indirect emissions, Federal land transfers are unlikely to be covered since the Federal agency will not maintain authority over reuse activities on that land. Consequently, Federal land transfers are included in the regulatory list of actions that will not exceed the de minimis levels and thus are exempt from the final conformity rules.

f. Emergencies and transportation actions. (1) Proposal. Section 51.853, paragraph (d), proposed types of actions that would be presumed to conform (unless the Federal agency determines otherwise based on its own information or after reviewing any information presented to the Federal agency). Section 51.853, paragraph (d)(1), listed "temporary Federal actions in response to national emergencies." The proposal noted that this provision would cover Federal activities which require extremely quick action on the part of the Federal agencies involved. Where the timing of such Federal activities makes it impossible to meet the requirements of this rule, EPA indicated that it would be appropriate to presume conformity. Several examples are listed in the preamble to the proposal (58 FR 13843).

(2) *Comment.* One commenter stated that transportation projects should be exempt. Other commenters recommended that a broader set of emergencies should be covered and that an exemption is appropriate for such actions, including responses to natural disasters such as hurricanes and earthquakes.

(3) *Response.* As proposed, certain transportation projects are exempt from this rule as specified in § 51.853(a). Those actions are subject to the transportation conformity rule.

The EPA agrees that immediate responses to natural disasters such as hurricanes, earthquakes and similar events such as responses to terrorist acts, civil unrest, or military mobilizations should be exempt. The exemption is needed where a Federal agency cannot practicably complete a conformity analysis prior to taking actions in response to an emergency. Accordingly, a definition of "emergency" is contained in the final rule and the exemption is contained in § 51.853(d)(2). Additional examples of emergencies that are exempt from this rule are: emergencies under CERCLA, immediate responses to the release or discharge of oil or hazardous material in accordance with approved Spill Prevention and Response Plans or Spill Contingency Plans which are consistent with the requirements of the National Contingency Plan, and response to life- and property-threatening emergencies.

The rule is clarified to state that this provision includes continuing actions which are, in effect, commenced immediately after the emergency is determined and are not limited to "national" emergencies. This does not, however, include long-term Federal actions taken in response to such events unless, as required in § 51.853(e), the Federal agency makes a periodic determination that the emergency conditions still exist. In such cases it would be impractical for the Federal emergency actions to be delayed so that a conformity determination could be made. For purposes of this rule, immediate responses are actions commenced on the order of hours or days after the emergency is determined and long-term responses occur on the order of months or years thereafter.

g. Procurement requests. (1) Proposal. The preamble to the proposed rules discussed the need for emissions associated with the Federal action to be "reasonably foreseeable" at the time the conformity determination is required (58 FR 13839) and stated that an agency is not required to speculate or guess at indirect emissions which are conceivable but not actually identifiable. The preamble also indicated (58 FR 13840) that where it is impossible to accurately locate and quantify emissions and therefore impossible to accurately complete the air quality analysis, such emissions should not be considered "reasonably foreseeable." Further, the preamble stated that on-going programs or operations, such as certain permit renewal actions, that do not increase emissions over previous levels fall below the de minimis levels in the rule (58 FR 13842); that is, only emissions increases are counted toward the de minimis levels.

(2) Comment. Several commenters recommended that procurement actions by a Federal agency should not be covered by the conformity rules and that the annual cost of conformity analyses for the total of all such actions could be greater than $100 million. The commenters argued that most procurement actions should be viewed as a separate category of Federal activity for purposes of an environmental analysis. Procurement actions would merely implement the decision to conduct or carryout a policy, plan, program or project. The environmental analysis and thus the conformity determination would be made on the decision to go forward with the program or project, not on the follow-on procurement action.

(3) Response. The March 15, 1993 proposal was silent on the application of conformity requirements to procurement actions. Many comments were received on procurements and generally indicated that procurements should be exempt from the final conformity rule. However, the EPA believes that certain procurement actions may constitute Federal actions under the general conformity provisions. It is impossible at this time to resolve competing concerns regarding which procurement actions should be covered and which should be exempt since the existing record is inadequate. Therefore, the EPA will propose to cover certain procurements in a future rulemaking.

As noted, EPA intends to issue an NPR regarding attainment areas. The EPA intends to include in this proposal request for comment on exemptions for certain procurement actions which it believes would fit the de minimis criteria or result in emissions which are not reasonably foreseeable. The EPA believes the vast majority of procurement actions would be de minimis or not reasonably foreseeable. Given the complexity of Federal procurement and the government's desire to streamline procurement activities as discussed in the National

Performance Review[7], the EPA will seek comment on exemptions and the process for applying conformity to procurement activities.

h. Fugitive emissions. (1) Proposal. The total of direct and indirect emissions must be included in the conformity analyses.

(2) Comment. Some commenters alleged that fugitive emissions can neither be reasonably quantified nor efficiently controlled, and therefore believed that projects that generate fugitive emissions should be exempt. They noted that fugitive emissions generally are not considered under the Act under the NSR program.

(3) Response. Since fugitive emissions can cause violations of the NAAQS and since there are many techniques available to control such emissions, fugitive emissions are not exempt from the general conformity rules. The conformity rules consider the "total" emissions from a Federal action. Total consistency with the NSR program is not possible, in any event, since that program also excludes mobile source emissions from consideration, whereas the general conformity rule requires that they be considered.

i. Modeling. (1) Proposal. The rule proposed to exempt actions covered by new source review (paragraph (c)(1) of § 51.853).

(2) Comment. A commenter recommended that the rule exempt actions where the Federal agency performs an air quality analysis, for example, under State environmental statutory provisions.

(3) Response. The NSR exemption is based on an air quality analysis and the prohibition of emissions or actions that would cause or contribute to a NAAQS violation. An air quality analysis is not adequate by itself to justify an exemption from the conformity rules since it does not ensure that actions would be prohibited, as necessary to prevent a NAAQS violation.

j. Miscellaneous. (1) Proposal. The proposal specifically identifies very few activities that are presumed to conform, but establishes de minimis levels in § 51.853(b)(1). Federal agencies are also allowed to establish by rulemaking specific categories of actions which would be presumed to conform.

(2) Comment. Various comments were received which suggested adding exemptions to the rule, including:

(1) Non-hub or general aviation airports.

(2) Emergency generators.

(3) Prescribed burns that follow a State-approved smoke management plan.

(4) Actions consistent with an agency's pollution prevention plan.

(5) All Federal actions for which agencies have established categorical exclusions under NEPA.

(6) Projects that request section 7 consultation for threatened and endangered species from the U.S. Fish and Wildlife Service.

(7) Act Title V permits.

(8) Federal actions where the agency does not make a determination within a 30-day time period.

(3) Response. The EPA agrees with the intent of the commenters to avoid unnecessary conformity analyses, especially where the air quality impact is likely to be very small. The final rule lists several examples of de minimis actions. However, rather than attempting to list individually all of the potential de minimis actions, EPA has established the tons/year de minimis levels.

In addition, the final rule allows Federal agencies to establish their own presumptions of conformity through separate rulemaking actions, as proposed in § 51.853. This separate procedure is necessary since exemptions under NEPA or other statutes may not be appropriate as exemptions from the Act. That is, section 176(c) does not specifically exempt any activities and, thus, a separate analysis is needed to show that any activity to be presumed to conform has no air quality impacts. The final rule includes a provision in § 51.853, paragraph (g)(2), which allows a Federal agency to document that certain types of future actions would be de minimis; where similar actions have occurred in recent years, that experience should be the basis for the needed documentation.

A 30-day timeframe is unlikely to be adequate to complete a conformity analysis in many cases. The EPA expects the conformity analysis to be coupled with the NEPA analysis and, thus, not result in undue delays. Therefore, EPA is not providing any exemption for actions not completed within 30 days.

k. Case-by-case reevaluation. (1) Proposal. Federal agencies are allowed to establish by rulemaking specific categories of actions which would be presumed to conform. However, on a case-by-case basis, an action that is presumed to conform would be subject to a conformity determination where it is shown to the Federal agency that the particular action did not, in fact, conform [§ 51.853(h)].

(2) Comment. One commenter suggested that the rule should provide a mechanism for addressing cases where data generated from other sources, such as NEPA, indicates that the proposed Federal activity could result in a violation of the NAAQS; in such cases conformity cannot be presumed and further analysis should be required.

(3) Response. The EPA agrees that a category of Federal activity may be properly presumed to conform, but exceptions might be discovered where individual projects within the category should be subject to a conformity analysis. Section 51.853, paragraph (j), in the final rule, therefore, allows the presumption to be rebutted.

e. Research activities. (1) Proposal. The proposal identified research activities, where no environmental detriment is incurred, as actions that would be presumed to conform [§ 51.853(d)(2)].

(2) Comment. One commenter indicated that an environmental agency would be best suited to determine where an action would have no environmental detriment.

(3) Response. The EPA agrees and has revised the provision so that the final rule leaves the determination of environmental detriment to the State agency primarily responsible for the applicable SIP. The EPA also believes that this change provides adequate assurance that there will be no adverse air quality impact and, thus, the provision is an exemption under the final rule.

K. Applicability—Calculation

1. Proposal

In some cases, a Federal action may include several direct and indirect emission sources, only some of which are covered under § 51.853, paragraph (c). The preamble to the proposal indicated that the applicability calculation should include emissions that are presumed to conform (58 FR 13843), although the determination analysis should not.

2. Comment

A commenter objected to the preamble language, indicating that any emissions that are presumed to conform should not be part of the applicability calculation.

3. Response

The EPA agrees that the approach suggested by the commenter is the m' logical approach. It is inappropriate include for applicability purposes emissions as to which no conformity determination is required. Therefore,

[7] "Creating a government that works better and costs less." National Performance Review, 1993.

the final rule provides that emissions that are exempt or presumed to conform are not part of the definition of "total of direct and indirect emissions" and, thus are not required to be part of the applicability or determination analyses.

The final rule requires the inclusion of the total direct and indirect emissions in the applicability (§ 51.853) and conformity (§ 51.858) determinations, except the portion of emissions which are exempt or presumed to conform under § 51.853. For example, assume that a Federal action includes construction of a new industrial boiler (whose emissions are subject to preconstruction review and, thus, exempt) and a separate office building, and assume further that direct emissions from the boiler exceed the de minimis levels in § 51.853, but the direct and indirect emissions from the office building alone are less than the de minimis levels. In that case, the action, as a whole, would not exceed the de minimis levels and, therefore, would not need a conformity determination.

L. Reporting Requirements

1. Proposal

The proposed rule contains requirements for a Federal agency to notify EPA and the State and local air quality agencies of draft and final conformity determinations.

2. Comment

The EPA received comments suggesting that additional, early notification should be required, including notification of the Metropolitan Planning Organization (MPO) and affected Federal Land Manager (FLM).

3. Response

The proposal required notification of the State and local air agencies since their expertise should be sought when interpretation of the SIP is needed. The final rule also requires notification of the MPO and affected FLM's. The MPO needs to be involved and consulted where planning assumptions are at issue. Although the conformity determination is a Federal responsibility, the State and local agencies must, in some cases, provide important information. For example, the Federal agency would need to consult with the State and/or local agency to determine the status of an area's emissions budget or population projections. Therefore, the final rule includes these requirements.

In addition, Class I areas can be seriously affected by air emissions. It is therefore important that FLM's be able to be part of the decision-making process for Federal actions that have the potential to impact land under their jurisdiction. Consequently, § 51.855 was amended to require a Federal agency taking a Federal action that requires a conformity determination and that is within 100 km of a Class I area to consult with the affected FLM when the Federal action is proposed and to notify the FLM within 30 days of the draft conformity determination and again within 30 days of the final conformity determination. This 30-day timeframe is also consistent with the timeframe in the public participation requirements of the rule, as described in the following discussion.

M. Public Participation

1. Proposal

Under the proposed rule, Federal agencies making conformity determinations would be required to provide 45 days for written public comment prior to taking any formal action on a draft determination (§ 51.856). This period may be concurrent with any other public involvement, such as occurs in the NEPA process or as otherwise required by the Administrative Procedure Act (APA), where applicable.

In procedures that might extend beyond the usual NEPA process, conformity to a SIP must specifically involve the appropriate EPA Regional Office(s), State and local air quality agencies. The Federal agency must make available for review to all interested parties the draft determination and supporting materials which describe the analytical methods and conclusions relied upon in making the determination. The agency should provide, upon request, a description of significant assumptions, the source of data and assumptions not generated by the sponsoring agency, and a reconciliation of the estimates of population, employment, travel, and congestion with those currently in use in the air quality planning process.

2. Comment

The EPA received a wide range of comments on public participation. Many supported the EPA proposal. Some commenters thought that general conformity determinations should require rulemaking actions and notification in the **Federal Register**. Others felt that no public participation is necessary. It was also suggested that each Federal agency should define its own public participation requirements. One commenter wanted the general conformity rule to follow the public participation requirements outlined in the new transportation statute. Some commenters wanted to expand the requirements for public announcement of Federal agency determinations and a longer public comment period, while others wanted these requirements further restricted. It was pointed out that the 45-day comment period was inconsistent with the statutory requirements for shorter public comment periods of a number of Federal agencies.

Certain commenters asked EPA to clarify where the prominent advertisement is to be made. Another comment suggested that the advertisement should be in a "daily newspaper of general circulation."

Comments were also received suggesting that the State and local air agencies should have a concurrence role in the conformity analysis.

Several comments recommended that the NEPA requirements for public participation should be met at the same time as the conformity requirements in order to streamline the process and reduce any time and resource burdens.

3. Response

The final rule is revised somewhat to clarify the requirements of § 51.856 and to adjust the public comment period. A Federal agency is not required to maintain mailing lists and make information automatically available to those requesting to be on the list. Such a requirement could be unduly burdensome and unnecessary since those on the list would not necessarily review all the material automatically supplied. Thus, the rule requires only that the Federal agency respond to an information request which is related to a specific action. If information is requested of the Federal agency, it should be provided in a timely manner. The rule does not prohibit a Federal agency from voluntarily maintaining and responding to a mailing list.

In addition, the final rule is changed from the proposal to specify that information must be made available only in the case of a conformity determination under § 51.858. As described in the discussion on de minimis levels elsewhere in this preamble, no documentation is required by this rule for de minimis determinations under § 51.853 in order to avoid unreasonable administrative burdens on the Federal agencies. This approach is also consistent with the requirements in § 51.855 in the proposed and final rules which apply the reporting requirements only to conformity determinations under

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§ 51.858, not to applicability analyses under § 51.853.

The procedures in the final rule provide 30-day opportunities for public participation at two points in the decision-making process: Where a draft conformity determination is being made and where a final conformity determination was made. These procedures allow the public the opportunity to examine information used in the applicability calculations and draft conformity determination, to question the draft determination, to review others' comments, and, after the final determination, to use legal means, if necessary, to influence the project. The change in the comment period from 45 to 30 days was made to comply with other specific statutory requirements for public comment that other Federal agencies must comply with. This change is consistent with the comment period provided for by NEPA (40 CFR 1507.3(d)).

The EPA believes this approach provides the most effective balance between the Act's (section 127) and APA's requirements for public notification and participation and the need to avoid procedures that are unnecessarily costly, time-consuming and burdensome to the Federal agencies affected. The EPA is authorized to establish public participation requirements under sections 176(c)(4)(B) and 301(a)(1) of the Act, and 30 days notice is a reasonable requirement. Since the Act does not require conformity determinations to be formal rulemaking actions, formal rulemaking is not required by this rule unless separately required under the APA.

The EPA does not agree that the State and local air agencies should have a concurrence role in the conformity analysis. Section 176(c) of the Act does not give EPA the authority to require such concurrence.

The EPA agrees that Federal agencies should consider meeting the conformity public participation requirements at the same time as the NEPA requirements. The final rule allows the concurrent process. However, in some cases, a Federal agency may have valid reasons to use different procedures; thus, the rule does not require a concurrent process. Further, in many cases, a NEPA analysis may not include a public participation process; therefore, the flexibility is clearly needed.

The EPA agrees that the prominent advertisement should be made in a local daily newspaper of general circulation. The rule includes this clarification (§ 51.856).

N. Emissions Budget

1. Proposal

Paragraph (a)(5)(i) provides that a Federal action conforms with the air quality criteria where emissions from the action, together with all other emissions in the attainment or nonattainment area, would not exceed the emissions budget contained in the applicable SIP. The SIP's are intended to accommodate growth, and where a project is demonstrated to conform to the approved air plan, the associated growth in emissions is appropriate. In order to determine the status of the emissions budget at any time, an accounting system is needed to track the many factors included in the total emissions over an area or subarea. The tracking needs to be consistent with the State's reasonable further progress (RFP) tracking and needs to account for source compliance with SIP limits, changes in emissions due to growth and other operational changes from minor and major new stationary sources, and emissions due to other economic growth. Paragraph (a)(5)(i) of § 51.858 allows a Federal agency to rely on a certification that the Federal action is consistent with the emissions budget. The certification may only be made by the State agency primarily responsible for developing and implementing the applicable SIP. That State agency could determine that emissions from a Federal action would not exceed the emissions budget specified in the applicable SIP.

2. Comment

A commenter suggested that EPA clarify which State agency is responsible for the applicable SIP and determines consistency with the SIP emission budget. One comment suggested that the Federal agency request a determination from the MPO and local air agency regarding the effect on the emission budget. Another commenter stated that under § 51.858, the State agency responsible for the applicable SIP must determine, in each case, whether emissions associated with the Federal action are within the emissions budget specified in the air plan. The commenter was concerned that this creates an unmanageable system whereby State agencies not otherwise involved with the project or the conformity assessment itself will be required to become familiar with the action at a late stage in the process, causing delays and confusion. One commenter suggested that EPA should assist States in making this determination.

3. Response

For the purpose of this rule, the State, regional or local agency, or combination of agencies, that is responsible for developing the attainment demonstration and tracking RFP is the entity that can certify consistency of Federal actions with the SIP emissions budget, unless some other agency/agencies is/are designated by the Governor of the State. Other agencies, including EPA, may not have sufficient information to make this determination. In addition, to assure that the State determination is well founded and that the public has an opportunity to review that determination, § 51.858(a)(5)(i)(A) requires the State to document its determination.

The conformity rules do not require the State to determine in each case whether emissions associated with a Federal action are within the emissions budget. This is an option that may be used by the Federal and the State agencies. The State agency is, however, required to be notified of any conformity determinations and, thus, could be expected to be familiar with the action.

The EPA also clarified the definition of emission budgets in the final rule. The EPA will issue further guidance regarding emission budgets in the near future. An emissions budget does not exist in all nonattainment areas. In many cases, however, the SIP attainment and maintenance demonstrations and/or RFP plans will be revised or established in the near future, consistent with the amended Act requirements. In these SIP provisions, emissions budgets will be established and may be used to determine conformity, as provided in the final rule.

O. Mitigation Measures

1. Proposal

If an action does not initially conform with the applicable SIP, then a plan for mitigation or for finding emissions offsets could be pursued. Emissions offsets are appropriate where an action (with or without mitigation measures) still results in emissions that do not otherwise conform to an applicable SIP. Mitigation measures, in contrast, reduce the potential impact of an action so that the action would result in fewer emissions. Assuming implementation of the mitigation measures, the conformity analysis (i.e., consistency with the emissions budget, air quality modelir emission milestones, etc.) would consider a smaller amount of emissions associated with the action.

Any measures that are assumed to mitigate air quality impacts must be identified and the process for implementation and enforcement of such measures must be described. Under the proposal, it was indicated that if the Federal agency, other governmental agency, or private sponsor of the project failed to implement the mitigation measures committed to and found necessary in the conformity determination, then the conformity determination automatically became invalid and resulted in the revocation of all permits, approvals, and licenses originally supported by that conformity determination. This revocation would result in the need for a new conformity determination.

Mitigation measures should generally be included by the Federal agency in enforceable documents such as permit conditions. Mitigation measures may need to be revised due to unforeseen circumstances that may arise as the action and/or related activity is completed. Where the revised mitigation measures are subject to public review and it is demonstrated that the revised measures continue to support the conformity determination, such revision would be acceptable.

The proposal indicated that States may choose to make mitigation measures committed to by a project sponsor as part of a conformity determination automatically enforceable through the SIP. One possible mechanism for incorporating mitigation measures into the SIP is for States to include a generic provision in their conformity SIP's adopting in advance and incorporating by reference the mitigation measures identified as necessary for making a conformity determination.

2. Comments

One commenter stated that the automatic revocation of the conformity determination is not an enforceable mechanism and injects too much uncertainty into the overall program.

Another commenter recommended that minor changes in mitigation measures which do not increase emissions should not need public comment.

Several comments suggested that SIP's should be required to include a generic enforcement provision, similar to other permit programs. Such a provision could make enforceable any conditions made pursuant to the SIP conformity rule and needed to show an action conforms.

A comment raised the concern that direct enforcement against non-Federal parties could violate the prohibition against indirect source review programs in section 110(a)(5).

One commenter stated that local air agencies could provide the Federal agency with suggested mitigation measures to offset the project related emissions.

Another commenter suggested that a community, working with local air agencies, could decide to adjust its emission budget to allow for a specific Federal action.

3. Response

The EPA agrees that automatic revocation is not an appropriate or enforceable mechanism. Therefore, the proposed § 51.860(c) does not appear in the final rule. Second, EPA agrees that a generic enforcement provision in the SIP is needed for mitigation agreements. Therefore, the final rule includes the requirements in § 51.860 (b)–(f) which indicate that States must adopt a generic enforcement provision which will make any agreements, including mitigation measures, necessary for a conformity determination both State and federally enforceable. Section 51.860(a) is also revised to indicate that a funding commitment is not needed in all cases.

The final rule includes the provision in § 51.860(b) of the proposal which requires any licenses, permits or approvals of the action to be conditioned on the governmental or private entity meeting the mitigation measures necessary for the conformity determination. This provision is renumbered in the final rule as § 51.860(d).

In addition to requiring in § 51.860(b) and (d) that written commitments and conditions to mitigation measures be obtained from project sponsors prior to making a positive conformity determination, § 51.860(c) and (f) of the final rule require that project sponsors comply with such commitments and conditions once made. Consistent with these provisions, § 51.858(d) provides that the analysis, which results in a conformity determination or identifies mitigation necessary for a conformity determination, must be completed before the conformity determination is made. Pursuant to these final rules issued under Title I of the Act, EPA can enforce mitigation commitments and conditions directly against project sponsors under section 113 of the Act, which authorizes EPA to enforce the provisions of rules promulgated under the Act.

As provided in § 51.860(g), once a State revises its SIP to adopt the Federal general conformity rule and EPA approves that revision, then any agreements or commitments, including mitigation measures, necessary for a conformity determination will be both State and federally enforceable. In addition, after EPA approves that SIP revision, citizens can enforce against responsible parties for violations of SIP requirements under section 304 of the Act.[8]

The concern was raised to EPA that direct enforcement against non-Federal parties could violate the prohibition against indirect source review programs in section 110(a)(5). However, EPA concludes that this prohibition is not relevant to the requirement that project sponsors comply with mitigation commitments. The EPA is not promulgating a generally applicable requirement for review of all indirect sources. Rather, EPA is enabling Federal agencies to make positive conformity determinations under section 176(c) based on voluntary commitments by project sponsors to complete mitigation measures. Project sponsors are not obligated to make such commitments. Where they volunteer to do so to facilitate Federal conformity determinations, EPA is requiring them to live up to such commitments. Without such a requirement, EPA could not allow positive conformity determinations based on mitigation measures prior to actual construction of mitigation measures.

The EPA does not agree certain changes in mitigation measures should avoid the public participation requirements. The determination that a change is a "minor" change or the calculation that there is no emissions increase may be subject to considerable judgment. As such there is a need for public participation. Section 51.860(e) reflects this provision.

As mentioned previously and as provided in § 51.858(a)(5)(i) of the final rule, EPA agrees that the State and local air agencies can play an important role in the conformity process. These agencies can provide the Federal agency with suggested mitigation measures to offset the project related emissions. The Federal agencies can take such a list and work with the local planning and regulatory agencies to effect necessary emissions reductions.

[8] Currently, the sponsors of any projects which are subject to Federal programs identified in the SIP, e.g., NSR permits and PSD requirements, are subject to State and Federal enforcement actions if applicable procedures and permit conditions are not followed. Project sponsors of Federal actions requiring a conformity determination will be subject to similar enforcement actions if they fail to implement mitigation measures prescribed by the approved SIP revision. Enforceability through the SIP will apply to all parties who agree to mitigate direct and indirect emissions associated with a Federal action for a conformity determination.

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In addition, EPA agrees that a Federal action should proceed where the State and/or local air agencies decide to revise the SIP to accommodate the action. As provided in § 51.858(a)(5)(i) of the final rule, EPA agrees that a mechanism is needed to allow the action to proceed under certain circumstances. This approach is consistent with the congressional desire to assure that State plans are not undermined by Federal actions; thus, where the State voluntarily commits to revise its SIP so that a Federal action conforms, that action would not undermine the State's decision-making ability and should be allowed to conform. The State may make a commitment to regulate or mitigate emissions from sources not under the Federal agency's control (i.e., commit to revise its SIP) to allow a Federal action to proceed that otherwise would not conform. The commitment must be made by the Governor or Governor's designee for submitting SIP revisions and must provide for revision of the SIP so that emissions from the Federal action would conform to the SIP emission budget in a time period consistent with the time that emissions from a Federal action would occur.

This provision could apply, where the total of direct and indirect emissions from the action are determined by the State agency responsible for the applicable SIP to result in a level of emissions which, together with all other emissions in the nonattainment (or maintenance) area, would exceed an emissions budget specified in the applicable SIP. In such cases, the State Governor or the Governor's designee for submitting SIP actions would make a written commitment to EPA which would have to include the following:

(1) A specific schedule for adoption and submittal of a revision to the SIP which would achieve the needed emissions reductions prior to the time emissions from the Federal action would occur;

(2) Identification of specific measures for incorporation into the SIP which would result in a level of emissions which, together with all other emissions in the nonattainment or maintenance area, would not exceed any emissions budget specified in the applicable SIP;

(3) A demonstration that all existing applicable SIP requirements are being implemented in the area and for the pollutants affected by the Federal action, and that local authority to implement additional requirements has been fully pursued;

(4) Assurances that the responsible Federal agencies have required all reasonable mitigation measures associated with their action; and

(5) Written documentation including all air quality analyses supporting the conformity determination.

In order to assure that the commitment to revise the SIP is enforceable, the final rule also provides that where a Federal agency made a conformity determination based on a State commitment under paragraph (a)(5)(i)(B) of § 51.858, such a State commitment is automatically deemed a call for a SIP revision by EPA under section 110(k)(5) of the Act based on the inadequacy of the applicable SIP in light of the positive conformity finding. Should EPA find that the State failed to satisfy the commitment, sanctions under section 179 of the Act would apply for failure to respond to the SIP call. The EPA here determines that where the State commitment is automatically deemed a SIP call, the State must respond to that SIP call within 18 months from the time the State commitment is made, or by such earlier time, if any, that the State commits to revise the SIP.

P. EPA and State Review Role

1. Proposal

The proposal indicated that the Federal agency must give EPA, State and local air agencies, and relevant Federal agencies a 45-day notice about the proposed Federal action and draft conformity determination, and notify these same agencies within 45 days of its final conformity determination (§ 51.855). The State agency is responsible for determining if the total direct and indirect emissions from the action are within the emissions budget specified in the applicable SIP (§ 51.858).

2. Comments

The EPA received several different comments on the respective roles and responsibilities for local, State, and Federal air agencies. Some commenters felt that EPA should be responsible for approving or disapproving all conformity determinations. Others felt this authority should rest with the State, while some wanted the MPO to have a veto on conformity determinations. A number of commenters wanted a lead agency designated (similar to that in the NEPA process) that would coordinate the conformity decision-making process or have authority to make a conformity determination in cases where multiple Federal agencies were involved in a Federal action.

3. Response

The consultation procedures outlined in the proposal requiring consultation with EPA, State and local air agencies, and relevant Federal agencies are contained in the final rule (§ 51.855 and § 51.858). The 45-day notification period was changed to 30 days to be consistent with the public participation requirements. Section 176(c) states that each Federal agency is responsible for making its own conformity determination. The EPA cannot remove that authority from the Federal agency and assign it elsewhere, as suggested by some commenters.

The State air agency does have an active role in the conformity determination, however, since the State indicates whether the action falls within the SIP emissions budget. Furthermore, if the emissions from the Federal activity exceed the emissions budget and cannot be offset by other activities under the Federal agency's control, then the State agencies have the option of mitigating emissions from sources not under Federal control. In this case, without the State agencies' agreement to revise the SIP to include such mitigation measures, the project would not conform. Consequently, EPA believes the consultation procedures described in the conformity rule will ensure accountability of the Federal action to the State and EPA, while giving the ultimate authority and responsibility to the Federal Agency as intended by section 176(c).

IV. Discussion of Other Issues and Response to Comments

A. 40 CFR Part 93

1. Proposal

The part 93 provisions apply as soon as the final rule becomes effective. The part 51 provisions direct States to revise their SIPs to incorporate the conformity requirements within 12 months after promulgation of this rule (§ 51.851(a)).

2. Comment

One commenter recommended that the rule provide specific guidance concerning conformity determinations in the absence of an approved SIP.

3. Response

As described in the proposal, the part 93 provisions apply until EPA approves the conformity SIP revision submitted by the State (§ 51.851(b)). An applicable SIP is currently in place for all areas and should be used for conformity purposes.

B. SIP Revision—Deadline

1. Proposal

Although the statute specifies that EPA should require States to submit their conformity SIP revisions by November 15, 1992, the congressional intent was also that EPA would have promulgated final conformity rules by November 15, 1991. In light of the delay in EPA promulgation of these rules, it is now clearly impossible for States to submit conformity SIP's by November 15, 1992. Therefore, EPA requires States to revise their SIP's within 1 year after the date of publication of the conformity rule. This approach is consistent with the congressional intent to provide States with a 1-year timeframe to complete their rulemaking once EPA had established the Federal criteria and procedures for conformity determinations.

2. Comment

Several commenters supported the 1-year timeframe as being consistent with congressional intent. One commenter suggested 18 months. Another commenter recommended that the SIP revision be required as soon as possible and that those revisions should be due not later than March 15, 1994. The EPA also received comments requesting clarification as to which agency is to submit the SIP revision.

3. Response

The final rule incorporates a 1-year timeframe since that represents an expeditious schedule for the State agencies and since this timeframe is consistent with congressional intent, considering the actual date of final Federal rulemaking. The SIP revision must be submitted by the Governor or Governor's designee responsible for submitting SIP revisions. Responsibility for implementing the conformity rule itself should fall to the primary agency responsible for implementing the SIP, usually the State air quality agency.

If a State does not revise its SIP within the 12 months following Federal Register publication of the final general conformity rule, then EPA will make a finding of failure to submit the revision, which would start the sanctions clock. Since, in this case, the State would not have a revised SIP and also would not have adopted the general conformity regulation, any conformity determinations made prior to State adoption and EPA approval of the SIP revision would be subject to the Federal rule and Federal enforceability procedures.

In addition, the rule is clarified with respect to application in areas newly designated as nonattainment. In such cases, the requirement for the State SIP revision by 12 months after publication of the general conformity rule could be unreasonable. Therefore, the rule provides that a State must revise its SIP to include the general conformity provisions within 12 months of an area's redesignation to nonattainment. The EPA general conformity rule would apply in any interim period.

C. SIP Revision—General Conformity

1. Proposal

As described in the proposal, EPA believes that section 176(c)(4)(A) and (C) of the Act clearly require EPA to promulgate criteria and procedures for determining conformity for both general and transportation activities (58 FR 13838) and to require States to submit SIP revisions including conformity criteria and procedures for both types of activities.

2. Comment

Certain commenters disagreed with EPA's interpretation of section 176(c)(4) of the Act, arguing that SIP revisions should be required only for transportation activities. However, no new information was provided by the commenters.

3. Response

For the reasons described in full in the proposal, EPA continues to believe that a SIP revision is required for general conformity by section 176(c)(4)(C) of the Act.

D. Federal Actions—Miscellaneous

1. Proposal

The description of a "Federal action" is set out in the preamble (58 FR 13838) and in the regulatory portion (definitions) of the proposal notice.

2. Comment

One commenter requested EPA to clarify that a renewal of an existing permit or approval does not give rise to a new conformity requirement, assuming the renewal does not materially alter the type or amount of emissions associated with the originally permitted activity.

Some commenters requested that the NPDES actions should all be required to undergo a conformity analysis and others supported the proposal which calls for a conformity analysis where it is an EPA-issued NPDES permit, but not where it is a State-issued permit under a delegated NPDES program.

One commenter stated that Federal actions should include certain actions taken by State or regional non-Federal agencies.

3. Response

As described in section III.G., the definition of "Federal action" in the final rule is changed from the description in the proposal notice (58 FR 13838) in order to clarify its meaning. The following responses cover additional concerns regarding this term.

While section 176(c)(2) of the Act may be interpreted to impose certain obligations on non-Federal actions under the transportation conformity provisions, the same interpretation does not apply for general conformity (such as State-issued NPDES permits) since the relevant statutory language is different.

Section 176(c)(1) does not impose any obligations on non-Federal parties other than MPO's. Thus, EPA cannot require non-Federal actions to make conformity determinations under the general conformity rule. Where a State is taking an independent action without Federal support, even under an EPA approved program such as a State NPDES program, there is no Federal action subject to these rules. On the other hand, where a Federal agency delegates its responsibility to take certain actions to a State or local agency, as in the case of certain block grants under Housing and Urban Development programs or Federal NPDES programs, the action remains a Federal action and the State must make a conformity determination on the Federal agency's behalf.

The EPA agrees that permit renewal actions or any action that does not increase emissions, would be exempt from the conformity rule and is so stipulated in § 51.853(c)(2)(ii).

E. Applicable Implementation Plan

1. Proposal

"Applicable implementation plan" is defined as the most recent EPA-approved or promulgated SIP (58 FR 13849).

2. Comment

The EPA received comments suggesting that the conformity determinations should be based on the most recent SIP revisions submitted by the State, even if EPA has not approved them, until such revisions are superseded by a more recent State submittal or by a Federal implementation plan (FIP); basing conformity determinations on outdated and inadequate SIP's is "very unproductive." Other comments suggested that actions in regions that do not have an approved SIP should be exempt from conformity.

Certain commenters noted that Congress included explicit interim conformity requirements for transportation plans, programs and projects, but provided no comparable language for other Federal actions. These commenters suggested that, absent a newly-revised SIP, it is not possible for a Federal agency to assess conformity or whether the project will delay timely attainment of any standard or other milestones.

3. Response

The language of section 176(c) refers to conformity "to an implementation plan approved or promulgated under section 110." The plain language of the statute does not allow the flexibility suggested by the commenter.

The applicable SIP is updated by the State as necessary to meet the Act requirements. In addition, EPA takes action to approve, disapprove, or promulgate revisions to the SIP. While portions of an applicable SIP might be disapproved in certain areas of the country, the approved portion that remains constitutes the applicable SIP; i.e., an applicable SIP exists in all regions upon which to determine conformity. Section 110(n) of the amended Act preserves the applicability of previously approved SIP's. Prior to the newly-revised SIP, there might not be any SIP milestones to consider, simplifying the conformity determination.

Unlike the transportation conformity rule which primarily relies on the SIP emissions budget, the general conformity rule provides several means to determine conformity, some of which do not require a newly-revised SIP (i.e., post-1990) and accompanying attainment demonstration, milestones and emissions budget. As described in § 51.858 of the proposal, general conformity can be demonstrated by air quality modeling, obtaining emissions offsets, or determining that the action does not increase emissions with respect to the baseline emissions. Thus, the obligation to determine that Federal actions will not cause or contribute to NAAQS violations under section 176(c)(1)(B) applies even where recent SIP revisions have not been submitted or approved.

F. Increase the Frequency or Severity

1. Proposal

"Increase the frequency or severity" means to cause a location or region to exceed a standard more often or to cause a violation at a greater concentration. "A greater concentration" could be taken to mean any value numerically greater than previously existed. In the case of monitored ozone data, measurements are made in parts per million to only two significant figures. In the case of modeled data, if results are reported to three significant figures, then a difference in the third significant figure is considered to be a difference for purposes of conformity determinations.

2. Comment

A commenter stated that, given the limitations of current air quality models, it seems unrealistic to deal with such a level of significance in considering "increases in the frequency or severity" of existing air quality violations. Another commenter stated that it will be virtually impossible to meet this requirement.

3. Response

The distinction between significant figures in measured and modeled numbers is made in order to be consistent with current EPA guidance for interpretation of measured and modeled air quality data. Since emissions in nonattainment areas are generally decreasing, the ambient concentrations should also be decreasing. Thus, it would not be impossible to show an action does not increase the frequency or severity of existing air quality violations.

G. Maintenance Area

1. Proposal

Maintenance area means an area with a maintenance plan approved under section 175A of the Act (§ 51.852).

2. Comment

The EPA received comments asking for clarification of the definition, specifically wanting to know if this definition includes all maintenance areas as designated under both the 1977 and 1990 amendments to the Act.

3. Response

The definition includes only those areas that were redesignated from nonattainment to attainment (i.e., maintenance areas) after the 1990 amendments to the Act.

H. Offsets

1. Proposal

The proposal refers to emission offsets in § 51.858.

2. Comment

One commenter requested EPA to clarify that offsets must go beyond those reductions necessary for attainment of the NAAQS.

3. Response

Emission offsets are an integral part of the air program, especially within the NSR program. The final conformity rule includes a definition of offsets which is consistent with EPA guidance regarding the use and restrictions for offsets. This definition is intended to assure that offsets within the air programs are calculated and credited consistently and that the term is used the same in the conformity rules as in the EPA NSR program. All offsets must, therefore, be quantifiable, consistent with the applicable SIP attainment and RFP demonstrations, surplus to 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.

I. Definitions—Miscellaneous

1. Proposal

Certain terms described below were not defined in the proposal.

2. Comment

The EPA received general comments requesting the rule to be clear.

3. Response

The EPA added or removed definitions of the following terms in the rule in order to clarify the requirements:

(1) "Administrator" was deleted since the term is not used in the rule.

(2) In the definition of "Applicable SIP," the sentence in the proposal referring to maintenance plans does not appear in the final rule because it does not change the meaning of the definition and "maintenance plan" is defined elsewhere in the rule.

(3) The definition of "Milestone" is clarified with respect to PM–10 by referencing section 189(c)(1) of the Act.

(4) The definition of "Metropolitan Planning Organization" is revised to be consistent with the definition in the transportation conformity rule.

(5) "Nonattainment Area" is clarified to refer to areas designated as nonattainment under section 107.

J. Conformity Determination

1. Proposal

In some cases, multiple Federal agencies may need to make a conformity determination for a related project. A Federal agency may either conduct its own conformity air quality analysis or adopt the analysis of another agency, for example, the lead NEPA agency. A Federal agency must always make its own conformity determination. Allowing each Federal agency with responsibility for making a conformity

determination to develop its own analysis or adopt that of another Federal agency, gives flexibility to the Federal agency and fulfills the agency's responsibility for making a conformity determination. A Federal agency retains the ability to conduct its own air analysis or use that of another Federal agency and make its own conformity decision. If an agency, due to one of its analyses, determines that the project does not conform, then it may not make a positive conformity determination. If there are differing conformity determinations for a Federal action by several Federal agencies involved, the respective agencies would have to reconcile their differences before the entire project could proceed.

If another Federal agency disagrees with a Federal agency's conformity determination, but does not itself have jurisdiction for the Federal action, then the Federal agency should provide written comments to the Federal agency with jurisdiction. The Federal agency with jurisdiction is required to consider the comments of other interested agencies under the proposed rules.

2. Comments

A number of commenters supported the procedures outlined in the proposal. One commenter suggested that the general conformity rule use the same interagency coordination procedures as those in the new transportation statute. Some commenters felt that a lead agency, similar to that used in NEPA, should have responsibility for the conformity determination; one commenter suggested the lead agency should be the one with continuing authority over the project.

3. Response

The final rule requires that each Federal agency be responsible for making its own conformity determination as described in § 51.854. The rationale for this is explained in the response to comments on the EPA and State review roles. Because section 176(c) indicates that each Federal agency is responsible for making its own conformity determination, EPA cannot remove that authority from the Federal agency and assign it elsewhere. Although the general conformity rule does not specifically identify a lead agency, coordination of conformity determinations will be necessary because all Federal agencies with jurisdiction over the project will have to make a positive conformity finding for the project to proceed. Therefore, differences among Federal agencies will have to be resolved through consultation among those agencies. The EPA is not mandating formalized consultation and dispute resolution procedures, but rather leaves this to the discretion of the Federal agencies involved to allow for greater flexibility.

K. Air Quality Related Values (AQRV's)

1. Proposal

The proposal did not specifically address AQRV's.

2. Comment

One commenter stated that conformity should be applied broadly, so that Federal actions will not adversely affect the AQRV's of protected Federal lands.

3. Response

To the degree that a SIP includes requirements related to AQRV's, a Federal action would need to conform to those SIP provisions. The EPA believes that section 176(c) of the Act is intended to protect the NAAQS and the SIP. Section 176(c)(1)(A) and (B) define conformity, and do not include reference to any parameters beyond SIP requirements and NAAQS. Thus, the conformity rule does not require the conformity analysis to cover values other than the NAAQS, unless they are specifically contained in the SIP. For example, if a SIP contains PSD requirements, a Federal action must conform to those requirements to the extent they apply; in general, actions subject to PSD would not need a conformity analysis since the stationary source emissions would be exempt under § 51.853(c)(1) or § 51.853(b)(1) and any vehicle emissions associated with the action would not usually be subject to the PSD requirements.

L. Frequency of Conformity Determinations

1. Proposal

A conformity determination expires if the action is not taken in a reasonable time period (58 FR 13844). The EPA believes that conformity determinations should not be valid indefinitely, since the environment surrounding the proposed action will change over time.

The EPA proposed that the conformity status of a general Federal action automatically lapses 5 years from the date of the initial determination if the Federal action has not been completed or if a continuous program has not been commenced to implement that Federal action in a reasonable time. "Commenced" as used here has the same general meaning as used in the PSD program (40 CFR 51.166).

2. Comment

The EPA received comments both supporting and criticizing the 5-year period and other comments suggesting a 3-year period to be consistent with the transportation rule. One commenter suggested that a "continuous program" of on-site construction includes design and engineering work.

3. Response

The 5-year timeframe for conformity determinations, as described in the NPR, is contained in the final rule. The 3-year timeframe for the transportation conformity rule is specified in section 176(c)(4)(B)(ii) of the Act. However, there is no similar specification in section 176(c) for the frequency of general conformity determinations. After extensive consultation with the Federal agencies and review of the comments, EPA has decided to keep the 5-year renewal timeframe for general conformity decisions because it is consistent with the renewal frequency of NEPA decisions rather than the 3-year timeframe required for transportation conformity. Consistency with NEPA is important in order to allow Federal agencies to incorporate the new conformity procedures within their existing NEPA procedures. Most general conformity actions also need NEPA analyses, but would not need transportation conformity decisions.

The EPA agrees that a continuous program of on-site construction may include design and engineering work. Where on-site construction has been commenced and meaningful design and engineering work is continuing, this represents the kind of commitment to an action which should not be jeopardized by expiration of a previous conformity determination.

The rule is clarified in § 51.857(a) to refer to the "date a final conformity determination is reported under § 51.855." This replaces the phrase the "date of the initial conformity determination" since it is clearer. The rule is also clarified in § 51.857(b) to replace the vague phrase "the scope of the project" with "the scope of the final conformity determination reported under § 51.855." The final rule also contains a provision in § 51.857(c) which clarifies that actions which are taken subsequent to a conformity determination must be consistent with the basis of that determination.

M. Tiering

1. Proposal

The EPA proposed that Federal agencies could use the concept of tiering and analyze actions in a staged manner

(§ 51.858, paragraph (d)). Tiering would not be acceptable for purposes of determining applicability (§ 51.853), however, since that approach might have undermined the rule if agencies chose to narrowly define their actions as separate activities for purposes of determining applicability.

2. Comments

A few commenters supported the use of tiering for conformity decisions and pointed out that it gives the Federal agency needed flexibility in planning. Many other commenters were opposed to conditioning long-term conformity decisions. Some opposed tiering because conditional findings create uncertainty, making it difficult for developers and lenders to justify investment in long-term projects. Others were against it because they felt it could result in a misleading conclusion that a meaningful analytical judgment has been made and that it would invite conflict between investment-backed expectations and the protection of public health.

3. Response

The EPA agrees with the commenters who stated that tiering would create too much uncertainty in the conformity determination process. Furthermore, it was thought that tiering could cause the segmentation of projects for conformity analyses, which might provide an inaccurate estimate of overall emissions. The segmentation of projects for conformity analyses when emissions are reasonably foreseeable is not permitted by this rule. Thus, the tiering provision is not included in the final rule. A full conformity determination on all aspects of an activity must be completed before any portion of the activity is commenced.

N. Applicability—Regionally Significant Actions

1. Proposal

The EPA proposed the concept of "regionally significant actions," to capture those actions that fall below the de minimis emission levels, but have the potential to impact the air quality of a region. When the emissions impact from a Federal action does not exceed the tons per year cutoff for a Federal action otherwise requiring a conformity determination, but the total direct and indirect emissions from the Federal action represent 10 percent or more of a nonattainment area's total emissions for that pollutant, the action is defined by the proposed regulations as a regionally significant action and must go through a full conformity analysis (§ 51.853(g)).

2. Comment

Many commenters supported the concept of regionally significant actions and believed that conformity determinations should be required for them. However, there was diverse opinion on the most appropriate level to define a regionally significant action; some commenters felt 10 percent of a nonattainment area's emissions for a pollutant to be too high, while others felt it was too low. However, no commenters provided specific documentation to support a different number. There were also some commenters who felt the entire concept of regional significance to be inappropriate and that the de minimis cut-offs should suffice for conformity applicability requirements.

3. Response

EPA is maintaining the requirement of conformity determinations for regionally significant actions in the final rule as defined in § 51.853 of the NPR. The rationale is explained in the preamble to the NPR (58 FR 13842). The EPA specifically invited comments and documentation on whether 10 percent was an appropriate significance level or whether some other percentage should be set. In view of the fact that documentation for more appropriate significance levels was not provided by the commenters, the 10 percent level of significance is used. In addition, the rule is clarified to indicate that the requirements of §§ 51.850 and 51.855 through 51.860 apply to regionally significant actions.

O. Applicability—NAAQS Precursors

1. Proposal

The PM–10 precursor pollutants should be included in the conformity analyses where the applicable SIP's control strategy requires reductions in such precursor pollutants. For ozone, emissions of NOx and VOC must be considered for purposes of both applicability and analysis. However, where an area received an exemption from NOx requirements under section 182(f) of the Act or the control strategy in the approved maintenance plan does not include NOx control measures, only VOC emissions need to be considered (58 FR 13847).

2. Comment

Commenters indicated that analysis of PM–10 precursors should be required to satisfy the provision of section 176(c)(1)(B)(i) that Federal activities must not contribute to any new violation of any standard in any area. Another commenter indicated that the rule should consider the regional impact of NOx emissions compared to VOC emissions.

3. Response

Section 189(e) of the Act provides that applicable control requirements under PM–10 nonattainment area SIP's in effect for major stationary sources of PM–10 are also applicable to major stationary sources of PM–10 precursors, except where EPA determines that the sources of PM–10 precursors do not contribute significantly to PM–10 levels which exceed the PM–10 NAAQS in the area. Consistent with this evidence of congressional intent, the final conformity rule requires the inclusion of PM–10 precursors in conformity analyses where they are a significant contributor to the PM–10 levels in the PM–10 nonattainment area SIP. The significant contribution may be from major stationary sources as well as other types of sources.

In contrast, the Act specifically requires reductions in emissions of both NOx and VOC to meet the ozone standard. Only where there is a demonstration consistent with the requirements of section 182(f) and EPA approves the demonstration are the NO. reductions not required. Thus, the conformity rule provides for the consideration of the regional impact of NOx emissions in ozone nonattainment and maintenance areas, as described in the proposal.

The final rule includes a definition of the phrase "precursors of a criteria pollutant." This definition incorporates the concerns described above. A definition of "total of direct and indirect emissions" is added to the final rule, as discussed elsewhere in this preamble, and includes the phrase "emissions of precursors of criteria pollutants" in order to incorporate this concept into the final rule.

P. Attainment Demonstration

1. Proposal

Paragraph (a)(1) of § 51.858 provides that a Federal action conforms if emissions from the action are "specifically identified and accounted for" in the applicable SIP's attainment or maintenance demonstration.

2. Comment

A commenter suggested that a Federal action should be determined to conform where the total emissions from the Federal action are "consistent with" th projected levels of emissions inventory forecasts in the applicable SIP attainment demonstration.

3. Response

The EPA believes that the language proposed in § 51.858(a)(1) is appropriate. Specificity is needed in order to avoid letting this provision become a significant loophole, open to varying interpretations. On the other hand, the emissions budget provision in § 51.858(a)(5)(i) provides a mechanism similar to that suggested by the commenter.

Q. Transportation Conformity

1. Proposal

Section 51.858(a)(5)(ii) provides that a Federal action that is specifically included in a conforming transportation plan, would be determined to conform.

2. Comment

One commenter stated that the MPO should be involved in determining when a project is specifically included in a transportation plan.

3. Response

The final rule is clarified to indicate that the MPO must determine that an action is "specifically included" in a conforming plan since the MPO is likely to be better qualified to make that interpretation than the Federal agency making the conformity determination. The rule is also clarified to state that a conforming plan refers to a transportation plan and transportation improvement program which have been found to conform under 40 CFR part 51 or part 93.

R. Baseline Emissions

1. Proposal

Where EPA has not approved a revision to the relevant SIP attainment or maintenance demonstration since 1990, a Federal action may be determined to conform if emissions from the action do not increase emissions with respect to the baseline emissions (paragraph (d) of § 51.858).

2. Comment

A commenter suggested that the rule or preamble should clarify that Federal agencies may use the latest emissions inventory available from State and local agencies in gauging the baseline. Further, conformity determinations based on such inventories should remain valid, and not be re-analyzed when a new inventory is complete.

Another commenter stated that it is not appropriate for areas which were designated nonattainment before the 1990 amendments to the Act to use a year before 1990 as the baseline. Such areas are required to submit 1990 emission inventories. For areas designated nonattainment after the 1990 amendments to the Act, the approach to establishing baselines in the proposal may be appropriate.

One commenter pointed out that using 1990 as a baseline is inappropriate in many cases since many Federal actions related to the military took place at the time of Desert Storm. As an alternative they suggest the rule allow use of a baseline established from the highest estimated emissions over a 3-year period from 1989–91. Regarding military base closure actions, one commenter stated that the baseline emissions should be the preclosure announcement baseline operating conditions. This approach does not alter the emissions budget that would have existed if a base continued to operate. Such emissions were contained in the existing and future emissions inventory numbers being used by the South Coast Air Quality Management District in its 1989 air quality plan. This should be the emissions budget used to make the conformity determination for that District.

The EPA also received a comment stating that if 1990 emissions inventory levels are used as a baseline, it is important that some type of "credit" be given to a Federal agency that is required to make a conformity determination with respect to an airport related improvement or modification project at an airport that has already implemented significant emission reduction measures prior to 1990. This credit could be made by increasing the de minimis amount for certain airport actions.

Several commenters requested clarification on how to calculate the baseline emissions. One commenter recommended that the comparison should be between the "action" versus "no action" and not between the "action" and "1990 base."

3. Response

The baseline calculation is discussed in the proposal (58 FR 13846) and specifies calendar year 1990 or an alternate time period, consistent with the time period used to designate or classify the area in 40 CFR part 81. Use of the "latest emission inventory" should, in many cases, coincide with use of the 1990 inventory since the 1990 amendments to the Act required all ozone nonattainment areas to develop a 1990 inventory. For PM–10, the Act also required an emissions inventory. But, for the initial PM–10 areas designated nonattainment as of enactment, the inventories are generally for 1 of the calendar years in the mid- to late-1980's. The approach in the final rule uses 1990, which is the baseline year specified in the Act from which to measure progress toward attainment, the PM–10 emissions inventory years (not specifically included in the proposed rule), or the designation/classification time period, which is representative of emission levels that must be reduced in order to provide for attainment. Use of more recent emissions inventories may not be appropriate since such inventories might not be representative of the full extent of the emissions associated with the air quality problem.

The EPA sees no basis for the rule to select certain activities for "credit" due to previously implemented emission reduction measures, whether at airports or military bases. Such decisions reside with the State when the control strategy and emissions budget are developed. Since the final rule allows use of the years other than 1990 where appropriate, it could, in effect, provide some of the "credit" the commenter is suggesting in some cases.

As described in the proposal, baseline emissions are defined as the total of direct and indirect emissions that are estimated to have occurred during calendar year 1990 or an alternate period based on the classification or designation as promulgated in 40 CFR part 81. The proposed rule intended to provide for a positive conformity determination if the future use of the area resulted in equal or less emissions. However, the proposal did not take into account that any motor vehicle emission activities occurring in the baseline year would, in fact, emit less in the future year scenario (at the same, historic activity levels) due only to improved emissions controls in newer vehicles. Thus, the proposed rule was skewed in a manner that unjustifiably could appear to allow future actions to conform. Therefore, § 51.858(a)(5)(iv)(B) of the final rule is revised to focus on the baseline activity levels rather than the baseline emissions and the emission calculations must use emission factors appropriate to the future years analyzed. In other words, the rule specifies a "build/no build" test, not a "build/1990" test.

S. Annual Reductions

1. Proposal

Paragraph (c) of § 51.858 of the proposal states that a Federal action may not be determined to conform unless emissions from the action are consistent with all relevant requirements and milestones contained in the applicable SIP, such as elements identified as part of the RFP schedules.

2. Comment

The EPA received comments suggesting that the rules should require Federal activities to be consistent with the RFP requirements of the Act and with expeditious attainment of the NAAQS. Thus, the general conformity rules should be amended to require Federal agencies to demonstrate that their activities are achieving annual reductions in emissions and are consistent with State efforts to achieve attainment as expeditiously as practicable.

A commenter noted that the proposed rule would allow Federal agencies to satisfy the conformity provision by merely offsetting predicted emission increases from a project on a 1:1 basis. The commenter suggested that the rule should be modified to specify that a Federal action only conforms if the action is contributing to the required annual reductions in emissions and is consistent with State efforts to achieve attainment as expeditiously as practicable.

Another commenter noted that emissions budgets set in the SIP are supposed to accommodate growth.

3. Response

The EPA believes that, for the general conformity, the provisions in paragraph (c) of § 51.858 meet the section 176(c) Act requirements for RFP and other milestones and that additional language concerning attainment as expeditiously as practicable would not substantively alter these requirements. A State has considerable discretion to select a strategy to meet the RFP requirements. Neither the Act RFP requirements nor the Act general conformity requirements specify that each individual Federal action contribute proportionately to emission reductions. Instead, the Act generally allows a State to choose a strategy that might achieve greater reductions at certain sources and lesser or no reductions at other sources, and which may provide for growth in certain areas. The transportation conformity rule, in contrast to the general conformity rule, reflects specific provisions of section 176(c) of the Act regarding specified required emission reductions from transportation activities. Consequently, so long as general Federal actions meet the requirements of the general conformity rule, EPA believes that such activities would be consistent with the SIP, RFP, and attainment demonstrations and that every general Federal action is not required by the Act to result in an emissions decrease.

T. Summary of Criteria for Determining Conformity

1. Proposal

The proposal contained a narrative description of the § 51.858 requirements for making conformity determinations.

2. Comment

Some commenters requested EPA to include in the final rule preamble a table summarizing the requirements in § 51.858.

3. Response

The following table summarizes these requirements; it should not be read to substitute for the regulatory language itself. If there is a conflict between the table and other portions of this final rulemaking notice, the table should not be relied upon.

Section 51.858(a)	Areawide only		Local and possibly areawide		Local only
	O_3	NO_2	PM–10	CO	Pb/SO
(1) Specified in attainment or maintenance demostration	X	X	X	X	X
(2) Offsets within same nonattainment/maintenance area	X	X			
(3) Areawide and local modeling	.....	.....	X	X	X
(4)(i) Local modeling only if local problem	.....	.....	X	X	
(4)(ii) Areawide modeling only *or* meet (5)	.....	.....	X	X	
(5)(i) Emissions budget	X	X	(*)	(*)	
(5)(ii) Transportation plan	X	X	(*)	(*)	
(5)(iii) Offsets	X	X	(*)	(*)	
(5)(iv) Baseline/No increase	X	X	(*)	(*)	
(5)(V) Water project	X	X			

X=Option to show conformity.
*=Option if areawide problem.

U. Planning Assumptions

1. Proposal

Paragraph (a) of § 51.859 requires the conformity analyses to be based on the latest planning assumptions approved by the MPO.

2. Comment

A commenter recommended that conformity determinations should be based on the latest planning assumptions used in establishing the SIP's RFP emissions target(s) and emissions budget(s). States should be required to evaluate and update the SIP's planning assumptions used for demonstrating RFP and attainment. Discrepancies between the planning assumptions and estimates used to demonstrate RFP and attainment and those used for project-level conformity determinations could distort estimates of growth in emissions in the nonattainment area.

3. Response

As noted in the preamble to the proposal (58 FR 13846), EPA acknowledges that the conformity determination may be more difficult where the assumptions in the SIP differ from the recent MPO assumptions. For actions such as wastewater treatment plants, planning assumptions are indeed critical. However, for many other Federal actions, the planning assumptions are not as critical a factor in determining conformity.

In addition, the plain language of the statute does not allow the approach suggested by the commenter. Section 176(c) of the Act states: "The determination of conformity shall be based on the most recent estimates of emissions, and such estimates shall be determined from the most recent population, employment, travel and congestion estimates as determined by the metropolitan planning organization or other agency authorized to make such estimates." Thus, EPA must require use of the most recent planning assumptions.

In the event any revisions to these planning assumptions are necessary, § 51.859(a)(2) in the proposal indicated that such revisions must be approved in writing by the MPO or other agency authorized to make such estimates for the urban area. This section has been revised in the final rule to indicate that written approval is not required, as long

as the MPO or appropriate agency has authorized the change, so as not to delay the conformity analysis.

V. Forecast Emission Years

1. Proposal

Paragraph 51.859(d) in the proposal identified the emission scenarios to be considered. Total direct and indirect emission estimates were proposed to be projected, consistent with key dates with respect to the amended Act, the project itself, and the applicable SIP. Thus, the analysis was proposed to contain:

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

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

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

2. Comment

One commenter indicated that the emission scenarios requirement should be omitted and lead agencies be allowed to determine the scenarios on a project-specific basis. Another commenter stated that the analysis should include a maintenance period. The EPA also received a comment that all Federal actions must be analyzed for their impact in the 20(+)-year timeframe.

3. Response

The scenarios proposed by EPA are also reflected in the final rule because they are the minimum possible scenarios which still meet the statutory requirements that relate conformity to attainment, maintenance, SIP milestones, and RFP. The above emission estimates are necessary in order to assure that the Federal action would not "delay timely attainment of any standard or any required interim emission reductions or other milestones in any area" (section 176(c)(1)(B)(iii) of the Act). This provision links emissions from the action to the emission reduction targets required by the Act to demonstrate RFP prior to the attainment date. Emission estimates are also needed to provide for determinations of conformity with respect to maintenance plans as required by section 176(c)(4)(B)(iii) of the Act. For an action to conform to the applicable SIP, it must conform at all of the above times.

The inclusion of a maintenance period is not reasonable since many SIP's may not have identified a maintenance period. The rigidity of a 20(+)-year timeframe is also unnecessary. Rather, the emission scenarios should be keyed to the relevant years for RFP, attainment and maintenance planning specified in the SIP. In some, but not all, cases a 20(+)-year timeframe will, in fact, be necessary under the final rule to meet one of the specified emission scenarios.

W. Total of Direct and Indirect Emissions

1. Proposal

The preamble states that "net" emissions from the various direct and indirect sources should be used in the applicability and conformity analyses (58 FR 13847). However, the rule uses the phrase, "total direct and indirect emissions."

2. Comment

A commenter suggested that EPA should expressly state in the final rule that "net" emissions from the particular Federal action under review should be evaluated in determining both applicability and conformity.

Another comment stated that the conformity analysis should include the direct and indirect impacts of the Federal activity along with all other reasonably foreseeable projects (Federal and non-Federal) in the area.

3. Response

The final rule is revised to clarify that the total direct and indirect emissions may be a "net" emissions calculation. For example, where an agency has several offices in one metropolitan area and is considering consolidation into one large centralized office, vehicular activity may actually decrease, depending on the location of the new office building, availability of mass transit, and other factors. In such cases, the Federal agency should consult with the MPO in determining the "net" emissions from such an action. Consultation with the MPO is also important to help assure that indirect emissions, once attributed to a source, will not be double-counted by attributing the same emissions to nearby projects that are subsequently reviewed.

The conformity requirements for applicability and analysis generally do not include reasonably foreseeable projects other than those caused by the Federal action. Thus, the calculation of emissions for de minimis or offset purposes includes only the (net) direct and indirect emissions caused by the Federal action in question. However, where an air quality modeling analysis is part of the conformity determination, the EPA guideline on air quality models (reference in § 51.859) requires the modeling to include emissions from existing sources as well as the potential new emissions due to the Federal action in order to accurately determine the effect of the action on the NAAQS and whether the action might cause or contribute to a new violation or worsen an existing violation.

In addition, the definition is revised to clarify that emissions of criteria pollutants and emissions of precursors of criteria pollutants (as defined in the final rule) are included within the meaning of "total of direct and indirect emissions." Further, the final definition makes it clear that the portion of emissions which are exempt or presumed to conform under § 51.853 are not included in the "total of direct and indirect emissions."

X. New or Revised Emissions Models

1. Proposal

The proposed rules require use of the most current version of the motor vehicle emissions model specified by EPA and available for use in the preparation or revision of SIP's (58 FR 13852).

2. Comment

One commenter suggested that the final rules should provide that conformity determinations be made with the same mobile source emissions model as was used in the development of the SIP until such time as EPA approves a SIP revision, based on a new model.

Another commenter noted that the latest planning assumptions may not be consistent with assumptions contained in the SIP. In such cases, the commenter suggests that the final rule should allow the affected agencies to determine which prevails. The commenter also suggested that the general conformity rule should provide a transition period similar to that in the transportation conformity rule, where EPA updates the motor vehicle emissions model.

3. Response

The statute requires the determination of conformity to be based on the most recent estimates of emissions, and such estimates shall be determined from the most recent population, employment, travel, and congestion estimates as determined by the MPO or other agency authorized to make such estimates. As noted in the proposal (58 FR 13846–13847) EPA recognizes this issue and urges that these estimates should be consistent with those in the applicable SIP, to the extent possible. However, based on the clear statutory language,

the most recent estimates must be used, rather than the estimates that may have been used in (older) SIP revisions. In cases where the emissions estimate in the applicable SIP is outdated and the Federal agency chooses not to rely on it in the conformity analysis, the final conformity rules allow a Federal agency to demonstrate conformity through analyses that focus on emission offsets and/or air quality modeling.

Section 51.859(b) of the final rule includes provisions to provide flexibility for cases where use of otherwise required emission models or emission factors is inappropriate and the approval of the EPA Regional Administrator is obtained. In addition, the final rule provides a reasonable grace period where the EPA motor vehicle emissions model has been updated, so that ongoing analysis efforts are not unduly disrupted. The grace period is consistent with the provisions in the transportation conformity rule as suggested by the comment.

Specifically, the rule establishes a 3-month grace period during which the motor vehicle emissions model previously specified by EPA as the most current version may be used. In addition, conformity analyses for which the analysis was begun during the grace period or no more than 3 years before the notice of availability of the latest emission model may continue to use the previous version of the model specified by EPA.

Y. Air Quality Modeling—General

1. Proposal

Where the conformity analysis relies on air quality modeling, that modeling must use EPA-approved models, unless otherwise approved by the EPA Regional Administrator [paragraph (c) of § 51.859]. The analysis must include any year for which the applicable SIP specifies an annual emissions budget (paragraph (d)(3) of § 51.859).

2. Comment

One commenter pointed out several problems in the rules: the rule would require the use of models that are inappropriate for complex terrain; before any models can be used, they must be EPA-approved; and conformity determinations should also include an analysis of the milestone years that are used in the SIP to demonstrate attainment.

3. Response

As proposed, the final rules generally require use of EPA-approved models, including complex terrain models in some cases. However, where such models are unavailable for a particular application, alternate air quality analyses can be conducted upon approval of the EPA Regional Administrator. The EPA believes it is essential to standardize air quality model applications since models could otherwise be invented or existing models manipulated to show virtually any results desired.

However, § 51.858(a)(3) in the final rule does not apply to ozone or nitrogen dioxide modeling efforts. The EPA believes that, as a technical matter, application of existing air quality dispersion models to assess project level emission changes for these regional scale pollutants is generally not appropriate. That is, photochemical grid models are generally not sufficient to assess incremental changes to areawide ozone concentrations from emissions changes at a single or group of small sources. Emission changes should amount to some significant fraction of base emissions before photochemical grid modeling results can be interpreted with sufficient confidence that the results are not lost in the noise of the model and the input data.

In addition, § 51.858(a) (3) and (4) are revised to clarify that, in some cases, either local or areawide modeling or the provisions of § 51.858(a)(5) for CO and/or PM–10 would satisfy the § 51.858(a) requirements. As specified in § 51.858(a)(4), the State agency primarily responsible for the applicable SIP would identify the cases/areas for which both local and areawide modeling is not needed to demonstrate conformity since that agency has the expertise to make such a determination.

The analysis required in paragraph (d)(3) of § 51.859 is for the same years as the milestone years noted by the commenter. This requirement applies where the applicable SIP specifically includes emissions budgets for the milestone and/or attainment years.

Z. Air Quality Modeling—PM–10

1. Proposal

The proposal called for modeling of localized PM–10 impacts in some cases (§ 51.858).

2. Comment

This analysis is not currently in use in California and is unfamiliar to technical air quality consultants and the California Air Resources Board.

3. Response

The EPA's air quality modeling guideline contains models intended specifically to analyze the local and regional impacts of PM–10, including point, area, and volume sources. In addition, EPA will be making guidance available on how to use an existing guideline model (CALINE3) and other EPA guidance to analyze the local air quality impacts of PM–10 roadway emissions.

AA. Activity on Federally-Managed Land

1. Proposal

The preamble to the general conformity proposal indicates that prescribed burning activities by FLM could be one activity affected by the rule.

2. Comment

Comments submitted by Federal land managers include general comments that are addressed elsewhere in this preamble. Some of the comments are more specific to their land management activities and are addressed here.

Regarding de minimis levels, one commenter stated that the proposed rule mixes up emissions and impacts; the rule should focus on the "effect" on the nonattainment area rather than emissions. The commenter stated that the approach has implications for prescribed burning. Prescribed burning is a temporary source that may occur at a time of year when the air quality standards are not being violated. In addition, the focus on emissions is also a problem when the smoke is blown away from the nonattainment area.

3. Response 1

Regarding de minimis levels, the emissions-based threshold does not provide as direct an indicator of a project's air quality impact as an ambient concentration-based threshold. It was selected for the final rule, however, because it does provide a rough indicator of a project's impact. In addition, it was selected because it is not feasible to expect Federal agencies, at the conformity applicability stage, to perform the air quality dispersion modeling analysis necessary to determine whether a project is above an air quality concentration. Such an analysis would be time consuming and potentially result in the Federal agency having to expend significant resources analyzing the air quality impact of an action that could be determined, upon completion of analysis, to have a "de minimis" air quality impact. Moreover, for some actions requiring an air quality modeling analysis up-front is a potential waste of resources when the Federal agency may ultimately select an option for adequately showing conformity that does not involve air quality modeling.

Regarding the timing of prescribed burns, if a burn occurs during a time of year when a nonattainment area does not experience violations of the NAAQS and the applicable SIP's attainment demonstration specifically reflects that finding, then such a burn may be determined to conform pursuant to § 51.858(a)(1).

Regarding the direction of smoke emissions, for the reasons noted above EPA has selected an emissions-based threshold for conformity applicability purposes. Such an approach does not account for emissions direction or dispersion. Depending on the nature and scope of the activity and conformity option selected pursuant to section 51.858, the conformity analysis may or may not explicitly address these factors. Section 51.855 was amended, however, to require the consultation and notification of FLM's by other Federal agencies when a Federal action requiring a conformity determination is within 100 km of a Class I area.

4. Comment

Two commenters noted that the rule could affect many of their agencies' activities. One commenter stated the rule becomes less focused as it attempts to address the different types of Federal actions. The commenter stated the rule is unclear about how the Federal agency should make a conformity determination for prescribed fire, among other activities, to take into account the complex issues involved. The commenter stated that the rule should encourage pollution prevention by exempting actions consistent with an agency's pollution prevention plan. Another comment indicated that most of its agency's management plans, which are programmatic, include emissions that are not reasonably foreseeable.

5. Response

The final rule applies to nonattainment and maintenance areas and requires conformity determinations for Federal actions where the total of direct and indirect emissions exceed de minimis levels as described in § 51.853(b). Section 51.858 provides several options for showing conformity for Federal activity generally, including FLM activity. The conformity showing includes an air quality test where the Federal agency must demonstrate that the action does not cause or contribute to any new NAAQS violation or increase the frequency or severity of any existing violation. The Federal agency can either make this showing explicitly through air quality modeling or by selecting a surrogate option such as consistency with an emissions budget. The conformity showing also includes an emissions test where the Federal agency must show that the action is consistent with all SIP requirements and milestones.

In general, EPA recognizes the complex problems posed by the goals and missions of the air quality and land management agencies and EPA intends to work with the FLM's and States to find solutions. One such area of concern is ecosystem management and forest health and the challenges posed to air quality and visibility by the need for more prescribed burning expressed by the FLM.

Regarding reasonably foreseeable emissions, the rule does not require Federal agencies to include emissions in conformity applicability determinations or analyses which are not reasonably foreseeable. Reasonably foreseeable emissions (as defined in § 51.852) are projected future indirect emissions that are identified at the time the conformity determination is made and for which the location and quantity is known.

Regarding pollution prevention plans, while the final rule does exempt certain actions or presume them to conform, it does not specifically exempt actions consistent with a Federal agency's pollution prevention plan. Paragraph (c)(2) of § 51.853 of the final rule exempts actions whose total direct and indirect emissions are below the de minimis rates and other actions which would result in no emissions increase or an emissions increase that is clearly de minimis. Certain actions listed in paragraph (c)(3) of § 51.853 where the emissions are not reasonably foreseeable are also exempt. In addition, paragraphs (d) and (e) of § 51.853 of the final rule identify other actions which are exempt from conformity, such as Federal actions in response to emergencies. Therefore, since this rule does not exempt them or presume them to conform, actions consistent with an agency's pollution prevention plan that increase emissions beyond the de minimis levels are subject to conformity. However, §§ 51.853(g) and 51.853(h) of the rule provide Federal agencies with the requirements and procedures to establish activities that are presumed to conform which could conceivably include actions consistent with a pollution plan provided the rule's appropriate requirements are met. Further, to address those situations where prescribed burns are part of a conforming smoke management plan, § 51.853(c)(4)(ii) was added to exempt such actions.

6. Comment

One comment concerned the air pollution emissions information EPA maintains in a document entitled "Compilation of Air Pollutant Emission Factors (AP–42)." The commenter indicated the document does not correctly represent emissions from prescribed burning. The commenter also stated that the rule should not require the development of demographic and other data from urban nonattainment areas when they are not relevant, nor should the rule dictate such data in suburban or rural areas in the agency's planning process. In addition, the commenter stated that the rule would require the use of inappropriate air quality models. Another commenter stated that models for use in analyzing prescribed burning emissions in mountainous terrain have not yet been developed.

7. Response

Regarding emission factors, the final rule allows for alternative emissions data to be used where it is more accurate than that provided in EPA's AP–42 document. Regarding demographic data, the final rule requires that all planning assumptions must be derived from data most recently approved by the MPO where available. Such data are available for urban areas; the rule does not require its use in suburban and rural areas if it is unavailable.

Regarding modeling, if EPA guideline modeling techniques are not appropriate in a conformity determination, then the rule provides for the use of alternative models provided written approval is obtained from the EPA Regional Administrator. If no model is available for a particular application, then modeling may not be an option available for that conformity determination.

BB. Federalism Assessment

1. Proposal

The preamble to the proposal states that there are no federalism effects associated with this rule (58 FR 13848).

2. Comment

One commenter stated that a federalism assessment should be conducted under Executive Order 12612.

3. Response

A federalism assessment has not been conducted under Executive Order 12612. However, federalism effects are considered throughout this rule (e.g., discussions regarding State, Federal

agency, and EPA roles in General Conformity).

V. Economic Impact

The estimates presently available are preliminary and do not reflect substantive and recent revisions to the final rule. These estimates represent specific information solicited from the Federal agencies presumed to be affected by the rule. The EPA is interested in comments from the affected agencies on the economic impacts presented in this section. A revised analysis will be prepared and submitted to OMB in the form of a revised Information Collection Request (ICR) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

The preliminary estimates presented here are based on data provided by the following sources: Department of Interior (DOI), Department of Agriculture (USDA), Department of Energy (DOE), Department of Defense (DOD), Department of Housing and Urban Development (HUD) and the General Services Administration (GSA). It is estimated by the Federal agencies that between 10,000 and 50,000 Federal actions may need to be reviewed annually for applicability of the conformity rule. About 15% of these actions will require a conformity determination. The estimated cost of one conformity determination ranges from $1,700 for a straightforward determination to $133,000 for a base closure conformity determination. In total, the anticipated cost of the general conformity rule from the raw data submitted by the agencies ranges from $63 million per year to $111 million per year. These annual cost estimates reflect a U.S. Army Corps of Engineer's (COE) estimated annual cost ranging from $53 million to $102 million.

There are several factors that will lead to a change in these estimates, substantially lowering and narrowing the ranges. These factors are:

(1) Some of the estimates were based on the inclusive definition co-proposed by the rule in March 1993, and the definitions of indirect emissions and Federal action, but are not representative of the final rule.

(2) New "de minimis" cutoffs and various added exemptions are present in the final rule and differ from the proposed rule.

(3) There is need to completely account for overlap of Federal projects which have air environmental consequences and are subject to the National Environmental Policy Act (NEPA) as well as the NSR, operating permit, SIP and FIP, NSP and hazardous emission standards and other requirements of the Act.

Most of the cost of determining conformity falls to Federal agencies and/or private sponsors of projects needing Federal action. The Federal agencies and/or private sponsors will need to fund the analysis of the actions for air quality impact. In addition, State and local agencies may choose to participate in development and/or review of the analysis. The incremental cost estimates include recordkeeping, reporting, performing air quality and mitigation analysis, and considering public comments where appropriate.

As stated above, these estimates are preliminary. Revisions will be addressed in a forthcoming revised document that will specifically assess the costs and recordkeeping and reporting burden of the rule, as stipulated under Section VI(C) Paperwork reduction Act below.

VI. Administrative Requirements

A. Executive Order 12866

Under Executive Order 12866, (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a "significant regulatory action". As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 and applicable EPA guidelines revised in 1992 require Federal agencies to identify potentially adverse impacts of Federal regulations upon small entities Small entities include small businesses organizations, and governmental jurisdictions. The EPA has determined that this regulation does not apply to any small entities. This regulation directly affects only Federal agencies. Consequently, a Regulatory Flexibility Analysis (RFA) is not required. As required under section 605 of the Regulatory Flexibility Act, 5 U.S.C. *et seq.*, I certify that this regulation does not have a significant impact on a substantial number of small entities and thereby does not require a Regulatory Flexibility Analysis (RFA).

C. Paperwork Reduction Act

The Paperwork Reduction Act (PRA) requires that an agency prepare an Information Collection Request (ICR) to obtain OMB clearance for any activity that will involve collecting information from ten or more non-Federal respondents. These information requirements include reporting, monitoring, and/or recordkeeping. The ICR for this rule includes the cost to the States of developing and implementing the General Conformity rule as well as the cost of the collection burden for private sponsors of activities that require Federal support or approval.

The information collection requirements in 40 CFR parts 51 and 93 have not been approved by OMB and are not effective until OMB approves them. These information collection requirements will be submitted as part of a revised ICR to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* These requirements will not be effective until OMB approves them and a technical amendment to that effect is published in the Federal Register.

D. Federalism Implications

A federalism assessment has not been conducted under Executive Order 12612. However, federalism effects are considered throughout this rule (e.g., discussions regarding State, Federal agency, and EPA roles in General Conformity).

List of Subjects

40 CFR Part 6

Environmental impact statements, Foreign relations, Grant programs—environmental protection, Waste treatment and disposal.

40 CFR Parts 51 and 93

Environmental protection, Administrative practice and procedure, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead,

Nitrogen oxides, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur dioxide, Volatile organic compounds.

Dated: November 15, 1993.

Carol M. Browner,

Administrator.

The Code of Federal Regulations, title 40, chapter I, is amended as follows:

PART 6—[AMENDED]

1. The authority citation for part 6 is revised to read as follows:

Authority: 42 U.S.C. 4321 *et seq.*, 7401–7671q; 40 CFR part 1500.

2. Section 6.303 is amended by removing and reserving paragraphs (c) through (g) and revising paragraphs (a) and (b) to read as follows:

§ 6.303 Air quality.

(a) The Clean Air Act, as amended in 1990, 42 U.S.C. 7476(c), requires Federal actions to conform to any State implementation plan approved or promulgated under section 110 of the Act. For EPA actions, the applicable conformity requirements specified in 40 CFR part 51, subpart W, 40 CFR part 93, subpart B, and the applicable State implementation plan must be met.

(b) In addition, with regard to wastewater treatment works subject to review under Subpart E of this part, the responsible official shall consider the air pollution control requirements specified in section 316(b) of the Clean Air Act, 42 U.S.C. 7616, and Agency implementation procedures.

(c)–(g) [Reserved]

PART 51—[AMENDED]

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

Authority: 42 U.S.C. 7401–7671q.

2. Part 51 is amended by adding a new subpart W to read as follows:

Subpart W—Determining Conformity of General Federal Actions to State or Federal Implementation Plans

Sec.

Subpart W—Determining Conformity of General Federal Actions to State or Federal Implementation Plans

§ 51.850 Prohibition.

(a) No department, agency or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve any activity which does not conform to an applicable implementation plan.

(b) A Federal agency must make a determination that a Federal action conforms to the applicable implementation plan in accordance with the requirements of this subpart before the action is taken.

(c) Paragraph (b) of this section does not include Federal actions where either:

(1) A National Environmental Policy Act (NEPA) analysis was completed as evidenced by a final environmental assessment (EA), environmental impact statement (EIS), or finding of no significant impact (FONSI) that was prepared prior to January 31, 1994;

(2) (i) Prior to January 31, 1994, an EA was commenced or a contract was awarded to develop the specific environmental analysis;

(ii) Sufficient environmental analysis is completed by March 15, 1994 so that the Federal agency may determine that the Federal action is in conformity with the specific requirements and the purposes of the applicable SIP pursuant to the agency's affirmative obligation under section 176(c) of the Clean Air Act (Act); and

(iii) A written determination of conformity under section 176(c) of the Act has been made by the Federal agency responsible for the Federal action by March 15, 1994.

(d) Notwithstanding any provision of this subpart, a determination that an action is in conformance with the applicable implementation plan does not exempt the action from any other requirements of the applicable implementation plan, the NEPA, or the Act.

§ 51.851 State implementation plan (SIP) revision.

(a) Each State must 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 subpart. The State must submit the conformity provisions within 12 months after November 30, 1993 or within 12 months of an area's designation to nonattainment, whichever date is later.

(b) The Federal conformity rules under this subpart and 40 CFR part 93, in addition to any existing applicable State requirements, establish the conformity criteria and procedures necessary to meet the Act requirements until such time as the required conformity SIP revision is approved by EPA. A State's conformity provisions must contain criteria and procedures that are no less stringent than the requirements described in this subpart. A State may establish more stringent conformity criteria and procedures only if they apply equally to non-Federal as well as Federal entities. Following EPA approval of the State conformity provisions (or a portion thereof) in a revision to the applicable SIP, the approved (or approved portion of the) State criteria and procedures would govern conformity determinations and the Federal conformity regulations contained in 40 CFR part 93 would apply only for the portion, if any, of the State's conformity provisions that is not approved by EPA. In addition, any previously applicable SIP requirements relating to conformity remain enforceable until the State revises its SIP to specifically remove them from the SIP and that revision is approved by EPA.

§ 51.852 Definitions.

Terms used but not defined in this part shall have the meaning given them by the Act and EPA's regulations, (40 CFR chapter I), in that order of priority.

Affected Federal land manager means the Federal agency or the Federal official charged with direct responsibility for management of an area designated as Class I under the Act (42 U.S.C. 7472) that is located within 100 km of the proposed Federal action.

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 of the Act, or promulgated under section 110(c) of the Act (Federal implementation plan), or promulgated or approved pursuant to regulations promulgated under section 301(d) of the Act 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 which uses an air quality dispersion model to determine the effects of emissions on air quality.

Cause or contribute to a new violation means a Federal action that:

(1) Causes a new violation of a national ambient air quality standard

(NAAQS) at a location in a nonattainment or maintenance area which would otherwise not be in violation of the standard during the future period in question if the Federal action were not taken; or

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

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

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

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

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

Emissions budgets are those portions of the applicable SIP's projected emissions inventories that describe the levels of emissions (mobile, stationary, area, etc.) that provide for meeting reasonable further progress milestones, attainment, and/or maintenance for any criteria pollutant or its precursors.

Emissions offsets, for purposes of § 51.858, are emissions reductions which are quantifiable, consistent with the applicable SIP attainment and reasonable further progress demonstrations, surplus to 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.

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

EPA means the Environmental Protection Agency.

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

Federal agency means, for purposes of this subpart, a Federal department, agency, or instrumentality of the Federal government.

Increase the frequency or severity of any existing violation of any standard in any area means to cause a nonattainment area to exceed a standard more often or to cause a violation at a greater concentration than previously existed and/or would otherwise exist during the future period in question, if the project were not implemented.

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

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

(2) The Federal agency can practicably control and will maintain control over due to a continuing program responsibility of the Federal agency.

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

Maintenance area means an area with a maintenance plan approved under section 175A of the Act.

Maintenance plan means a revision to the applicable SIP, meeting the requirements of section 175A of the Act.

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

Milestone has the meaning given in sections 182(g)(1) and 189(c)(1) of the Act.

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

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

Nonattainment Area (NAA) means an area designated as nonattainment under section 107 of the Act and described in 40 CFR part 81.

Precursors of a criteria pollutant are:

(1) For ozone, nitrogen oxides (NO_X), unless an area is exempted from NO_X requirements under section 182(f) of the Act, and volatile organic compounds (VOC); and

(2) For PM–10, those pollutants described in the PM–10 nonattainment area applicable SIP as significant contributors to the PM–10 levels.

Reasonably foreseeable emissions are projected future indirect emissions tha 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.

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

Regionally significant action means 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 for that pollutant.

Total of direct and indirect emissions means the sum of direct and indirect emissions increases and decreases caused by the Federal action; i.e., the "net" emissions considering all direct and indirect emissions. The portion of emissions which are exempt or presumed to conform under § 51.853, (c), (d), (e), or (f) are not included in the "total of direct and indirect emissions The "total of direct and indirect emissions" includes emissions of criteria pollutants and emissions of precursors of criteria pollutants.

§ 51.853 Applicability.

(a) Conformity determinations for Federal actions related to transportation plans, programs, and projects developed, funded, or approved under title 23 U.S.C. or the Federal Transit Act (49 U.S.C. 1601 *et seq.*) must meet the procedures and criteria of 40 CFR part 51, subpart T, in lieu of the procedures set forth in this subpart.

(b) For Federal actions not covered by paragraph (a) of this section, a conformity determination is required for each pollutant where the total of direct and indirect emissions in a nonattainment or maintenance area caused by a Federal action would equal or exceed any of the rates in paragraphs (b)(1) or (2) of this section.

(1) For purposes of paragraph (b) of this section, the following rates apply in nonattainment areas (NAAs):

	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
Marginal and moderate 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
Pb: All NAA's	25

(2) For purposes of paragraph (b) of this section, the following rates apply in maintenance areas:

	Tons/ year
Ozone (NO_x), SO_2 or NO_2: All maintenance areas	100
Ozone (VOC's):	
Maintenance areas inside an ozone transport region	50
Maintenance areas outside an ozone transport region	100
Carbon monoxide: All maintenance areas	100
PM–10: All maintenance areas	100
Pb: All maintenance areas	25

(c) The requirements of this subpart shall not apply to:

(1) Actions where the total of direct and indirect emissions are below the emissions levels specified in paragraph (b) of this section.

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

(i) Judicial and legislative proceedings.

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

(iii) Rulemaking and policy development and issuance.

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

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

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

(vii) The routine, recurring transportation of materiel and personnel.

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

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

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

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

(xii) Planning, studies, and provision of technical assistance.

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

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

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

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

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

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

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

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

(xxi) Actions by the Department of the Treasury to effect fiscal policy and to exercise the borrowing authority of the United States.

(3) The following actions where the emissions are not reasonably foreseeable:

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

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

(4) Actions which implement a decision to conduct or carry out a conforming program such as prescribed burning actions which are consistent

with a conforming land management plan.

(d) Notwithstanding the other requirements of this subpart, a conformity determination is not required for the following Federal actions (or portion thereof):

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

(2) Actions in response to emergencies or natural disasters such as hurricanes, earthquakes, etc., which are commenced on the order of hours or days after the emergency or disaster and, if applicable, which meet the requirements of paragraph (e) of this section.

(3) Research, investigations, studies, demonstrations, or training (other than those exempted under paragraph (c)(2) of this section), where no environmental detriment is incurred and/or, the particular action furthers air quality research, as determined by the State agency primarily responsible for the applicable SIP.

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

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

(e) Federal actions which are part of a continuing response to an emergency or disaster under paragraph (d)(2) of this section and which are to be taken more than 6 months after the commencement of the response to the emergency or disaster under paragraph (d)(2) of this section are exempt from the requirements of this subpart only if:

(1) The Federal agency taking the actions makes a written determination that, for a specified period not to exceed an additional 6 months, it is impractical to prepare the conformity analyses which would otherwise be required and the actions cannot be delayed due to overriding concerns for public health and welfare, national security interests and foreign policy commitments; or

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

(f) Notwithstanding other requirements of this subpart, actions specified by individual Federal agencies that have met the criteria set forth in either paragraph (g)(1) or (g)(2) 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.

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

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

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

(ii) Interfere with provisions in the applicable SIP for maintenance of any standard;

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

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

(A) A demonstration of reasonable further progress;

(B) A demonstration of attainment; or

(C) A maintenance plan; or

(2) The Federal agency must provide documentation that the total of direct and indirect emissions from such future actions would be below the emission rates for a conformity determination that are established in paragraph (b) of this section, based, for example, on similar actions taken over recent years.

(h) In addition to meeting the criteria for establishing exemptions set forth in paragraphs (g)(1) or (g)(2) 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;

(2) The Federal agency must notify the appropriate EPA Regional Office(s), State and local 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;

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

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

(i) Notwithstanding the other requirements of this subpart, when the total of direct and indirect emissions of any pollutant from a Federal action does not equal or exceed the rates specified in paragraph (b) of this section, but represents 10 percent or more of a nonattainment or maintenance area's total emissions of that pollutant, the action is defined as a regionally significant action and the requirements of § 51.850 and §§ 51.855 through 51.860 shall apply for the Federal action.

(j) Where an action otherwise presumed to conform under paragraph (f) of this section is a regionally significant action or does not in fact meet one of the criteria in paragraph (g)(1) of this section, that action shall not be presumed to conform and the requirements of § 51.850 and §§ 51.855 through 51.860 shall apply for the Federal action.

(k) The provisions of this subpart shall apply in all nonattainment and maintenance areas.

§ 51.854 Conformity analysis.

Any Federal 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 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.

§ 51.855 Reporting requirements.

(a) A Federal agency making a conformity determination under § 51.858 must provide to the appropriate EPA Regional Office(s), State and local air quality agencies 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.

(b) A Federal agency must notify the appropriate EPA Regional Office(s), State and local air quality agencies 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 § 51.858.

§ 51.856 Public participation.

(a) Upon request by any person regarding a specific Federal action, a Federal agency must make available for review its draft conformity determination under § 51.858 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 § 51.858 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 NEPA process.

(c) A Federal agency must document its response to all the comments received on its draft conformity determination under § 51.858 and make the comments and responses available, 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 § 51.858 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.

§ 51.857 Frequency of conformity determinations.

(a) The conformity status of a Federal action automatically lapses 5 years from the date a final conformity determination is reported under § 51.855, unless the Federal action has been completed or a continuous program has been commenced to implement that Federal action within a reasonable time.

(b) Ongoing Federal activities at a given site showing continuous progress are not new actions and do not require periodic redeterminations so long as such activities are within the scope of the final conformity determination reported under § 51.855.

(c) If, after the conformity determination is made, the Federal action is changed so that there is an increase in the total of direct and indirect emissions above the levels in § 51.853(b), a new conformity determination is required.

§ 51.858 Criteria for determining conformity of general Federal actions.

(a) An action required under § 51.853 to have a conformity determination for a specific pollutant, will be determined to conform to the applicable SIP if, for each pollutant that exceeds the rates in § 51.853(b), or otherwise requires a conformity determination due to the total of direct and indirect emissions from the action, the action meets the requirements of paragraph (c) of this section, and meets any of the following requirements:

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

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

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

(i) Specified in paragraph (b) of this section, based on areawide air quality modeling analysis and local air quality modeling analysis; or

(ii) Meet the requirements of paragraph (a)(5) of this section and, for local air quality modeling analysis, the requirement of paragraph (b) of this section;

(4) For CO or PM–10—

(i) Where the State agency primarily responsible for the applicable SIP determines that an areawide air quality modeling analysis is not needed, the total of direct and indirect emissions from the action meet the requirements specified in paragraph (b) of this section, based on local air quality modeling analysis; or

(ii) Where the State agency primarily responsible for the applicable SIP determines that an areawide air quality modeling analysis is appropriate and that a local air quality modeling analysis is not needed, the total of direct and indirect emissions from the action meet the requirements specified in paragraph (b) of this section, based on areawide modeling, or meet the requirements of paragraph (a)(5) of this section; or

(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 an area's attainment or maintenance demonstration after 1990 and the State makes a determination as provided in paragraph (a)(5)(i)(A) of this section or where the State makes a commitment as provided in paragraph (a)(5)(i)(B) of this section:

(A) The total of direct and indirect emissions from the action (or portion thereof) is determined and documented by the State agency primarily responsible for the applicable SIP to result in a level of emissions which, together with all other emissions in the nonattainment (or maintenance) area, would not exceed the emissions budgets specified in the applicable SIP;

(B) The total of direct and indirect emissions from the action (or portion thereof) is determined by the State agency responsible for the applicable SIP to result in a level of emissions which, together with all other emissions in the nonattainment (or maintenance) area, would exceed an emissions budget specified in the applicable SIP and the State Governor or the Governor's designee for SIP actions makes a written commitment to EPA which includes the following:

(*1*) A specific schedule for adoption and submittal of a revision to the SIP which would achieve the needed emission reductions prior to the time emissions from the Federal action would occur;

(*2*) Identification of specific measures for incorporation into the SIP which would result in a level of emissions which, together with all other emissions in the nonattainment or maintenance area, would not exceed any emissions budget specified in the applicable SIP;

(*3*) A demonstration that all existing applicable SIP requirements are being implemented in the area for the pollutants affected by the Federal action, and that local authority to implement additional requirements has been fully pursued;

(*4*) A determination that the responsible Federal agencies have required all reasonable mitigation measures associated with their action; and

(*5*) Written documentation including all air quality analyses supporting the conformity determination;

(C) Where a Federal agency made a conformity determination based on a State commitment under paragraph (a)(5)(i)(B) of this section, such a State commitment is automatically deemed a call for a SIP 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 commits to revise the applicable SIP;

(ii) The action (or portion thereof), as determined by the MPO, is specifically included in a current transportation plan and transportation improvement program which have been found to conform to the applicable SIP under 40 CFR part 51, subpart T, or 40 CFR part 93, subpart A;

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

(iv) Where EPA has not approved a revision to the relevant SIP attainment or maintenance demonstration since 1990, the total of direct and indirect emissions from the action for the future years (described in § 51.859(d)) do not increase emissions with respect to the baseline emissions:

(A) The baseline emissions reflect the historical activity levels that occurred in the geographic area affected by the proposed Federal action during:

(*1*) Calendar year 1990;

(*2*) The calendar year that is the basis for the classification (or, where the classification is based on multiple years, the most representative year), if a classification is promulgated in 40 CFR part 81; or

(*3*) The year of the baseline inventory in the PM–10 applicable SIP;

(B) The baseline emissions are the total of direct and indirect emissions calculated for the future years (described in § 51.859(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

(v) Where the action involves regional water and/or wastewater projects, such projects are sized to meet only the needs of population projections that are in the applicable SIP.

(b) The areawide and/or local air quality modeling analyses must:

(1) Meet the requirements in § 51.859; and

(2) Show that the action does not:

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

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

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

(d) Any analyses required under this section must be completed, and any mitigation requirements necessary for a finding of conformity must be identified before the determination of conformity is made.

§ 51.859 Procedures for conformity determinations of general Federal actions.

(a) The analyses required under this subpart must be based on the latest planning assumptions.

(1) All planning assumptions must be derived from the estimates of population, employment, travel, and congestion most recently approved by the MPO, or other agency authorized to make such estimates, where available.

(2) Any revisions to these estimates used as part of the conformity determination, including projected shifts in geographic location or level of population, employment, travel, and congestion, must be approved by the MPO or other agency authorized to make such estimates for the urban area.

(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 and written approval of the EPA Regional Administrator is obtained for any modification or substitution, they may be modified or another technique substituted on a case-by-case basis or, where appropriate, on a generic basis for a specific Federal agency program.

(1) For motor vehicle emissions, the most current version of the motor vehicle emissions model specified by EPA and available for use in the preparation or revision of SIPs in that State must be used for the conformity analysis as specified in paragraphs (b)(1)(i) and (ii) of this section:

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

(ii) A grace period of three months shall apply during which the motor vehicle emissions model previously specified by EPA as the most current version may be used. Conformity analyses for which the analysis was begun during the grace period or no more than 3 years before the **Federal Register** notice of availability of the latest emission model may continue to use the previous version of the model specified by 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)"[1] must be used for the conformity analysis unless more accurate emission data are available, such as actual stack test data from stationary sources which are part of the conformity analysis.

(c) The air quality modeling analyses required under this 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 (Revised)" (1986), including supplements (EPA publication no. 450/2–78–027R)[2], unless:

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

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

(d) The analyses required under this subpart, except § 51.858(a)(1), 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 Act mandated attainment year or, if applicable, the farthest year for which emissions are projected in the maintenance plan;

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

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

[1] Copies may be obtained from the Technical Support Division of OAQPS, EPA, MD–14, Research Triangle Park, NC 27711.

[2] See footnote 1 at § 51.859(b)(2).

§ 51.860 Mitigation of air quality impacts.

(a) Any measures that are intended to mitigate air quality impacts must be identified and the process for implementation and enforcement of such measures must be described, including an implementation schedule containing explicit timelines for implementation.

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

(c) Persons or agencies voluntarily committing to mitigation measures to facilitate positive conformity determinations must comply with the obligations of such commitments.

(d) In instances where the Federal agency is licensing, permitting or otherwise approving the action of another governmental or private entity, approval by the Federal agency must be conditioned on the other entity meeting the mitigation measures set forth in the conformity determination.

(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 § 51.856 and the public participation requirements of § 51.857.

(f) The implementation plan revision required in § 51.851 shall provide that written commitments to mitigation measures must be obtained prior to a positive conformity determination and that such commitments must be fulfilled.

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

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

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

Authority: 42 U.S.C. 7401–7671p.

2. Part 93 is amended by adding a new subpart B to read as follows:

Subpart B—Determining Conformity of General Federal Actions to State or Federal Implementation Plans

Sec.

Subpart B—Determining Conformity of General Federal Actions to State or Federal Implementation Plans

§ 93.150 Prohibition.

(a) No department, agency or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve any activity which does not conform to an applicable implementation plan.

(b) A Federal agency must make a determination that a Federal action conforms to the applicable implementation plan in accordance with the requirements of this subpart before the action is taken.

(c) Paragraph (b) of this section does not include Federal actions where:

(1) A National Environmental Policy Act (NEPA) analysis was completed as evidenced by a final environmental assessment (EA), environmental impact statement (EIS), or finding of no significant impact (FONSI) that was prepared prior to January 31, 1994; or

(2)(i) Prior to December 30, 1993, an environmental analysis was commenced or a contract was awarded to develop the specific environmental analysis;

(ii) Sufficient environmental analysis is completed by March 15, 1994 so that the Federal agency may determine that the Federal action is in conformity with the specific requirements and the purposes of the applicable SIP pursuant to the agency's affirmative obligation under section 176(c) of the Clean Air Act (Act); and

(iii) A written determination of conformity under section 176(c) of the Act has been made by the Federal agency responsible for the Federal action by March 15, 1994.

(d) Notwithstanding any provision of this subpart, a determination that an action is in conformance with the applicable implementation plan does not exempt the action from any other requirements of the applicable implementation plan, the National Environmental Policy Act (NEPA), or the Clean Air Act (Act).

§ 93.151 State implementation plan (SIP) revision.

The Federal conformity rules under this subpart, in addition to any existing applicable State requirements, establish the conformity criteria and procedures necessary to meet the Act requirements until such time as the required conformity SIP revision is approved by EPA. A State's conformity provisions must contain criteria and procedures that are no less stringent than the requirements described in this subpart. A State may establish more stringent conformity criteria and procedures only if they apply equally to nonfederal as well as Federal entities. Following EPA approval of the State conformity provisions (or a portion thereof) in a revision to the applicable SIP, the approved (or approved portion of the) State criteria and procedures would govern conformity determinations and the Federal conformity regulations contained in this part would apply only for the portion, if any, of the State's conformity provisions that is not approved by EPA. In addition, any previously applicable SIP requirements relating to conformity remain enforceable until the State revises its SIP to specifically remove them from the SIP and that revision is approved by EPA.

§ 93.152 Definitions.

Terms used but not defined in this part shall have the meaning given them by the Act and EPA's regulations (40 CFR chapter I), in that order of priority.

Affected Federal land manager means the Federal agency or the Federal official charged with direct responsibility for management of an area designated as Class I under the Act (42 U.S.C. 7472) that is located within 100 km of the proposed Federal action.

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 of the Act, or promulgated under section 110(c) of the Act (Federal implementation plan), or promulgated or approved pursuant to regulations promulgated under section 301(d) of the Act 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 which uses an air quality dispersion model to determine the effects of emissions on air quality.

Cause or contribute to a new violation means a Federal action that:

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

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

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

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

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

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

Emissions budgets are those portions of the applicable SIP's projected emission inventories that describe the levels of emissions (mobile, stationary, area, etc.) that provide for meeting reasonable further progress milestones, attainment, and/or maintenance for any criteria pollutant or its precursors.

Emissions offsets, for purposes of § 93.158, are emissions reductions which are quantifiable, consistent with the applicable SIP attainment and reasonable further progress demonstrations, surplus to 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.

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

EPA means the Environmental Protection Agency.

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

Federal agency means, for purposes of this subpart, a Federal department, agency, or instrumentality of the Federal government.

Increase the frequency or severity of any existing violation of any standard in any area means to cause a nonattainment area to exceed a standard more often or to cause a violation at a greater concentration than previously existed and/or would otherwise exist during the future period in question, if the project were not implemented.

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

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

(2) The Federal agency can practicably control and will maintain control over due to a continuing program responsibility of the Federal agency.

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

Maintenance area means an area with a maintenance plan approved under section 175A of the Act.

Maintenance plan means a revision the applicable SIP, meeting the requirements of section 175A of the Act.

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

Milestone has the meaning given in sections 182(g)(1) and 189(c)(1) of the Act.

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

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

Nonattainment area means an area designated as nonattainment under section 107 of the Act and described in 40 CFR part 81.

Precursors of a criteria pollutant are:

(1) For ozone, nitrogen oxides (NOx), unless an area is exempted from NOx requirements under section 182(f) of the Act, and volatile organic compounds (VOC); and

(2) For PM–10, those pollutants described in the PM–10 nonattainment area applicable SIP as significant contributors to the PM–10 levels.

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

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

Regionally significant action means 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 emission inventory for that pollutant.

Total of direct and indirect emissions means the sum of direct and indirect emissions increases and decreases caused by the Federal action; i.e., the "net" emissions considering all direct and indirect emissions. The portion of emissions which are exempt or presumed to conform under § 93.153 (c),

(d), (e), or (f) are not included in the "total of direct and indirect emissions." The "total of direct and indirect emissions" includes emissions of criteria pollutants and emissions of precursors of criteria pollutants.

§ 93.153 Applicability.

(a) Conformity determinations for Federal actions related to transportation plans, programs, and projects developed, funded, or approved under title 23 U.S.C. or the Federal Transit Act (49 U.S.C. 1601 *et seq.*) must meet the procedures and criteria of 40 CFR part 51, subpart T, in lieu of the procedures set forth in this subpart.

(b) For Federal actions not covered by paragraph (a) of this section, a conformity determination is required for each pollutant where the total of direct and indirect emissions in a nonattainment or maintenance area caused by a Federal action would equal or exceed any of the rates in paragraphs (b)(1) or (2) of this section.

(1) For purposes of paragraph (b) of this section, the following rates apply in nonattainment areas (NAA's):

	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
Marginal and moderate 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
Pb:	
All NAA's	25

(2) For purposes of paragraph (b) of this section, the following rates apply in maintenance areas:

	Tons/year
Ozone (NO_X), SO_2 or NO_2:	
All Maintenance Areas	100
Ozone (VOC's):	
Maintenance areas inside an ozone transport region	50
Maintenance areas outside an ozone transport region	100
Carbon monoxide:	
All Maintenance Areas	100
PM–10:	
All Maintenance Areas	100
Pb:	
All Maintenance Areas	25

(c) The requirements of this subpart shall not apply to the following Federal actions:

(1) Actions where the total of direct and indirect emissions are below the emissions levels specified in paragraph (b) of this section.

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

(i) Judicial and legislative proceedings.

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

(iii) Rulemaking and policy development and issuance.

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

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

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

(vii) The routine, recurring transportation of materiel and personnel.

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

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

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

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

(xii) Planning, studies, and provision of technical assistance.

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

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

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

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

(xvii) Actions by the Board of Governors of the Federal Reserve System or any Federal Reserve Bank necessary to effect monetary or exchange rate policy.

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

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

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

(xxi) Actions by the Department of the Treasury to effect fiscal policy and to exercise the borrowing authority of the United States.

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

(i) Initial Outer Continental Shelf lease sales which are made on a broad scale and are followed by exploration

and development plans on a project level.

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

(4) Actions which implement a decision to conduct or carry out a conforming program such as prescribed burning actions which are consistent with a conforming land management plan.

(d) Notwithstanding the other requirements of this subpart, a conformity determination is not required for the following Federal actions (or portion thereof):

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

(2) Actions in response to emergencies or natural disasters such as hurricanes, earthquakes, etc., which are commenced on the order of hours or days after the emergency or disaster and, if applicable, which meet the requirements of paragraph (e) of this section.

(3) Research, investigations, studies, demonstrations, or training (other than those exempted under paragraph (c)(2) of this section), where no environmental detriment is incurred and/or, the particular action furthers air quality research, as determined by the State agency primarily responsible for the applicable SIP;

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

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

(e) Federal actions which are part of a continuing response to an emergency or disaster under paragraph (d)(2) of this section and which are to be taken more than 6 months after the commencement of the response to the emergency or disaster under paragraph (d)(2) of this section are exempt from the requirements of this subpart only if:

(1) The Federal agency taking the actions makes a written determination that, for a specified period not to exceed an additional 6 months, it is impractical to prepare the conformity analyses which would otherwise be required and the actions cannot be delayed due to overriding concerns for public health and welfare, national security interests and foreign policy commitments; or

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

(f) Notwithstanding other requirements of this subpart, actions specified by individual Federal agencies that have met the criteria set forth in either paragraph (g)(1) or (g)(2) 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.

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

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

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

(ii) Interfere with provisions in the applicable SIP for maintenance of any standard;

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

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

(A) A demonstration of reasonable further progress;

(B) A demonstration of attainment; or

(C) A maintenance plan; or

(2) The Federal agency must provide documentation that the total of direct and indirect emissions from such future actions would be below the emission rates for a conformity determination that are established in paragraph (b) of this section, based, for example, on similar actions taken over recent years.

(h) In addition to meeting the criteria for establishing exemptions set forth in paragraphs (g)(1) or (g)(2) 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;

(2) The Federal agency must notify the appropriate EPA Regional Office(s), State and local 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;

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

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

(i) Notwithstanding the other requirements of this subpart, when the total of direct and indirect emissions of any pollutant from a Federal action does not equal or exceed the rates specified in paragraph (b) of this section, but represents 10 percent or more of a nonattainment or maintenance area's total emissions of that pollutant, the action is defined as a regionally significant action and the requirements of § 93.150 and §§ 93.155 through 93.160 shall apply for the Federal action.

(j) Where an action otherwise presumed to conform under paragraph (f) of this section is a regionally significant action or does not in fact meet one of the criteria in paragraph (g)(1) of this section, that action shall not be presumed to conform and the requirements of § 93.150 and §§ 93.155 through 93.160 shall apply for the Federal action.

(k) The provisions of this subpart shall apply in all nonattainment and maintenance areas.

§ 93.154 Conformity analysis.

Any Federal 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 consider comments from any interested parties. Where multiple Federal agencies have jurisdiction for various aspects of a project, a Federal agency may choose t adopt the analysis of another Federal agency or develop its own analysis in order to make its conformity determination.

§ 93.155 Reporting requirements.

(a) A Federal agency making a conformity determination under § 93.158 must provide to the appropriate EPA Regional Office(s), State and local air quality agencies 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.

(b) A Federal agency must notify the appropriate EPA Regional Office(s), State and local air quality agencies 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 § 93.158.

§ 93.156 Public participation.

(a) Upon request by any person regarding a specific Federal action, a Federal agency must make available for review its draft conformity determination under § 93.158 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 § 93.158 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 NEPA process.

(c) A Federal agency must document its response to all the comments received on its draft conformity determination under § 93.158 and make the comments and responses available, 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 § 93.158 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.

§ 93.157 Frequency of conformity determinations.

(a) 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 has been commenced to implement that Federal action within a reasonable time.

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

(c) If, after the conformity determination is made, the Federal action is changed so that there is an increase in the total of direct and indirect emissions, above the levels in § 93.153(b), a new conformity determination is required.

§ 93.158 Criteria for determining conformity of general Federal actions.

(a) An action required under § 93.153 to have a conformity determination for a specific pollutant, will be determined to conform to the applicable SIP if, for each pollutant that exceeds the rates in § 93.153(b), or otherwise requires a conformity determination due to the total of direct and indirect emissions from the action, the action meets the requirements of paragraph (c) of this section, and meets any of the following requirements:

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

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

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

(i) Specified in paragraph (b) of this section, based on areawide air quality modeling analysis and local air quality modeling analysis; or

(ii) Meet the requirements of paragraph (a)(5) of this section and, for local air quality modeling analysis, the requirement of paragraph (b) of this section;

(4) For CO or PM–10—

(i) Where the State agency primarily responsible for the applicable SIP determines that an areawide air quality modeling analysis is not needed, the total of direct and indirect emissions from the action meet the requirements specified in paragraph (b) of this section, based on local air quality modeling analysis; or

(ii) Where the State agency primarily responsible for the applicable SIP determines that an areawide air quality modeling analysis is appropriate and that a local air quality modeling analysis is not needed, the total of direct and indirect emissions from the action meet the requirements specified in paragraph (b) of this section, based on areawide modeling, or meet the requirements of paragraph (a)(5) of this section; or

(5) For ozone or nitrogen dioxide, and for purposes of paragraphs (a)(3)(11) 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 an area's attainment or maintenance demonstration after 1990 and the State makes a determination as provided in paragraph (a)(5)(i)(A) of this section or where the State makes a commitment as provided in paragraph (a)(5)(i)(B) of this section:

(A) The total of direct and indirect emissions from the action (or portion thereof) is determined and documented by the State agency primarily responsible for the applicable SIP to result in a level of emissions which, together with all other emissions in the nonattainment (or maintenance) area, would not exceed the emissions budgets specified in the applicable SIP;

(B) The total of direct and indirect emissions from the action (or portion thereof) is determined by the State agency responsible for the applicable SIP to result in a level of emissions which, together with all other emissions in the nonattainment (or maintenance) area, would exceed an emissions budget specified in the applicable SIP and the State Governor or the Governor's designee for SIP actions makes a written commitment to EPA which includes the following:

(*1*) A specific schedule for adoption and submittal of a revision to the SIP which would achieve the needed emission reductions prior to the time emissions from the Federal action would occur;

(*2*) Identification of specific measures for incorporation into the SIP which would result in a level of emissions which, together with all other emissions in the nonattainment or maintenance area, would not exceed any emissions budget specified in the applicable SIP;

(*3*) A demonstration that all existing applicable SIP requirements are being implemented in the area for the pollutants affected by the Federal action, and that local authority to

implement additional requirements has been fully pursued;

(4) A determination that the responsible Federal agencies have required all reasonable mitigation measures associated with their action; and

(5) Written documentation including all air quality analyses supporting the conformity determination;

(C) Where a Federal agency made a conformity determination based on a State commitment under paragraph (a)(5)(i)(B) of this section, such a State commitment is automatically deemed a call for a SIP 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 commits to revise the applicable SIP;

(ii) The action (or portion thereof), as determined by the MPO, is specifically included in a current transportation plan and transportation improvement program which have been found to conform to the applicable SIP under 40 CFR part 51, subpart T, or 40 CFR part 93, subpart A;

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

(iv) Where EPA has not approved a revision to the relevant SIP attainment or maintenance demonstration since 1990, 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) The baseline emissions reflect the historical activity levels that occurred in the geographic area affected by the proposed Federal action during:

(1) Calendar year 1990;

(2) The calendar year that is the basis for the classification (or, where the classification is based on multiple years, the most representative year), if a classification is promulgated in 40 CFR part 81; or

(3) The year of the baseline inventory in the PM–10 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

(v) Where the action involves regional water and/or wastewater projects, such projects are sized to meet only the needs of population projections that are in the applicable SIP.

(b) The areawide and/or local air quality modeling analyses must:

(1) Meet the requirements in § 93.159; and

(2) Show that the action does not:

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

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

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

(d) Any analyses required under this section must be completed, and any mitigation requirements necessary for a finding of conformity must be identified before the determination of conformity is made.

§ 93.159 Procedures for conformity determinations of general Federal actions.

(a) The analyses required under this subpart must be based on the latest planning assumptions.

(1) All planning assumptions must be derived from the estimates of population, employment, travel, and congestion most recently approved by the MPO, or other agency authorized to make such estimates, where available.

(2) Any revisions to these estimates used as part of the conformity determination, including projected shifts in geographic location or level of population, employment, travel, and congestion, must be approved by the MPO or other agency authorized to make such estimates for the urban area.

(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 and written approval of the EPA Regional Administrator is obtained for any modification or substitution, they may be modified or another technique substituted on a case-by-case basis or, where appropriate, on a generic basis for a specific Federal agency program.

(1) For motor vehicle emissions, the most current version of the motor vehicle emissions model specified by EPA and available for use in the preparation or revision of SIPs in that State must be used for the conformity analysis as specified in paragraphs (b)(1)(i) and (ii) of this section:

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

(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. Conformity analyses for which the analysis was begun during the grace period or no more than 3 years before the **Federal Register** notice of availability of the latest emission model may continue to use the previous version of the model specified by 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)" [1] must be used for the conformity analysis unless more accurate emission data are available, such as actual stack test data from stationary sources which are part of the conformity analysis.

(c) The air quality modeling analyses required under this 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 (Revised)" (1986), including supplements (EPA publication no. 450/2–78–027R) [2], unless:

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

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

(d) The analyses required under this subpart, except § 93.158(a)(1), 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 Act mandated attainment year or, if applicable, the farthest year for which emissions are projected in the maintenance plan;

[1] Copies may be obtained from the Technical Support Division of OAQPS, EPA, MD–14, Research Triangle Park, NC 27711.

[2] See footnote 1 at § 93.159(b)(2).

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

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

§ 93.160 Mitigation of air quality impacts.

(a) Any measures that are intended to mitigate air quality impacts must be identified and the process for implementation and enforcement of such measures must be described, including an implementation schedule containing explicit timelines for implementation.

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

(c) Persons or agencies voluntarily committing to mitigation measures to facilitate positive conformity determinations must comply with the obligations of such commitments.

(d) In instances where the Federal agency is licensing, permitting or otherwise approving the action of another governmental or private entity, approval by the Federal agency must be conditioned on the other entity meeting the mitigation measures set forth in the conformity determination.

(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) The implementation plan revision required in § 93.151 shall provide that written commitments to mitigation measures must be obtained prior to a positive conformity determination and that such commitments must be fulfilled.

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

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