

## **National Capital Region Transportation Planning Board**

777 North Capitol Street, N.E., Suite 300, Washington, D.C. 20002-4290 (202) 962-3310 Fax: (202) 962-3202

### MEMORANDUM

November 1, 2006

To: Transportation Planning Board Technical Committee

From: Michael J. Clifford   
Systems Planning Applications Director

Subject: November 3, 2006 Technical Committee Meeting Item 7 Materials

This memo forwards (attached) two sets of materials for discussion under item 7 at the November 3, 2006 TPB Technical Committee meeting.

**A. Recent Court Decision on Conformity Rule** The first attachment provides information on a recent court decision affecting EPA's transportation conformity rule. This action, discussed at the October 24, 2006 meeting of the Travel Management Subcommittee, vacates a provision of the rule concerning use of conformity assessment criteria other than use of existing 1-hour ozone SIP emissions budgets. The court action does not affect the TPB's October 18, 2006 conformity determination for the 2006 CLRP and FY2007 – 12 TIP as the assessment utilized the region's 1-hour ozone emissions budgets.

**B. Notice of Intent to Commence Civil Action against US DOT and the TPB** The second attachment provides information on a notice of intent to commence civil action against US DOT and the TPB on grounds of a failure to conduct a quantitative PM2.5 hot-spot assessment for the InterCounty Connector in Maryland. Materials in this attachment include: the notice of intent to commence civil action; EPA's regulatory announcement concerning key elements of the hot-spot final rule; and excerpts from the Federal Register establishing the requirements in the final conformity rule.

Attachments (2)

**Mike Clifford**

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**From:** Rich Denbow [rdenbow@ampo.org]  
**Sent:** Wednesday, October 25, 2006 10:44 AM  
**To:** rdenbow@ampo.org; cbaber@baltometro.org; 'Chris Klaus'; rpatronsky@catsmpo.com; ssalameh@citynet.net; jwieczoreck@mail.dot.state.de.us; Imcauliffe@dot.state.ny.us; Mike Clifford; 'SUSAN HARDY'; 'Lubertino, Graciela'; 'Harold Brazil'; Mike.Conger@knoxtrans.org; Randy.Simon@ky.gov; 'Joan Weidner'; carol.lawrence@ewgateway.org; CHIEBERT@SEWRPC.org; mgarcia@dot.state.ny.us; 'Tracy Clymer'; proth@indygov.org; JJOERKE@MARC.ORG; jmchenry@hallcounty.org; mgarcia@dot.state.ny.us; Ron Kirby  
**Cc:** 'Debbie Singer'; 'DeLania Hardy'; Cecilia.Ho@dot.gov; ssiwek@aol.com; 'Rudy Kapichak'  
**Subject:** DC Circuit Conformity Decision

As you have probably heard, on October 20 the U.S. Court of Appeals for the DC Circuit decided a challenge brought by ED and others to EPA's transitional transportation conformity rules. Below are two items related to the decision:

- 1) an email memo from FHWA HQ to division and resource center staff regarding the decision.
- 2) A brief summary from Beveridge & Diamond, AMPO's attorneys for these matters.

I've also attached the Court's decision. If you have any questions or concerns please let me know.

Rich

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 Director of Technical Programs  
 Association of Metropolitan Planning Organizations  
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 Washington, DC 20036  
 (202) 296-7051 ext.5  
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 rdenbow@ampo.org

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From FHWA:

**From:** Marchese, April <FHWA>  
**Sent:** Monday, October 23, 2006 3:08 PM  
**To:** ##ALLHDA; ##ALLFLH; ##ALLRCM  
**Cc:** Burbank, Cindy <FHWA>; Solury, Tony <FHWA>; Ho, Cecilia <FHWA>; Biondi, Emily <FHWA>; Jensen, Gary <FHWA>; HEPODs; HEPRCTeams; DFSALLFED; FieldAirQuality; Aikens, Harold <FHWA>; Liff, Diane <FHWA>; MacPhee, Lisa <FHWA>; Gaber, Mark <FHWA>; Moses, Ronald <FHWA>; Ortez, David <FHWA>; Thomason, James <FHWA>; Vaughn-Fair, Sharon <FHWA>  
**Subject:** INFORMATION: Recent Court Decision on Conformity Rules

**To the Attention of Division and Resource Center Air Quality and Planning Staff**

The purpose of this E-mail is to alert Division Offices and the Resource Center to a recent decision by the U.S. Court of Appeals vacating a provision of the Transportation Conformity Rule (40 CFR 93.109 (e)(2)(v)), and to request information from any Division that has utilized this provision.

On October 20, 2006, the DC Circuit filed an opinion (see attached) vacating a provision of the



Transportation Conformity Rule. Although we have not yet had the opportunity to fully understand the potential ramifications of this decision, it is important that States and MPOs be made aware of it.

The July 1, 2004 revisions to the Rule to address the 8-hour ozone standard required that areas continue to utilize their 1-hour motor vehicle emissions budgets until they had 8-hour budgets in place.

However, 40 CFR 93.109(e)(2)(v) was a provision that allowed areas to use the interim emissions tests instead of the 1-hour budgets where the interim tests could be shown to be more appropriate for ensuring that the plan, TIP, or project would not create new violations, worsen existing violations, or delay timely attainment of the 8-hour standard, as determined through interagency consultation. This is the provision that Court vacated.

All other provisions regarding the use of the interim emissions tests remain unaffected by the court decision.

While we work with EPA and the Chief Counsel's office to assess the implications of this opinion, please do not make any conformity determinations based on 40 CFR 93.109(e)(2)(v) and contact our Office if any pending conformity determinations in your State rely on this provision.

In addition, please contact our Office if any prior conformity determination in your State has relied on this provision.

For further information, or to reply regarding the use of this provision in your State, please contact Cecilia Ho at 202-366-9862 or [cecilia.ho@dot.gov](mailto:cecilia.ho@dot.gov) <<mailto:cecilia.ho@dot.gov>>, Gary Jensen at 202-366-2048 or [gary.jensen@dot.gov](mailto:gary.jensen@dot.gov) <<mailto:gary.jensen@dot.gov>>, or Emily Biondi at 202-366-9482 or [emily.biondi@dot.gov](mailto:emily.biondi@dot.gov) <<mailto:emily.biondi@dot.gov>>.

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From AMPO (Beveridge & Diamond)

**From:** David M. Williamson [<mailto:DWilliamson@bdlaw.com>]  
**Sent:** Tuesday, October 24, 2006 11:50 AM  
**To:** Debbie Singer; [dhardy@ampo.org](mailto:dhardy@ampo.org)  
**Cc:** Fred R. Wagner; David M. Friedland; Gus B. Bauman  
**Subject:** AMPO - DC Circuit Conformity Decision

I thought the following brief summary of the recent conformity ruling from the D.C. Circuit court would be useful to broadcast to your members. Feel free to use as you see fit, and give me a call if you have any questions. The ruling is fairly nuanced and complicated, and the consequences are difficult to identify, so I would welcome comments and thoughts of your members.

**On October 20, 2006, the D.C. Circuit court decided a challenge brought by Environmental Defense ("ED") and others to EPA's transitional transportation conformity rules, which had been promulgated in 2004. *Environmental Defense v. EPA*, No. 04-1291 (D.C. Cir. 2006); Transportation Conformity Rule Amendments, 69 Fed. Reg. 40,004 (July 1, 2004). The ruling was a mixed result consisting of three parts, one of which could affect MPOs that are in the transition between SIPs under the old .12 ppm 1-hour ozone NAAQS standard and the new .08 ppm 8-hour standard.**

**First, the court rejected ED's challenge to EPA's "milestone" rules at 40 C.F.R. 93.118(b), (d) and (e)(6). These rules originated in prior EPA rulemakings in 1993 and 1997, and were the subject of litigation in Atlanta in the early 2000s. The court found that the rules had not changed substantially in the 2004**

rulemaking, and that ED should have challenged them in 1993 or 1997 if at all, but that it was too late now to re-open the rulemaking process.

Second, the court invalidated EPA's 2004 "interim budget test" option at 40 C.F.R. 93.109(e)(2)(v). This test was designed "to provide MPOs with an interim test to take the place of current SIPs (based on one-hour NAAQS) until the new SIPs (based on eight-hour NAAQS) are approved." Although the court recognized (as EPA argued) that the interim test could actually be more stringent than a SIP MVEB test and would be a "sound means" to transition from the 1-hour to 8-hour standard, the court found that the Clean Air Act simply did not allow for any test other than the MVEB budget test. The court took pains to point out that "current SIPs [including outdated 1-hour SIPs] are legally sufficient until they are replaced by new SIPs."

Third, on a related issue, the court rejected a challenge to EPA's build/no build tests at 40 C.F.R. 93.119(b) (2), (d) and (e). The challenge was limited to application of the build/no build test to marginal and below ozone non-attainment areas, as well as coarse (PM10) and fine (PM2.5) particulate matter non-attainment areas, *without* MVEBs. The challengers argued that all transportation plans must show reductions in emissions in order to support the Clean Air Act's goals of reducing violations and expeditious attainment of NAAQS. The court disagreed, finding that the SIP as a whole must reduce emissions, but that "conformity to a SIP can be demonstrated by using the build/no build test, even if individual transportation plans do not actively reduce emissions," as long as the transportation plan "avoids increases" in emissions.

Although the court's rulings are nuanced and somewhat difficult to reconcile on an intellectual level (and in some cases, the court seems to have misunderstood the planning process, for example, incorrectly noting that "MPOs must revise their SIPs"), the practical consequences are clear. The ruling invalidates the interim build/no build test for areas that have older MVEBs in pre-existing 1-hour SIPs, thus possibly creating consequences for areas that need to establish new, workable MVEBs. In areas without MVEBs or existing SIPs (for example, in newly-created non-attainment areas), consistent with existing practice, the build/no build test can still be used. Most importantly, the ruling clarifies that NAAQS attainment is a function of the overall SIP, and transportation plans will not have to "actively reduce" mobile source emissions as long as emissions hold steady or fit within mobile source budgets. EPA will likely issue interpretative guidance in the next few months on this decision.

For more information, contact Max Williamson at (202) 789-6084 or [dwilliamson@bdlaw.com](mailto:dwilliamson@bdlaw.com).

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**NOTICE OF INTENT TO COMMENCE CIVIL ACTION  
TO REMEDY VIOLATION OF THE CLEAN AIR ACT**

Pursuant to 42 U.S.C. Section 7604(b)(1), Environmental Defense and the Sierra Club, on behalf of themselves and their members, hereby give notice of their intent to commence a civil action against Mary Peters, in her capacity as the Secretary of Transportation, for approving the Inter-county Connector Project ("ICC Project"), a major highway project linking I-95 in Prince Georges County, Maryland, with I-370 and I-270 in Montgomery County, Maryland, on May 29, 2006, see 71 Fed. Reg. 36,164 (June 23, 2006), and against the Secretary of Transportation and the National Capital Region Transportation Planning Board, acting as the designated metropolitan planning organization pursuant to 23 U.S.C. § 134(d), for approving the Transportation Improvement Program that programmed funds for the ICC Project in violation of the Clean Air Act (CAA). In the event such violations have not been remedied within 60 days following receipt of this Notice, the parties intend to commence a civil action to remedy such violations of the Act. As further specified below, the Secretary has approved the ICC Project, and the Transportation Improvement Program allocating federal funds for the ICC Project in violation of requirements of the Act and implementing regulations prohibiting approval by the Secretary of Transportation of any transportation project that will cause or contribute to violations of the National Ambient Air Quality standards.

Pursuant to the Clean Air Act, 42 U.S.C. §7407(d)(1), the Administrator of the U.S. Environmental Protection Agency has designated Prince Georges and Montgomery Counties, Maryland, the area where the ICC Project is located, as part of the Washington, DC-MD-VA nonattainment area for the pollutant "PM2.5" (particulate matter with an aerodynamic diameter equal to or less than 2.5 microns in size). 40 C.F.R. § 81.321. See 70 Fed. Reg. 979 (January 5, 2005). Because the area is designated nonattainment for PM2.5, the Clean Air Act requires that any transportation project and transportation improvement program approved or funded by the Secretary of Transportation in the area must first be shown to satisfy the conformity requirements of the Act. 42 U.S.C. §7506(c)(5).

The statutory provisions relevant to this Notice prohibit the Department of Transportation, as a Federal agency, from "approv[ing], accept[ing] or fund[ing] any transportation plan, program or project unless such plan, program or project has been found to conform to any applicable implementation plan in effect under this chapter." 42 U.S.C. §7506(c)(2). "Conformity to an implementation plan means—(A) conformity to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards; and (B) that such activities will not—(i) cause or contribute to any new violation of any standard in any area; (ii) increase the frequency or severity of any existing violation of any standard in any area; or (iii) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area." 42 U.S.C. §7506(c)(1).



**NOTICE OF INTENT TO COMMENCE CIVIL ACTION  
TO REMEDY VIOLATIONS OF THE CLEAN AIR ACT**

October 20, 2006

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EPA has promulgated regulations establishing criteria and procedures that the Secretary must satisfy when making the required showing that emissions from a federally funded or approved highway project will not cause or contribute to any new violation of any standard, or increase the frequency or severity of any existing violation. 40 C.F.R. §§ 93.116 and 93.123. The Secretary has approved the ICC Project without making the findings required by the Act and § 93.116 based upon the criteria required by § 93.123(b) and (c), and related EPA regulations. The failure to make findings required by the applicable criteria include, but are not limited to, the failure to determine the current background concentration of PM<sub>2.5</sub> at appropriate receptor locations in the area substantially affected by the project, the failure to determine future background concentrations, the failure to use available emissions factors to determine the ratio between current and future emissions, and the failure to apply emissions factors in the ratio of current to future traffic. Credible and relevant evidence available to the Secretary demonstrates that emissions from the proposed ICC Project will add emissions in an area where the National Ambient Air Quality Standard for PM<sub>2.5</sub> is being violated, or nearly violated, and that adding further emissions will cause or contribute to ambient air quality in violation of the National Ambient Air Quality Standard.

The Secretary of Transportation and the National Capital Region Transportation Planning Board, acting as the designated metropolitan planning organization pursuant to 23 U.S.C. § 134(d), violated the Clean Air Act by approving the Transportation Improvement Program for the National Capital Region because it allocates federal funds for the ICC Project which does not satisfy the statutory and regulatory requirements for a conforming transportation project pursuant to 42 U.S.C. § 7506(c) and regulations implementing the Act.

These violations are continuing until such actions are taken as are necessary to remedy the violations.

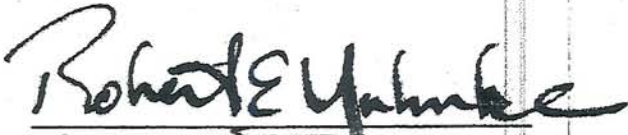
The above-named organizations intend to commence a civil action to enforce the legal duties described in this letter unless the approval for the ICC Project is withdrawn and funding commitments for the Project removed from the Transportation Improvement Program, or the findings required by the Act and applicable regulations have been made within sixty days of the postmark date of this Notice.

The undersigned attorneys are acting as legal counsel for the above-named organizations in this matter. Any communications should be addressed to the undersigned as follows: Hope Babcock and Erik Bluemel, Institute For Public Representation, Georgetown University Law Center, 600 New Jersey Avenue, N.W., Washington, D.C. 20001; 202-662-9535.

A copy of any written correspondence should be forwarded to Robert E. Yuhnke, 2910 County

**NOTICE OF INTENT TO COMMENCE CIVIL ACTION  
TO REMEDY VIOLATIONS OF THE CLEAN AIR ACT  
October 20, 2006  
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Road 67, Boulder, Colorado 80303; 303-499-0425.



**ROBERT E. YUHNKE**  
Robert E. Yuhnke & Associates

*October 20, 2006*



**HOPE BABCOCK**  
Director, IPR

**ON BEHALF OF:**

**Environmental Defense  
Sixth Floor  
1650 Connecticut Avenue, N.W.  
Washington, D.C. 20009**

**Sierra Club  
85 Second Street, Second Floor  
San Francisco, California 94105-3441**



Office of Transportation  
and Air QualityEPA420-F-06-022  
February 2006

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# Regulatory Announcement

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## Transportation Conformity Final Rule: PM<sub>2.5</sub> and PM<sub>10</sub> Hot-Spot Analyses in Project-Level Transportation Conformity Determinations for the PM<sub>2.5</sub> and PM<sub>10</sub> National Ambient Air Quality Standards

*EPA is finalizing the criteria for determining which transportation projects must undergo a local air quality analysis (i.e., a "hot-spot analysis") as part of conformity determinations in areas not meeting PM<sub>2.5</sub> (particulate matter smaller than 2.5 micrometers in diameter) air quality standards. This final rule also streamlines existing hot-spot requirements in PM<sub>10</sub> areas. A "hot-spot analysis" is an estimation of pollutant concentrations in a localized area resulting from the use or operation of a transportation project, and a comparison of those concentrations to the National Ambient Air Quality Standards (NAAQS).*

### Key Elements of the Final Rule

- This rule requires that PM<sub>2.5</sub> hot-spot analyses be performed only for new transportation projects with significant diesel traffic. Examples of such "projects of air quality concern" include intermodal freight or bus terminals, and major highway projects and congested intersections involving significant diesel traffic. No hot-spot analyses will be required for most projects in PM<sub>2.5</sub>



areas, because most projects are not an air quality concern. This final rule also streamlines existing  $PM_{10}$  hot-spot requirements in a similar way.

- The streamlined approach in this final rule will ensure that transportation and air quality agencies in  $PM_{2.5}$  and  $PM_{10}$  areas use their resources efficiently, while achieving clean air goals.
- In both  $PM_{2.5}$  and  $PM_{10}$  areas, a quantitative hot-spot analysis is not required until EPA issues a new motor vehicle emissions model capable of estimating local emissions as well as future hot-spot modeling guidance. Qualitative analyses will apply in the interim.
- This rule extends an existing flexibility by allowing the U.S. Department of Transportation to make “categorical hot-spot findings,” which would waive  $PM_{2.5}$  and  $PM_{10}$  hot-spot reviews for categories of projects where modeling shows that there is no air quality concern.

## Background

Transportation conformity is a Clean Air Act requirement that ensures that federally supported highway and transit projects are consistent with (“conform to”) the purpose of a state air quality implementation plan (SIP). Conformity ensures that public health is protected by early consideration of transportation decisions in cities with air quality challenges.

This final rule is part of EPA’s implementation of the current  $PM_{2.5}$  standards. The final rule is a result of two proposed rulemakings in November 2003 and December 2004. EPA received comments from state and local transportation and air quality agencies, environmental and transportation interest groups, and private citizens. EPA has worked closely with DOT in the development of this final rule.

## Health and Environmental Impacts

By focusing requirements on transportation projects of air quality concern, this rule ensures that conformity is practicably implemented and that conformity will help achieve the Clean Air Act’s public health and environmental goals.

## **For More Information**

You can access the final rule and related documents on EPA's Office of Transportation and Air Quality web site at: [www.epa.gov/otaq/transp/conform/conf-regs.htm](http://www.epa.gov/otaq/transp/conform/conf-regs.htm). For further information about the final rule, please contact:

Meg Patulski  
U.S. Environmental Protection Agency  
Transportation and Regional Programs Division  
2000 Traverwood Drive  
Ann Arbor, MI 48105  
(734) 214-4842  
E-mail: [patulski.meg@epa.gov](mailto:patulski.meg@epa.gov)

or

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# Federal Register

Friday,  
March 10, 2006

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## Part III

## Environmental Protection Agency

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40 CFR Part 93

**PM<sub>2.5</sub> and PM<sub>10</sub> Hot-Spot Analyses in  
Project-Level Transportation Conformity  
Determinations for the New PM<sub>2.5</sub> and  
Existing PM<sub>10</sub> National Ambient Air  
Quality Standards; Final Rule**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 93**

[EPA-HQ-OAR-2003-0049, FRL-8039-5]

RIN 2060-AN02

**PM<sub>2.5</sub> and PM<sub>10</sub> Hot-Spot Analyses in Project-Level Transportation Conformity Determinations for the New PM<sub>2.5</sub> and Existing PM<sub>10</sub> National Ambient Air Quality Standards**

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

**ACTION:** Final rule.

**SUMMARY:** This final rule establishes the criteria for determining which transportation projects must be analyzed for local particle emissions impacts in PM<sub>2.5</sub> and PM<sub>10</sub> nonattainment and maintenance areas. This rule establishes requirements in PM<sub>2.5</sub> areas and revises existing requirements in PM<sub>10</sub> areas. If required, an analysis of local particle emissions impacts is done as part of a transportation project's conformity determination. EPA is requiring a local particle emissions impacts analysis for certain transportation projects to ensure that these projects do not adversely impact the national ambient air quality standards and human health. The Clean Air Act requires federally supported highway and transit projects to be consistent with ("conform to") the purpose of a state air quality implementation plan. EPA has consulted with the Department of Transportation (DOT) on the development of this final rule, and DOT concurs with its content.

**DATES:** The final rule is effective April 5, 2006, for good cause found as explained in this rule.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA-HQ-OAR-2003-0049. All documents in the docket are listed on the <http://www.regulations.gov> Web site. Although listed in the index, some information may not be publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard copy at the Air Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday,

excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air Docket is (202) 566-1742.

**FOR FURTHER INFORMATION CONTACT:** Meg Patulski, Transportation and Regional Programs Division, Office of Transportation and Air Quality, U.S. Environmental Protection Agency, 2000 Traverwood Road, Ann Arbor, MI 48105, telephone number: (734) 214-4842, fax number: (734) 214-4052, e-mail address: [patulski.meg@epa.gov](mailto:patulski.meg@epa.gov); or Rudy Kapichak, Transportation and Regional Programs Division, Office of Transportation and Air Quality, U.S. Environmental Protection Agency, 2000 Traverwood Road, Ann Arbor, MI 48105, telephone number: (734) 214-4574, fax number: (734) 214-4052, e-mail address: [kapichak.rudolph@epa.gov](mailto:kapichak.rudolph@epa.gov).

**SUPPLEMENTARY INFORMATION:**

The contents of this preamble are listed in the following outline:

- I. General Information
- II. Background
- III. PM<sub>2.5</sub> Hot-spot Analyses
- IV. PM<sub>10</sub> Hot-spot Analyses
- V. Projects of Air Quality Concern and General Requirements for PM<sub>2.5</sub> and PM<sub>10</sub> Hot-spot Analyses
- VI. Timing of Quantitative PM<sub>2.5</sub> and PM<sub>10</sub> Hot-spot Analyses and Development of Future Guidance
- VII. Categorical PM<sub>2.5</sub> and PM<sub>10</sub> Hot-spot Findings
- VIII. Minor Change for Exempt Projects Regarding Compliance With PM<sub>2.5</sub> SIP Control Measures
- IX. How Does Today's Final Rule Affect Conformity SIPs?
- X. Statutory and Executive Order Reviews

**I. General Information**

*A. Does This Action Apply to Me?*

Entities potentially regulated by the transportation conformity rule are those that adopt, approve, or fund transportation plans, programs, or projects under title 23 U.S.C. or title 49 U.S.C. Regulated categories and entities affected by today's action include:

Category	Examples of regulated entities
Local government .....	Local transportation and air quality agencies, including metropolitan planning organizations (MPOs).
State government .....	State transportation and air quality agencies.

Category	Examples of regulated entities
Federal government ..	Department of Transportation (Federal Highway Administration (FHWA) and Federal Transit Administration (FTA)).

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this final rule. This table lists the types of entities of which EPA is aware that potentially could be regulated by the conformity rule. Other types of entities not listed in the table could also be regulated. To determine whether your organization is regulated by this action, you should carefully examine the applicability requirements in 40 CFR 93.102. If you have questions regarding the applicability of this action to a particular entity, consult the persons listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

*B. How Can I Get Copies of This Document?*

1. Docket

EPA has established an official public docket for this action under Docket ID No. EPA-HQ-OAR-2003-0049. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Air Docket in the EPA Docket Center. See the **ADDRESSES** section above. You may have to pay a reasonable fee for copying docket materials.

2. Electronic Access

You may access this **Federal Register** document electronically through EPA's transportation conformity Web site at <http://www.epa.gov/otag/transp/tragconf.htm>. You may also access this document electronically under the "Federal Register" listings at <http://www.epa.gov/fedrgstr/>.

An electronic version of the public docket is available through the Federal Docket Management System (FDMS), located at <http://www.regulations.gov>. You may use the FDMS to view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available



electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in B.1. of this section. Once in the FDMS electronic docket system, select "Advanced Search-Docket Search," then enter the appropriate docket identification number (which is EPA-HQ-OAR-2003-0049) in the "docket ID" field and click "submit".

## II. Background

### A. What Is Transportation Conformity?

Transportation conformity is required under Clean Air Act section 176(c) (42 U.S.C. 7506(c)) to ensure that federally supported highway and transit project activities are consistent with ("conform to") the purpose of the state air quality implementation plan (SIP). Conformity currently applies to areas that are designated nonattainment, and those redesignated to attainment after 1990 ("maintenance areas" with plans developed under Clean Air Act section 175A) for the following transportation-related criteria pollutants: Ozone, particulate matter (PM<sub>2.5</sub> and PM<sub>10</sub>),<sup>1</sup> carbon monoxide (CO), and nitrogen dioxide (NO<sub>2</sub>). Conformity to the purpose of the SIP means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment of the relevant national ambient air quality standards (NAAQS or "standards").

### B. What Is the History of the Transportation Conformity Rule?

EPA's transportation conformity rule establishes the criteria and procedures for determining whether transportation activities conform to the SIP. EPA first promulgated the transportation conformity rule on November 24, 1993 (58 FR 62188), and subsequently published a comprehensive set of amendments on August 15, 1997 (62 FR 43780) that clarified and streamlined language from the 1993 rule. EPA has made other smaller amendments to the rule both before and after the 1997 amendments.

More recently, on July 1, 2004, EPA published a final rule (69 FR 40004) that amended the conformity rule to accomplish three objectives. The final rule:

- Provided conformity procedures for state and local agencies under the new ozone and PM<sub>2.5</sub> air quality standards;

- Incorporated existing EPA and DOT federal guidance into the conformity rule consistent with a March 2, 1999 U.S. Court of Appeals decision; and
- Streamlined and improved the conformity rule.

The July 1, 2004 final rule incorporated most of the provisions from the November 5, 2003 proposal for conformity under the new ozone and PM<sub>2.5</sub> standards (68 FR 62690). EPA is conducting its conformity rulemakings in the context of EPA's broader strategies for implementing the new ozone and PM<sub>2.5</sub> standards.

Finally, on May 6, 2005, EPA promulgated a final rule entitled, "Transportation Conformity Rule Amendments for the New PM<sub>2.5</sub> National Ambient Air Quality Standard: PM<sub>2.5</sub> Precursors" (70 FR 24280). This final rule specified the transportation-related PM<sub>2.5</sub> precursors and when they apply in transportation conformity determinations in PM<sub>2.5</sub> nonattainment and maintenance areas.

### C. Why Are We Issuing This Final Rule?

In the November 2003 proposal, EPA presented two options concerning hot-spot analyses in PM<sub>2.5</sub> and PM<sub>10</sub> nonattainment and maintenance areas. EPA received substantial comment on this portion of the November 2003 proposal. After considering these comments, EPA, in consultation with the U.S. Department of Transportation (DOT), issued a supplemental notice of proposed rulemaking on December 13, 2004 (69 FR 72140) which requested further public comment on additional options for PM<sub>2.5</sub> and PM<sub>10</sub> hot-spot requirements and those options presented in the original November 2003 proposal. In developing today's final rule, EPA considered all of the comments received on PM<sub>2.5</sub> and PM<sub>10</sub> hot-spot analysis requirements both in response to the original November 2003 proposal as well as the December 2004 supplemental proposal. EPA received over 5,400 sets of comments on the two proposals from state and local transportation and air quality agencies, environmental groups, transportation advocates, and the general public.

EPA has consulted with DOT, our Federal partner in implementing the transportation conformity regulation, in developing the final rule, and DOT concurs with its content. Please see Sections III. and IV. for more information regarding how this final rule impacts project-level conformity determinations in PM<sub>2.5</sub> and PM<sub>10</sub> areas, including those for projects that are currently under development.

## III. PM<sub>2.5</sub> Hot-spot Analyses

### A. Background

#### 1. What Is a Hot-spot Analysis?

A hot-spot analysis is defined in 40 CFR 93.101 as an estimation of likely future localized pollutant concentrations resulting from a new transportation project and a comparison of those concentrations to the relevant air quality standard. A hot-spot analysis assesses the air quality impacts on a scale smaller than an entire nonattainment or maintenance area, including, for example, congested roadway intersections and highways or transit terminals. Such an analysis is a means of demonstrating that a transportation project meets Clean Air Act conformity requirements to support state and local air quality goals with respect to potential localized air quality impacts.

Prior to today's final rule, the conformity rule required some type of hot-spot analysis for all FHWA and FTA funded or approved non-exempt transportation projects in CO and PM<sub>10</sub> nonattainment and maintenance areas (40 CFR 93.116 and 93.123). This requirement applied for all project-level conformity determinations that occur both before and after a SIP is submitted for the CO or PM<sub>10</sub> air quality standards.

EPA established the type of hot-spot analysis—either quantitative or qualitative—based on the potential impact of a given project or project location on the air quality standards, so that more rigorous quantitative analyses are only required when necessary to meet statutory requirements. Since the original November 24, 1993 conformity rule, EPA has required quantitative analyses for projects that have the highest potential to impact the CO air quality standards (*i.e.*, "projects of air quality concern"). The conformity rule also has detailed projects that have the highest potential to impact the PM<sub>10</sub> standards, including new or expanded bus and rail terminals or transfer points involving diesel vehicles. These projects of air quality concern would be subject to quantitative hot-spot analyses once the tools and EPA's future modeling guidance are available. In contrast, more streamlined, qualitative hot-spot analyses have been required for all other projects.

Such a tiered approach was intended to utilize state and local resources in an efficient manner while meeting statutory requirements. Quantitative hot-spot analyses use dispersion modeling to determine the potential air quality impact of motor vehicle emissions associated with a highway or

<sup>1</sup> Section 93.102(b)(1) of the conformity rule defines PM<sub>2.5</sub> and PM<sub>10</sub> as particles with an aerodynamic diameter less than or equal to a nominal 2.5 and 10 micrometers, respectively.

transit project. Qualitative hot-spot analyses involve more streamlined reviews of local factors such as local monitoring data near a proposed project.

EPA notes, however, that quantitative PM<sub>10</sub> hot-spot analyses have not yet been required for projects of air quality concern due to a lack of EPA modeling guidance and appropriate methods. Section 93.123(b)(4) of the conformity rule states that the requirements for quantitative PM<sub>10</sub> hot-spot analyses will not take effect until EPA releases modeling guidance and announces in the **Federal Register** that these requirements are in effect, which EPA has not yet done.

Today's final rule does not impact the existing CO hot-spot requirements; however, the final rule revises the PM<sub>10</sub> hot-spot requirements as discussed in Sections IV. and V.

## 2. Proposed Options

EPA proposed several options for how PM<sub>2.5</sub> hot-spot requirements would apply for project-level conformity determinations in PM<sub>2.5</sub> nonattainment and maintenance areas. In general, these options were proposed to apply during the time periods before and after a PM<sub>2.5</sub> SIP is submitted. EPA is repeating in today's action the descriptions of the previously proposed options to assist in discussing the final rule and responses to comments. EPA noted in its proposals that hot-spot analyses would be based only on directly emitted PM<sub>2.5</sub> attributable to an individual transportation project, since secondary particles formed through PM<sub>2.5</sub> precursors take several hours to form in the atmosphere, giving emissions time to disperse beyond the immediate area of concern for localized analyses.

The following five options were proposed for PM<sub>2.5</sub> hot-spot requirements for individual projects in PM<sub>2.5</sub> areas prior to the submission of a PM<sub>2.5</sub> SIP (December 13, 2004, 69 FR 72144):

- *Options 1 and 2:* Do not apply any PM<sub>2.5</sub> hot-spot analysis requirements for any PM<sub>2.5</sub> area before the submission of the PM<sub>2.5</sub> SIP<sup>2</sup>;

- *Option 3:* Apply the existing conformity rule's PM<sub>10</sub> hot-spot analysis requirements with respect to PM<sub>2.5</sub> in all PM<sub>2.5</sub> areas;

- *Option 4:* Apply the existing conformity rule's PM<sub>10</sub> hot-spot analysis

requirements with respect to PM<sub>2.5</sub>, unless the EPA Regional Administrator or state air agency finds that localized PM<sub>2.5</sub> violations are not a concern for a given PM<sub>2.5</sub> area; or

- *Option 5:* Apply the existing conformity rule's PM<sub>10</sub> hot-spot analysis requirements with respect to PM<sub>2.5</sub>, only if the EPA Regional Administrator or state air agency finds that localized PM<sub>2.5</sub> violations are a concern for a given PM<sub>2.5</sub> area.

EPA proposed that an EPA or state air agency finding under Options 4 and 5 that PM<sub>2.5</sub> localized violations are or are not a concern prior to PM<sub>2.5</sub> SIP submission would be based on a case-by-case review of local factors for a given PM<sub>2.5</sub> area. EPA requested information from commenters about whether sufficient local information was available to make such findings.

EPA also proposed three options for project-level conformity determinations after the submission of a PM<sub>2.5</sub> SIP (December 13, 2004, 69 FR 72145):

- *Option A:* Do not apply any PM<sub>2.5</sub> hot-spot analysis requirements for any PM<sub>2.5</sub> area (*i.e.*, Option 1 from the November 2003 proposal);

- *Option B:* Only require quantitative PM<sub>2.5</sub> hot-spot analyses for projects at those types of locations that the PM<sub>2.5</sub> SIP identifies as a localized PM<sub>2.5</sub> air quality concern for a given area (*i.e.*, Option 2 from the November 2003 proposal). No quantitative or qualitative analyses would be required for any projects in other types of locations, or in PM<sub>2.5</sub> areas where the SIP does not identify types of locations as a localized PM<sub>2.5</sub> air quality concern; or

- *Option C:* Apply the existing conformity rule's PM<sub>10</sub> hot-spot analysis requirements with respect to PM<sub>2.5</sub> for all projects in PM<sub>2.5</sub> areas, with a minor addition.

Under Option C, EPA proposed to add a new criterion that would require that quantitative analyses also be performed at those types of project locations that the PM<sub>2.5</sub> SIP identifies as a PM<sub>2.5</sub> hot-spot concern. See the November 5, 2003 proposal (68 FR 62712–62713) and the December 13, 2004 supplemental proposal (69 FR 72144–72149) for further information on all of the proposed options.

For options involving hot-spot analyses, EPA proposed to not require quantitative PM<sub>2.5</sub> hot-spot analyses until EPA releases its future modeling guidance, consistent with the existing provision for PM<sub>10</sub> analyses in § 93.123(b)(4). EPA also proposed to extend to PM<sub>2.5</sub> areas the existing conformity rule's flexibility in § 93.123(b)(3) for DOT to make categorical hot-spot findings to further

streamline analysis requirements when modeling shows that additional analyses are not necessary to meet Clean Air Act requirements for a given project.

Last, EPA requested comments on all of the proposed options, and invited commenters to submit any data or other information about the proposed options, including whether state and local agencies would have information available for implementation. In developing this final rule, EPA considered all of the comments and information submitted for the November 2003 and December 2004 proposals. The December 2004 supplemental proposal also included proposed regulatory text that combined various PM<sub>2.5</sub> and PM<sub>10</sub> hot-spot options as illustrative examples, and EPA noted that any combination of the proposed PM<sub>2.5</sub> or PM<sub>10</sub> hot-spot options could be included in the final rule.

### B. Description of Final Rule

In summary, EPA is finalizing a hybrid of some of the proposed options by:

Being generally consistent with Options 3 (for the period before a SIP is submitted) and C (for the period after a SIP is submitted) for projects of localized air quality concern, and

- Providing the flexibility from other proposed options to eliminate qualitative hot-spot analyses for all projects not of air quality concern.

The final rule requires quantitative PM<sub>2.5</sub> hot-spot analyses only for projects of air quality concern, and qualitative hot-spot analyses would be done for these projects before EPA releases its future modeling guidance and announces that quantitative PM<sub>2.5</sub> hot-spot analyses are required under § 93.123(b)(4). EPA specifies in § 93.123(b)(1) that projects of air quality concern are highway and transit projects that involve significant levels of diesel vehicle traffic, or any other project that is identified in the PM<sub>2.5</sub> SIP as a localized concern.

EPA considered several factors in focusing on projects involving significant numbers of diesel vehicles in developing today's final rule. For example, PM<sub>2.5</sub> and PM<sub>10</sub> diesel emission factors are significantly higher than gasoline vehicles on a per-vehicle basis. In addition, studies in proximity of vehicular traffic tend to show that elevated PM<sub>2.5</sub> concentrations occur near diesel vehicle operations, but show less consistent evidence near locations with high gasoline vehicle operations. See Section V. for more information regarding how and why EPA defined projects of air quality concern in the final rule.

<sup>2</sup>Options 1 and 2 were originally proposed in the November 5, 2003 notice as well (68 FR 62712). Option 1 would have not required any PM<sub>2.5</sub> hot-spot requirement at any time before or after a PM<sub>2.5</sub> SIP is submitted. Option 2 also would not require PM<sub>2.5</sub> hot-spot analyses prior to a PM<sub>2.5</sub> SIP submission, and then only if the SIP identified types of projects or locations of air quality concern for a given area.



believes that all of the procedural requirements, e.g., docketing, hearing and comment periods, of section 307(d) have been complied with during the course of this rulemaking.

List of Subjects in 40 CFR Part 93

Environmental protection, Administrative practice and procedure, Air pollution control, Carbon monoxide, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Transportation, Volatile organic compounds.

Dated: February 23, 2006.

Stephen L. Johnson, Administrator.

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

PART 93—[AMENDED]

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

Authority: 42 U.S.C. 7401–7671q.

§ 93.101 [Amended]

2. Section 93.101 is amended in the first sentence of the definition for “Hot-spot analysis” by removing “CO and PM10” and adding in its place “CO, PM10, and/or PM2.5”.

§ 93.105 [Amended]

3. Section 93.105 is amended by removing paragraph (c)(1)(v) and redesignating paragraphs (c)(1)(vi) and (vii) as paragraphs (c)(1)(v) and (vi).

4. Section 93.109 is amended as follows:

a. In Table 1 of paragraph (b), revising both entries for “§ 93.116”;

b. By redesignating paragraphs (i)(1) and (2) as paragraphs (i)(2) and (3) and adding new paragraph (i)(1);

c. In paragraph (j) by removing “CO and PM10” and adding in its place “CO, PM10, and PM2.5”;

d. In paragraph (k) by removing “CO and PM10” and adding in its place “CO, PM10, and PM2.5”; and

e. In paragraph (l)(1) by removing “CO and PM10” and adding in its place “CO, PM10, and PM2.5”.

§ 93.109 Criteria and procedures for determining conformity of transportation plans, programs, and projects: General.

\* \* \* \* \*

(b) \* \* \*

TABLE 1.—CONFORMITY CRITERIA

Table with 5 columns and 1 row. Row 1: § 93.116 ..... CO, PM10, and PM2.5 hot-spots.

TABLE 1.—CONFORMITY CRITERIA— Continued

Table with 5 columns and 2 rows. Row 1: § 93.116 ..... CO, PM10, and PM2.5 hot-spots. Row 2: \* \* \* \* \*

\* \* \* \* \*

(i) \* \* \*

(1) FHWA/FTA projects in PM2.5 nonattainment or maintenance areas must satisfy the appropriate hot-spot test required by § 93.116(a).

\* \* \* \* \*

5. In § 93.116, the section heading and paragraph (a) are revised to read as follows:

§ 93.116 Criteria and procedures: Localized CO, PM10, and PM2.5 violations (hot-spots).

(a) This paragraph applies at all times. The FHWA/FTA project must not cause or contribute to any new localized CO, PM10, and/or PM2.5 violations or increase the frequency or severity of any existing CO, PM10, and/or PM2.5 violations in CO, PM10, and PM2.5 nonattainment and maintenance areas. This criterion is satisfied without a hot-spot analysis in PM10 and PM2.5 nonattainment and maintenance areas for FHWA/FTA projects that are not identified in § 93.123(b)(1). This criterion is satisfied for all other FHWA/FTA projects in CO, PM10 and PM2.5 nonattainment and maintenance areas if it is demonstrated that during the time frame of the transportation plan (or regional emissions analysis) no new local violations will be created and the severity or number of existing violations will not be increased as a result of the project. The demonstration must be performed according to the consultation requirements of § 93.105(c)(1)(i) and the methodology requirements of § 93.123.

\* \* \* \* \*

6. Section 93.123 is amended as follows:

a. Revising the section heading;

b. Amending the first sentence in paragraph (a)(1) introductory text by removing “CO and PM10” and adding in its place “CO, PM10, and PM2.5”;

c. Amending paragraph (b) by:

i. Revising the paragraph heading;

ii. Revising paragraphs (b)(1)(i), (ii) and (iii), and adding new paragraphs (b)(1)(iv) and (v); and

iii. Revising paragraphs (b)(2) and (b)(3);

d. Amending paragraph (c)(4) by removing “PM10 or CO” in the first sentence and adding in its place “CO, PM10, or PM2.5”; and

e. Amending paragraph (c)(5) by removing “CO and PM10” in the first sentence and adding in its place “CO, PM10, and PM2.5”.

§ 93.123 Procedures for determining localized CO, PM10, and PM2.5 concentrations (hot-spot analysis).

\* \* \* \* \*

(b) PM10 and PM2.5 hot-spot analyses.

(1) \* \* \*

(i) New or expanded highway projects that have a significant number of or significant increase in diesel vehicles;

(ii) Projects affecting intersections that are at Level-of-Service D, E, or F with a significant number of diesel vehicles, or those that will change to Level-of-Service D, E, or F because of increased traffic volumes from a significant number of diesel vehicles related to the project;

(iii) New bus and rail terminals and transfer points that have a significant number of diesel vehicles congregating at a single location;

(iv) Expanded bus and rail terminals and transfer points that significantly increase the number of diesel vehicles congregating at a single location; and

(v) Projects in or affecting locations, areas, or categories of sites which are identified in the PM10 or PM2.5 applicable implementation plan or implementation plan submission, as appropriate, as sites of violation or possible violation.

(2) Where quantitative analysis methods are not available, the demonstration required by § 93.116 for projects described in paragraph (b)(1) of this section must be based on a qualitative consideration of local factors.

(3) DOT, in consultation with EPA, may also choose to make a categorical hot-spot finding that § 93.116 is met without further hot-spot analysis for any project described in paragraph (b)(1) of this section based on appropriate modeling. DOT, in consultation with EPA, may also consider the current air quality circumstances of a given PM2.5 or PM10 nonattainment or maintenance area in categorical hot-spot findings for applicable FHWA or FTA projects.

\* \* \* \* \*

§ 93.125 [Amended]

7. Section 93.125(a) is amended by removing “PM10 or CO” in the first sentence and adding in its place “CO, PM10, or PM2.5”.

§ 93.126 [Amended]

8. Section 93.126 is amended in footnote 1 by removing “PM10” and adding in its place “PM10 and PM2.5”.

**§ 93.127 [Amended]**

■ 9. Section 93.127 is amended as follows:

■ a. Amending the second sentence by removing “or PM<sub>10</sub>”.

■ b. Adding a new sentence after the second sentence to read as follows: “The local effects of projects with respect to PM<sub>10</sub> and PM<sub>2.5</sub> concentrations must be considered and a hot-spot analysis performed prior to

making a project-level conformity determination, if a project in Table 3 also meets the criteria in § 93.123(b)(1).”

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