



# **Interim Guidance for Implementing the Transportation Conformity Provisions in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU)**

**Interim Guidance for Implementing the  
Transportation Conformity Provisions in the  
Safe, Accountable, Flexible, Efficient  
Transportation Equity Act:  
A Legacy for Users (SAFETEA-LU)**

Office of Transportation and Air Quality  
U.S. Environmental Protection Agency

Office of Natural and Human Environment  
Federal Highway Administration

Office of Planning and Environment  
Federal Transit Administration

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## **Section 1: Introduction**

### **1.1 What is the purpose of this interim guidance?**

The purpose of this document is to provide areas that are subject to transportation conformity with guidance on implementing the transportation conformity-related provisions contained in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), which was signed into law on August 10, 2005.<sup>1</sup> SAFETEA-LU revised a number of aspects of the Clean Air Act's section 176(c) transportation conformity provisions including:

- providing an additional six months to re-determine conformity after new state implementation plan (SIP) motor vehicle emissions budgets are either found adequate, approved or promulgated;
- changing the frequency requirements for transportation conformity determinations;
- providing an option for reducing the time period covered by conformity determinations;
- providing procedures for areas to use in substituting or adding transportation control measures (TCMs) to approved SIPs;
- adding a one-year grace period for conformity lapses; and
- streamlining requirements for conformity SIPs.

This guidance explains how to apply the transportation conformity-related changes made in SAFETEA-LU during the period before the federal conformity rule is revised to address the changes made by SAFETEA-LU.

### **1.2 What is transportation conformity?**

Transportation conformity is required under Clean Air Act section 176(c) to ensure that federally supported highway and transit project activities are consistent with (“conform to”) the purpose of the 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>), 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”). The transportation conformity regulation is found in 40 CFR part 93 and provisions related to conformity SIPs are found in 40 CFR 51.390.

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<sup>1</sup> Areas are subject to transportation conformity if they are nonattainment or maintenance for ozone, carbon monoxide, PM<sub>2.5</sub>, PM<sub>10</sub> or nitrogen dioxide.

### **1.3 Does this guidance create new requirements?**

No, this guidance is based on Clean Air Act transportation conformity requirements as revised by SAFETEA-LU and existing associated regulations and does not create any new requirements. This guidance merely explains how to implement the transportation conformity-related provisions contained in SAFETEA-LU.

The statutory provisions and the US Environmental Protection Agency (EPA) and US Department of Transportation (DOT) regulations described in this document contain legally binding requirements. This document is not a substitute for those provisions or regulations, nor is it a regulation itself. Thus, it does not impose legally binding requirements on EPA, DOT, states, or the regulated community, and may not apply to a particular situation based upon the circumstances. EPA and DOT retain the discretion to adopt approaches on a case-by-case basis that may differ from this guidance, but still comply with the statute and SIP, conformity and planning regulations. Any decisions regarding a particular SIP, conformity determination or TCM substitution or addition will be made based on the statute and regulations, after appropriate public input and rulemaking procedures where applicable. This guidance may be revised periodically without public notice.

### **1.4 What are EPA's plans for revising the conformity rule to address the changes made in SAFETEA-LU?**

SAFETEA-LU section 6011(g) requires that EPA, within two years of the date that SAFETEA-LU was enacted, revise the transportation conformity rule as necessary to address the new statutory provisions.

### **1.5 Who can I contact for more information?**

For specific questions concerning a particular nonattainment or maintenance area, please contact the SIP or transportation conformity staff person responsible for your state at the appropriate EPA regional office, Federal Highway Administration (FHWA) division office or Federal Transit Administration (FTA) regional office. A listing of EPA regional offices, the states they cover, and contact information for EPA regional conformity staff can be found at the following website: [www.epa.gov/otaq/transp/conform/contacts.htm](http://www.epa.gov/otaq/transp/conform/contacts.htm). Contact information for FHWA division offices can be found at: [www.fhwa.dot.gov/field.html](http://www.fhwa.dot.gov/field.html) and contact information for FTA regional offices can be found at: [www.fta.dot.gov/about/offices/4978\\_ENG\\_HTML.htm](http://www.fta.dot.gov/about/offices/4978_ENG_HTML.htm).

General questions about this guidance can be directed to:

Rudy Kapichak at EPA's Office of Transportation and Air Quality,  
[kapichak.rudolph@epa.gov](mailto:kapichak.rudolph@epa.gov) or 734-214-4574;

Cecilia Ho at FHWA's Office of Natural and Human Environment,  
[cecilia.ho@fhwa.dot.gov](mailto:cecilia.ho@fhwa.dot.gov) or 202-366-9862; or



Abbe Marner at FTA's Office of Planning and Environment,  
[abbe.marner@fta.dot.gov](mailto:abbe.marner@fta.dot.gov) or 202-366-4317.

### **1.6 Where can I find more information on the web?**

Additional information on the transportation conformity rule and associated guidance can be found on EPA's website at: [www.epa.gov/otaq/transp/conform](http://www.epa.gov/otaq/transp/conform).

Similarly, information on the conformity rule and associated guidance along with additional information on SAFETEA-LU implementation can be found at: [www.fhwa.dot.gov/environment/conform.htm](http://www.fhwa.dot.gov/environment/conform.htm) and [www.fhwa.dot.gov/safetealu/index.htm](http://www.fhwa.dot.gov/safetealu/index.htm).

Information on SAFETEA-LU can also be found at FTA's website at: [www.fta.dot.gov/17003\\_ENG\\_HTML.htm](http://www.fta.dot.gov/17003_ENG_HTML.htm).

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## **Section 2: Conformity Redeterminations**

*SAFETEA-LU section 6011(a) reads as follows:*

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

- “(E) The appropriate metropolitan planning organization shall redetermine conformity of existing transportation plans and programs not later than 2 years after the date on which the Administrator--
  - “(i) finds a motor vehicle emissions budget to be adequate in accordance with section 93.118(e)(4) of title 40, Code of Federal Regulations (as in effect on October 1, 2004);
  - “(ii) approves an implementation plan that establishes a motor vehicle emissions budget if that budget has not yet been determined to be adequate in accordance with clause (i); or
  - “(iii) promulgates an implementation plan that establishes or revises a motor vehicle emissions budget.”.

### **2.1 What does this provision do?**

This provision gives areas two years, increased from the previous 18 months, to determine conformity after actions that establish new motor vehicle emissions budgets:

- the effective date of EPA’s finding a motor vehicle emissions budget adequate;
- EPA’s approval into the SIP of a budget that has not yet been found adequate; or
- EPA’s promulgation a of federal implementation plan that establishes a budget.

### **2.2 When does this provision apply?**

This provision took effect on August 10, 2005, when SAFETEA-LU was signed into law.

The SAFETEA-LU conference report states that, “In the case where conformity is triggered by and EPA SIP action, this section provides metropolitan areas with 2 years to determine conformity (currently, areas have 18 months).” Therefore, all 18-month clocks that started prior to August 10, 2005, have been extended by six months by statute, bringing the total time of the existing clocks to two years. Additionally, all clocks started by adequacy findings or approvals after August 10, 2005, are now two-year clocks.

### **2.3 Does this provision have any effect on when adequacy and approval clocks begin?**

No, this provision does not change the point at which these clocks begin. The clocks begin on the effective date of EPA’s adequacy finding or the effective date of EPA’s SIP approval or federal implementation plan promulgation action, which is consistent with EPA’s conformity rule. (For more details see sections XV and XIX of the July 1, 2004, final rule, 69 Federal Register pages 40038 and 40050, respectively.)

**2.4 How do EPA and DOT interpret “approves a SIP that establishes a motor vehicle emissions budget if that budget has not yet been determined to be adequate”?**

The language in SAFETEA-LU specifies that the clock associated with a budget that is approved into the SIP only starts if the budget was not previously found adequate. If a budget had previously been found adequate, a clock for that budget would already have started on the effective date of EPA’s adequacy finding, so no new clock would start at the time of EPA’s approval of the budget into the SIP. This interpretation is consistent with how EPA and DOT have implemented section 93.104(e)(1) and (2) of the transportation conformity rule.

**2.5 How does the requirement to redetermine conformity relate to the transportation planning update clocks?**

The two-year trigger to redetermine conformity is not directly related to the transportation planning update clock. Under SAFETEA-LU the update cycle for transportation plans in nonattainment and maintenance areas and for all transportation improvement programs (TIPs) is four years.

Any of the three criteria for conformity redeterminations could trigger the need for a new conformity determination prior to the time that a transportation plan or TIP update would be needed under the statute as revised. Conversely, a planning update clock could trigger the need for a new conformity determination because a plan or TIP update was required prior to the end of the two-year conformity redetermination clock. In such a case, the conformity determination on the updated transportation plan or TIP would need to be based on the newly adequate or approved budgets and would satisfy the two-year redetermination requirement.

### **Section 3: Frequency of Conformity Determinations**

*SAFETEA-LU section 6011(b) reads as follows:*

(b) Frequency of Conformity Determination Updates.--Section 176(c)(4)(B)(ii) of the Clean Air Act (42 U.S.C. 7506(c)(4)(B)(ii)) is amended to read as follows:

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

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

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

#### **3.1 What does this provision do?**

This provision replaces the three-year conformity update cycle for transportation plans and TIPs previously included in the Clean Air Act. This provision revises the Clean Air Act to provide that the frequency for making conformity determinations on updated transportation plans and TIPs shall be every four years, except in cases in which the metropolitan planning organization (MPO) elects to update a plan or TIP more frequently, or the MPO is required to determine conformity to meet a two-year trigger after the effective date of EPA’s adequacy finding, SIP approval, or promulgation of motor vehicle emissions budgets.

#### **3.2 When does this provision apply?**

This provision took effect immediately on August 10, 2005, upon enactment of SAFETEA-LU, and the minimum frequency for making conformity determinations is now every four years. MPOs in nonattainment and maintenance areas may opt to apply the SAFETEA-LU four-year transportation plan update cycle to their existing conforming transportation plan. However, if they choose to do so, the subsequent transportation plan must reflect all SAFETEA-LU planning provisions at the time of the FHWA/FTA conformity determination.

Many areas have developed or are continuing to develop TIPs according to the pre-SAFETEA-LU metropolitan planning requirements. Such TIPs continue to be subject to two-year updates. Conformity determinations continue to be required at the time when such updates are made.

SAFETEA-LU section 6001(b) specifically states that “*The Secretary shall not require a State or metropolitan planning organization to deviate from its established planning update cycle to implement changes*” made by SAFETEA-LU prior to July 1, 2007. Therefore, states and MPOs are allowed to continue to comply with existing planning regulations for any metropolitan transportation plans and TIPs developed prior to July 1,

2007, including adherence to transportation plan and TIP update cycles and content requirements. Therefore, transportation plans and TIPs that are updated in accordance with the pre-SAFETEA-LU transportation planning cycles will have to demonstrate conformity according to those pre-SAFETEA-LU cycles.

However, if a state or MPO opts to implement **all** of the SAFETEA-LU section 6001 planning provisions prior to July 1, 2007, then the four-year update cycle would apply to the area's transportation plan and TIP, which would be in line with the four-year frequency for conformity determinations.

For transportation plans and TIPs developed after July 1, 2007, FHWA/FTA would be able to make a conformity determination only if the SAFETEA-LU planning provisions have been met. Please see FHWA/FTA interim guidance on SAFETEA-LU planning, environment, and air quality provisions for more information (<http://www.fhwa.dot.gov/hep/legreg.htm>).

**3.3 Does the discussion in DOT's May 25, 2001, guidance that aligns the transportation planning update and conformity update requirements still apply?**

Yes. The transportation planning update clock and the conformity update clock both begin upon the date of the FHWA and FTA conformity determination for the respective plan and/or TIP. The May 25, 2001, guidance is available at [http://www.fhwa.dot.gov/environment/conformity/planup\\_m.htm](http://www.fhwa.dot.gov/environment/conformity/planup_m.htm).

#### **Section 4: Time Horizon for Conformity Determinations in Nonattainment Areas**

*SAFETEA-LU section 6011(c) reads as follows:*

(c) Time Horizon for Conformity Determinations in Nonattainment Areas.--Section 176(c) of the Clean Air Act (42 U.S.C. 7506(c)) is amended by adding at the end the following:

“(7) Conformity horizon for transportation plans.--

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

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

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

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

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

“(C) Exception.--In any case in which an area has a revision to an implementation plan under section 175A(b) and the Administrator has found the motor vehicles emissions budgets from that revision to be adequate in accordance with section 93.118(e)(4) of title 40, Code of Federal Regulations (as in effect on October 1, 2004), or has approved the revision, the demonstration of conformity at the election of the metropolitan planning organization, after consultation with the air pollution control agency and solicitation of public comments and consideration of such comments, shall be required to extend only through the last year of the implementation plan required under section 175A(b).

“(D) Effect of election.--Any election by a metropolitan planning organization under this paragraph shall continue in effect until the metropolitan planning organization elects otherwise.

“(E) Air pollution control agency defined.--In this paragraph, the term ‘air pollution control agency’ means an air pollution control agency (as defined in section 302(b)) that is responsible for developing plans or

controlling air pollution within the area covered by a transportation plan."

#### **4.1 What does this provision do?**

This provision provides the option to shorten the horizon of plan/TIP conformity determinations. This provision amends the Clean Air Act to require a demonstration of conformity for the period ending with either the final year of the transportation plan, or at the election of the MPO, after consultation with the air pollution control agency and solicitation of public comments and consideration of such comments, the longest of the following periods:

- The first 10-year period of any such transportation plan.
- The latest year in the SIP applicable to the area that contains a motor vehicle emission budget.
- The year after the completion date of a regionally significant project<sup>2</sup> if the project is included in the TIP, or the project requires approval before the subsequent conformity determination.

If the MPO elects to demonstrate conformity for less than the full length of the transportation plan, the conformity determination must be accompanied by a regional emissions analysis, for informational purposes only, for the last year of the transportation plan and for any year beyond the term of the conformity determination shown to exceed emission budgets by an informational emissions analysis that accompanied a previous conformity determination.

In addition, if an area has an approved second 10-year maintenance plan, or has submitted a second 10-year maintenance plan and EPA has found its budgets adequate the MPO may elect to demonstrate conformity through the last year of the second maintenance plan. This election would be made after consultation with the air pollution control agency and solicitation of public comments and consideration of such comments.

Any election by an MPO to shorten the horizon for conformity shall continue in effect until the metropolitan planning organization elects otherwise.

The term "air pollution control agency" means an air pollution control agency that is responsible for developing plans or controlling air pollution within the area covered by a transportation plan.

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<sup>2</sup> Regionally significant project, as defined in 40 CFR 93.101, means a transportation project (other than an exempt project that is on a facility which serves regional transportation needs (such as access to and from the area outside of the region, major activity centers in the region, major planned developments such as new retail malls, sports complexes, etc., or transportation terminals as well as most terminals themselves) and would normally be included in the modeling of a metropolitan area's transportation network, including at a minimum all principal arterial highways and all fixed guideway transit facilities that offer an alternative to regional highway travel.



#### **4.2 When does this provision apply?**

This provision took effect on August 10, 2005, when SAFETEA-LU was signed into law. However, MPOs must continue to demonstrate conformity through the final year of the transportation plan, unless they make an election under this provision.

#### **4.3 Can an election made under this provision be made at the same time as a conformity determination?**

We encourage MPOs to make this election prior to the beginning of a public comment period on any conformity determination. However, if MPOs do wish to take public comment on the election at the same time as on a conformity determination, we think it is appropriate that the conformity information presented to the public include both an analysis reflecting the election, as well as an analysis that reflects the full length of the transportation plan.

#### **4.4 Does an “election of the MPO” require an MPO policy board action?**

Yes, the MPO policy board must make this election, similar to their responsibility to determine conformity.

#### **4.5 Does an MPO that elects to shorten the horizon need to make this election each time it makes a conformity determination, or only once?**

An election under this section need only be made once for a given pollutant or pollutants, and then it would apply for all future conformity determinations for that pollutant(s). As discussed in the SAFETEA-LU Conference Report, the decision to address a portion of the transportation plan rather than the entire plan when demonstrating conformity only needs to be made once, not each time a conformity determination is made.

#### **4.6 If an MPO elects to shorten the horizon, can it in the future elect to go back to having conformity apply for the entire length of the transportation plan?**

Yes. The MPO can elect to return to demonstrating conformity for the entire length of the plan. We will address the specifics in our rulemaking to incorporate SAFETEA-LU provisions into the conformity rule. If an MPO that has elected to shorten the horizon wishes to elect to go back to determining conformity for the entire length of the plan prior to the rulemaking, please consult with your EPA regional office, and your FHWA division office and/or FTA regional office.

#### **4.7 What constitutes “consultation with the air pollution control agency,” and does that agency need to concur? Does this election need to be part of the interagency consultation procedures and conformity SIP?**

Consultation with the air pollution control agency should include meaningful and timely discussion. The air pollution control agency is not required to concur in this election.

SAFETEA-LU does not specify a consultation process, but the MPO should incorporate consultation on an election into their normal interagency consultation with the air agency. In order for consultation with the air agency to be meaningful it should occur at an early stage in the decision making process. The MPO is not required to revise its existing interagency consultation procedures to include this consultation with the air agency and the air agency is not required to revise the conformity SIP for the area to address this consultation.

#### **4.8 What is an “air pollution control agency?” Might the requirement to consult with such agency actually apply to multiple agencies?**

The air pollution control agency is the agency or agencies responsible for developing SIPs for the nonattainment or maintenance area or areas that include the MPO. This could include the state agency or local agencies specifically responsible for SIP development, and in some areas, agencies responsible for multi-state SIP development. Therefore, the MPO may be required to consult with multiple agencies. Please see Section 302(b) of the Clean Air Act (<http://www.epa.gov/air/caa/caa302.txt>) for the definition of an air pollution control agency.

#### **4.9 Does this election need to be included in the public involvement procedures for the MPO?**

MPOs are required to solicit public comments and consider them in their election. MPOs should follow their normal process for public participation regarding conformity actions for this election. The MPO is not required to revise its public involvement procedures required by SAFETEA-LU section 6001 to address public consultation on reducing the area’s conformity horizon.

#### **4.10 If the MPO does make the election under this provision, what analysis years should be used for the regional emissions analysis?**

If an MPO makes this election, except in the case of an adequate or approved second ten-year maintenance plan, they should interpret references to “the last year of the [transportation] plan’s forecast period” in 40 CFR 93.118(b), 93.118(d)(2), and 93.119(g) to then be the latest of the following years:

- The tenth year of the plan,
- The latest year in the SIP applicable to the area that contains a motor vehicle emission budget, or
- The year after the completion date of a regionally significant project if the project is included in the TIP, or the project requires approval before the subsequent conformity determination.

All other analysis year requirements provided in 40 CFR 93.118(b), 93.118(d)(2) and 93.119(g) must still be met whether or not the MPO makes this election.

Where an area has an adequate or approved second ten-year maintenance plan, if an MPO elects to shorten the conformity horizon, they should interpret references to “the last year

of the [transportation] plan’s forecast period” in 40 CFR 93.118(b), and 93.118(d)(2) to be the last year of the second ten-year maintenance period.

#### **4.11 What constitutes “the first 10-year period of any such transportation plan” when an area amends its plan or TIP?**

For FHWA and FTA actions on plans/TIPs and associated amendments and transportation conformity determinations that meet the requirements of 40 CFR 93.122(g) of the transportation conformity rule, which allows conformity determinations to rely on a previous regional emissions analysis, a long-range transportation plan initially found to conform with a 10-year conformity horizon remains sufficient. For example, an MPO has adopted a 2006 to 2026 transportation plan and made the conformity determination using a 10-year conformity horizon (i.e., 2016). In 2008, the MPO can adopt a new TIP that relies on the previous regional emissions analysis; that is, the conformity horizon year could remain 2016.

However, if the long-range transportation plan is amended to add, delete, or significantly change the design concept or scope of a regionally significant project, or a regionally significant project is rescheduled such that it crosses conformity horizon years,<sup>3</sup> the transportation plan's conformity horizon would need to be at least 10 years at the time of the MPO's action. For example, an MPO has adopted a 2006 to 2026 transportation plan with a 10-year conformity horizon (i.e., 2016). In 2008, the MPO amends the plan and TIP to add a regionally significant project. In this case, the conformity horizon year would need to be 2018. Note, in this example the 2018 horizon assumes that no new SIP budgets have been found adequate or approved beyond 2018, and that there are no regionally significant projects in the amended TIP with a completion date in 2018 or beyond. If however, a new SIP budget has been found adequate or approved beyond 2018, the conformity horizon would need to be extended to the year for which the budget was established. For example if the budget was established for 2020, the conformity horizon would be 2020.

#### **4.12 What is meant by “applicable SIP?”**

In general, the “applicable SIP” is the SIP for the standard and pollutant for which the conformity analysis is being done. However, for 8-hour ozone areas that are demonstrating conformity with budgets in 1-hour ozone SIPs, the 1-hour SIP will be treated as the “applicable SIP” until such time as 8-hour budgets are found adequate or approved. At that time, the 8-hour SIP would become the “applicable SIP.”

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<sup>3</sup> A conformity horizon year is defined in 40 CFR 93.101 as a year for which the transportation plan describes the envisioned transportation system according to 40 CFR 93.106.

**4.13 If an MPO has elected to shorten its horizon, and wants to amend its plan in the years beyond the conformity horizon, will this trigger the need to redetermine conformity?**

Yes. Although this SAFETEA-LU provision addressed the conformity horizon, it did not change the requirement that a conformity determination is required for transportation plan revisions.

**4.14 Does the phrase “the project requires approval before the subsequent conformity determination” apply to non-federal projects?**

Yes. This provision applies to regionally significant non-federal projects that would require approval prior to the subsequent conformity determination.

**4.15 Can an MPO that is subject to conformity for multiple pollutants elect to shorten the conformity horizon year for one pollutant, but not for another?**

Yes. If an MPO is nonattainment and/or maintenance for more than one pollutant it could shorten the horizon for one pollutant and its precursor(s) but not the other(s) and its precursor(s). For example, an area could maintain a 20-year horizon for ozone precursors but shorten the horizon to 10 years for CO.

However, an MPO should retain the same horizon year for a pollutant and its precursors. For example, a PM<sub>2.5</sub> conformity determination would have the same horizon for PM<sub>2.5</sub> and all applicable PM<sub>2.5</sub> precursors. An 8-hour ozone conformity determination would have the same horizon for its precursors - NO<sub>x</sub> and volatile organic compounds (VOCs).

**4.16 Can an MPO that has made this election rely on a previous regional emissions analysis that was completed prior to the election?**

Yes. However, the previous regional emissions analysis must have included an analysis for the new horizon year as defined by this section and must meet the requirements of 40 CFR 93.122(g). For example, if the MPO now is using the tenth year of its plan (e.g., 2016) for conformity purposes, then it can rely on the previous regional emissions analysis if an analysis was performed for that year (e.g., 2016). Also, please note that according to 40 CFR 93.122(g)(3), reliance on a previous regional emissions analysis does not satisfy the frequency requirements in 40 CFR 93.104(b) and (c).

**4.17 Prior to adequate or approved budgets, if a nonattainment or maintenance area contains multiple MPOs, do all of the MPOs have to make this election, or can only one MPO make this election?**

This provision specifically applies at the MPO level, so it might appear that one MPO in a multi-MPO nonattainment or maintenance area could make this election even if the others do not. However, different analysis years may then apply to each MPO which could be in conflict with certain provisions under 40 CFR 93.119.

Therefore, for MPOs that are subject to 40 CFR 93.119 requirements, all of the MPOs within the nonattainment area would need to make the election to ensure that the regional emissions analysis covered the entire nonattainment area and that the same analysis years were used.

(See EPA’s guidance “Conformity Implementation in Multi-jurisdictional Nonattainment and Maintenance Areas for Existing and New Air Quality Standards” for more information. A PDF copy of this guidance can be downloaded from the [EPA website](#).)

**4.18 Once there are adequate or approved budgets, if a nonattainment or maintenance area within the same state contains multiple MPOs, do all of the MPOs have to make this election, or can only one MPO make this election?**

For nonattainment and maintenance areas with multiple MPOs, but a single budget for the entire area, all of the MPOs within the nonattainment area would need to make the election to ensure that the regional emissions analysis covered the entire nonattainment/maintenance area and that the same analysis years were used.

For MPOs with sub-area budgets who are conducting separate regional emissions analyses, an MPO could elect to shorten the conformity horizon regardless of any other MPO within the nonattainment or maintenance area that is not subject to that same sub-area budget.

**4.19 Prior to adequate or approved budgets, if a nonattainment or maintenance area contains multiple states, does the MPO(s) have to make this election for all states, or can an MPO make a separate election for a state?**

All of the MPOs within the nonattainment area would need to make the election to ensure that the regional emissions analysis covered the entire nonattainment area and that the same analysis years were used.

**4.20 Once there are adequate or approved budgets, if a nonattainment or maintenance area contains multiple states, does the MPO(s) have to make this election for all states, or can an MPO make a separate election for a state?**

For nonattainment and maintenance areas with a single budget for the entire multi-state area, the MPO(s) within the area would need to make the election for all states to ensure that the regional emissions analysis covered the entire nonattainment/maintenance area and that the same analysis years were used.

For MPOs with separate budgets for each state who are conducting separate regional emissions analyses, the election could be done separately for each state that is not subject to that same budget.

#### **4.21 How does this provision apply in donut areas?**

The regional emissions analysis for a donut area must be consistent with that of the associated MPO. Interagency consultation should be used to discuss the regional emissions analysis as required under 40 CFR 93.105(c)(3).

#### **4.22 Does this provision apply in isolated rural areas?**

We will address how this provision applies in isolated rural areas in our rulemaking to incorporate SAFETEA-LU provisions into the conformity rule. If anyone in an isolated rural area would like to take advantage of this provision prior to the rulemaking, please consult with your EPA regional office, and your FHWA division office and/or FTA regional office.

#### **4.23 What is meant by “if the project is included in the TIP?”**

For the purposes of determining a shortened horizon, a project is “included in the TIP” if any phase of the project other than an exempt phase, such as preliminary engineering to assess social, economic, and environmental effects of the proposed action or alternatives to that action, is included in the TIP. “Project” refers to the all required phases of a project necessary for implementation as reflected in the selected alternative in the NEPA document. In other words, if the TIP includes funding for any phase of final design, right-of-way acquisition, or construction, the horizon year must extend to the year beyond the completion date of the entire “project” as defined in the final NEPA document.

#### **4.24 What is meant by “the project requires approval before the subsequent conformity determination?”**

This provision requires that the conformity horizon extend to the year beyond the completion date of a regionally significant project before the regionally significant project can be determined to conform and be approved. In general, this provision applies to approval of any phase of a project other than an exempt phase such as preliminary engineering to assess social, economic, and environmental effects of the proposed action or alternatives. For example, the conformity horizon must extend to the year beyond the completion date of a regionally significant project before FHWA/FTA, for such project, can issue a Record of Decision (ROD), make a Finding of No Significant Impact (FONSI), or determine that the project is Categorical Excluded (CE). With FTA’s major transit capital investment projects, the project must be included in a conforming transportation plan before preliminary engineering can be approved. Therefore, the conformity horizon must extend to the year beyond the completion date of such project before FTA can approve preliminary engineering.

**4.25 Can non-regionally significant, non-exempt projects be found to conform even if the completion date of the project is beyond the shortened horizon?**

Yes, but the project would still need to meet the requirements for project-level conformity.

**4.26 Under this election, does the appropriate conformity test have to be met for the last year of the transportation plan? What about for any year shown to exceed emission budgets by a prior analysis?**

No. The regional emissions analysis described in Clean Air Act section 176(c)(7)(B), must be performed for the last year of the plan and for any year beyond the term of the conformity determination shown to exceed the emissions budgets by a prior informational analysis, but the analysis is for informational purposes only. This analysis does not need to meet the requirements of the budget test (40 CFR 93.118) or the interim emissions test(s) (40 CFR 93.119) for that year or years.

**4.27 How would the provision “and for any year shown to exceed emission budgets by a prior analysis” apply if there were no applicable emissions budgets?**

If there were no applicable emissions budgets at the time of the prior analysis, then the informational analysis would only need to be conducted for the last year of the plan.

**4.28 Do MPOs that utilize this provision in the case of an adequate or approved second ten-year maintenance plan have to develop a regional emissions analysis for the last year of the plan?**

No. The requirement to develop an informational analysis does not apply to MPOs that elect to only demonstrate conformity through the end of the second ten-year maintenance period.

**4.29 Does this provision change the requirement to analyze hot-spot emissions required under 40 CFR 93.116 for the full length of the transportation plan?**

No. This provision of SAFETEA-LU applies to the regional emissions analysis requirements for plans and TIPs, but does not apply to project-level hot-spot air quality analyses.

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## **Section 5: Substitution of Transportation Control Measures**

*SAFETEA-LU section 6011(d) reads as follows:*

(d) Substitution of Transportation Control Measures.--Section 176(c) of the Clean Air Act (42 U.S.C. 7506(c)) (as amended by subsection (c)) is amended by inserting after paragraph (7) the following:

“(8) Substitution of transportation control measures.--

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

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

“(ii) if the substitute control measures are implemented—

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

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

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

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

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

“(II) consultation with the Administrator; and

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

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

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

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

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

“(C) No requirement for express permission.--The substitution or addition of a transportation control measure in accordance with this paragraph and the funding or approval of such a control measure shall not be contingent on the existence of any provision in the applicable implementation plan that expressly permits such a substitution or addition.

“(D) No requirement for new conformity determination.--The substitution or addition of a transportation control measure in accordance with this paragraph shall not require—

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

“(ii) a revision of the implementation plan.

“(E) Continuation of control measure being replaced.--A control measure that is being replaced by a substitute control measure under this paragraph shall remain in effect until the substitute control measure is adopted by the State pursuant to subparagraph (B).

“(F) Effect of adoption.--Adoption of a substitute control measure shall constitute rescission of the previously applicable control measure.”.

### **5.1 What does this provision do?**

SAFETEA-LU amends the Clean Air Act to provide nonattainment and maintenance areas with a streamlined process for either replacing TCMs in approved SIPs with alternate TCMs or for adding TCMs to their approved SIPs. Under this provision, states are no longer required to include a TCM substitution mechanism in their SIPs in order to expedite the process for making TCM substitutions.

### **5.2 When does this provision apply?**

This provision took effect on August 10, 2005, when SAFETEA-LU was signed into law.

Nonattainment and maintenance areas that do not have TCM substitution mechanisms in their approved SIPs may begin using this statutory mechanism immediately to make substitutions or to add TCMs to their SIPs.

Several nonattainment and maintenance areas have TCM substitution mechanisms in their approved SIPs.<sup>4</sup> These areas must continue to use their SIP-approved TCM substitution mechanisms in addition to the new statutory mechanism as applicable to make substitutions. However, there may be conflicts between an already approved mechanism and the provision contained in SAFETEA-LU. In the event of such a conflict the area would follow the requirement contained in SAFETEA-LU. EPA, FHWA and FTA will work with areas with approved mechanisms on a case-by-case basis to answer any questions. These areas may elect to revise their SIPs to remove the approved TCM substitution mechanism. EPA will act expeditiously to approve requests to remove previously approved TCM substitution mechanisms. EPA will consider using either parallel processing or a direct final approval, as appropriate, to expedite such approvals.

### **5.3 How does this provision affect EPA's April 7, 2004, guidance on TCM substitution mechanisms?**

EPA is withdrawing the April 7, 2004, guidance document and replacing it with today's guidance. While much of the earlier guidance remains relevant, the TCM substitution provision in SAFETEA-LU makes large portions of the existing guidance unnecessary. For example, the portion of the guidance that discusses what a state must include in its SIP in order to have an approvable TCM substitution mechanism is no longer relevant because the provision in SAFETEA-LU allows states to make substitutions without having a substitution mechanism approved into their SIPs.

We are including the portions of the April 7, 2004, guidance that remain relevant in this guidance document.

### **5.4 What does SAFETEA-LU require in order for a TCM substitution to occur?**

For a TCM in an approved SIP to be removed and replaced with an alternate TCM SAFETEA-LU requires that:

- the substitute TCM(s) must achieve equal or greater emission reductions;
- the substitute TCM(s) must be implemented on a schedule that is consistent with the schedule for the TCM(s) being removed from the SIP; or, if the implementation date has passed for the TCM(s) being replaced, the replacement TCM must be implemented as soon as practicable but not later than the date on which emission reductions from the TCM(s) are necessary to achieve the purpose of the implementation plan;

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<sup>4</sup> Portland, OR; Albuquerque, NM; Texas; and Boston, MA have TCM substitution mechanisms in their approved SIPs.

- the substitute TCM(s) must be accompanied by evidence of adequate personnel, and funding and authority under state or local law to implement, monitor and enforce the TCM(s);
- the substitute TCM(s) must be developed through a collaborative process that includes participation by all affected jurisdictions (state and local air pollution control agencies and state and local transportation agencies such as the MPO, state and city DOTs, and transit providers); consultation with EPA; and reasonable notice and opportunity for public comment; and
- the equivalency of the substitute TCM(s) must be concurred on by the MPO, the state air pollution control agency and EPA.

### **5.5 What does SAFETEA-LU require in order for a new TCM to be added to an area's SIP?**

SAFETEA-LU requires that in order for a new TCM to be added to an approved SIP:

- the new TCM(s) must be accompanied by evidence of adequate personnel, and funding and authority under state or local law to implement, monitor and enforce the TCM(s);
- the new TCM(s) must be developed through a collaborative process that includes participation by all affected jurisdictions and agencies (e.g., state and local air pollution control agencies and state and local transportation agencies); consultation with EPA; and reasonable notice and opportunity for public comment; and
- the MPO, the state air pollution control agency and EPA must concur on the addition of the new TCM to the SIP.

### **5.6 Who must concur for EPA on the substitution or addition of TCMs?**

SAFETEA-LU requires concurrence by the Administrator of EPA. EPA intends to prepare a delegation of authority that will enable the Regional Administrators to concur on substitutions and additions. However, for any substitutions or additions that occur before the delegation is finalized, the EPA regional office should participate in the collaborative process that is used to develop the TCMs and keep the EPA Administrator's office informed as the process proceeds. If the substitution or addition fulfills all of the requirements contained in SAFETEA-LU, the regional office would transmit the package to the Administrator for concurrence. After concurrence, the Administrator would send a letter to the MPO and the state air agency.

### **5.7 How does an MPO or state/local transportation or air agency demonstrate that a substitute TCM provides equivalent emissions reductions?**

To demonstrate that the new TCM provides equal or greater emission reductions, the emission benefits of the substitute TCM should be analyzed in a manner that is consistent with the methodology used for analysis of the existing TCMs in the approved SIP, unless a better methodology is currently available. If a better methodology is available, the

project sponsor should recalculate the emissions benefits of the original TCM and use that emissions estimate in determining if the substitute TCM provides equivalent emissions reductions. EPA and US DOT believe that the Clean Air Act requires that the latest planning assumptions, and emissions models must also be used, as generally required for conformity and SIP purposes. If hot-spot analyses are needed, they should use the applicable air quality models, data bases, and other requirements specified in 40 CFR part 51, Appendix W (Guideline on Air Quality Models) or follow other relevant EPA guidance or approved methodologies for hot-spot analyses.

It should be noted that some approved SIPs include TCMs for which no emission reduction credit was claimed. If such a TCM is to be replaced through a TCM substitution, an emissions analysis should be performed for both the existing SIP-approved TCM and the proposed substitute TCM. It should be demonstrated that there will be an equivalent reduction in emissions as a result of the substitution.

In determining whether or not a substitute TCM provides equivalent emission reductions, the area should document that the substitute TCM provides emission reductions that are:

- permanent for the time period relied upon in the applicable SIP;
- for the same time of year (e.g., during the winter carbon monoxide season) or during a specific time of day (e.g., the morning or evening rush hour) relied upon in the applicable SIP;
- for the same pollutant or precursor as the original SIP TCM, unless the area has a SIP-approved trading mechanism that would allow trading between precursors or between a pollutant and its precursor(s); and
- for the same geographic location, if the such a location is identified as critical for the emission reductions for the applicable SIP (e.g., to meet applicable hot-spot requirements).

An area should also consider whether or not the substitution will have an effect on any other SIPs for the area. For example, if a TCM is relied upon in more than one SIP (e.g., a TCM is included in both an ozone attainment demonstration and a carbon monoxide maintenance plan) or is included in the baseline emissions, the emissions analysis that is performed for the substitution would need to consider the impacts on all the affected SIPs and motor vehicle emissions budgets.

It should also be noted that nonattainment areas must continue to meet the Clean Air Act's requirements for implementation of Reasonably Available Control Measures (RACM);<sup>5</sup> and serious PM<sub>10</sub> nonattainment areas must continue to meet requirements for implementation of Best Available Control Measures (BACM).<sup>6</sup> Serious, severe and

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<sup>5</sup> RACM requirements do not apply in maintenance areas.

<sup>6</sup> Provided that all applicable RACM and BACM requirements are met, EPA believes that TCMs substituted through the use of the mechanism contained in SAFETEA-LU would fulfill the requirements of Clean Air Act section 193 because the substitute TCMs provide equivalent emission reductions and therefore would not interfere with reasonable further progress or attainment. The requirements in Clean Air Act section 110(l) would not apply to substitutions made through the mechanism contained in

extreme ozone areas and moderate and serious carbon monoxide areas that have adopted TCMs to comply with Clean Air Act sections 182(c)(5), 182(d)(1)(A), 182(e)(4), 187(a)(2)(A) or 187(b)(2) may substitute TCMs; however, they must also continue to comply with those Clean Air Act requirements.

**5.8 What additional information should be provided to support a TCM substitution or addition?**

The material prepared to support a substitution or addition should clearly identify and describe the TCM in the approved SIP and the substitute TCM or the additional TCM. The substitute or additional TCM should meet all of the requirements of Clean Air Act section 110 and EPA's TCM SIP Guidance (EPA 450/2-89-020). Specifically, the documentation for each substitution or addition should include: 1) the name of the TCM in the approved SIP that is proposed to be replaced; 2) the name of the proposed substitute or additional TCM; 3) a brief but thorough description of both the original and substitute or additional TCMs including their locations and implementing agencies; 4) the steps and schedule for completing and operating the substitute or additional TCM; and 5) a brief explanation of why the substitution is necessary.

**5.9 Can the TCM substitution process be used to remove a TCM from the applicable SIP without providing a substitute measure?**

No. The TCM substitution process established in SAFETEA-LU does not provide legal authority for an area to remove a TCM from the applicable SIP unless it is replaced with a TCM that provides equivalent emissions reductions. TCMs can be removed from an applicable SIP through a SIP revision. Such a SIP revision would have to be shown to meet Clean Air Act section 110(l) requirements (e.g., the area would have to show that removal of the TCM would not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable Clean Air Act requirement).

**5.10 If a substitute TCM cannot be implemented on the same schedule as the original TCM, what is necessary in order to fulfill SAFETEA-LU's requirement that "the replacement TCM must be implemented as soon as practicable but not later than the date on which emission reductions are necessary to achieve the purpose of the implementation plan?"**

If it is not possible for the substitute TCM to be implemented by the same deadline as the original TCM, the substitute TCM would have to be implemented as expeditiously as practicable so that emission reductions can be achieved by the year required by the SIP. For example, if the TCM being replaced was to be implemented in 2008 and was included in the area's 2010 ozone attainment demonstration, the substitute TCM should be fully implemented no later than the beginning of the 2009 ozone season (i.e., the final complete ozone season before the maximum June 2010 attainment date). The substitute

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SAFETEA-LU because section 110(l) only applies to control measures approved into the SIP by EPA and these substitutions do not require EPA SIP approval.

TCM would be implemented by the time reductions are needed to support the SIP, in this case by the beginning of the 2009 ozone season.

**5.11 Would EPA concur on a substitution if the substitute TCM could not be implemented until after the date on which emission reductions are necessary to achieve the purpose of the implementation plan?**

EPA would not concur on a given substitution if it would interfere with any applicable requirement for reasonable further progress or timely attainment or maintenance of any NAAQS. Reliance on the TCM substitution provision in SAFETEA-LU would not be appropriate in the case where both the implementation date for the original TCM and SIP milestone date have passed. For example, if a TCM that was included in an area's 2010 ozone attainment demonstration was to be in place in 2009 and became delayed, it would not be appropriate to use a TCM substitution mechanism to replace it with one that could not be implemented until 2011. In this case, a formal SIP revision would be required to address the attainment demonstration as well as the substitute TCM, to ensure that sufficient control measures are in place to demonstrate timely attainment.

**5.12 Are TCMs in 1-hour ozone SIPs subject to the Clean Air Act and conformity rule requirements for timely implementation? And, can a TCM in an approved 1-hour ozone SIP in an 8-hour ozone nonattainment area be replaced by a substitute TCM through the TCM substitution process?**

EPA addressed requirements for the timely implementation of TCMs contained in 1-hour ozone SIPs in areas that are now designated as nonattainment or maintenance for the 8-hour ozone standard in the July 1, 2004 new standards rulemaking. Specifically, EPA stated that:

“Section 93.113 of the existing conformity rule requires that transportation plans, TIPs, and projects which are not from a conforming plan and TIP must provide for the timely implementation of TCMs from an approved SIP. EPA notes that today's final rule does not change the implementation of these requirements for any existing or new nonattainment or maintenance area, including 8-hour nonattainment areas that have approved 1-hour SIPs that contain TCMs.

Clean Air Act section 176(c) requires that TCMs in approved SIPs be implemented in a timely manner according to the schedules in the SIP. This requirement is not contingent on what type of SIP, pollutant, or standard for which the approved TCM was established. Conformity determinations for any pollutant and standard must provide for the timely implementation of TCMs in approved SIPs, including TCMs in approved SIPs for the 1-hour ozone standard after that standard is revoked. Such TCMs can only be removed from the 1-hour SIP through the SIP process.” (69 FR 40013)

Any area 8-hour ozone area considering changes to TCMs in an approved 1-hour SIP should consult with the EPA regional office in order to determine the appropriate mechanism for making the desired changes.

**5.13 What is necessary in order for an MPO or other implementing agency to show that it has adequate personnel and funding to implement the substitute or additional TCM?**

TCMs that are included in an area's transportation plan and TIP need to meet all applicable requirements in US DOT's metropolitan planning regulations, including the metropolitan plan and TIP fiscal constraint requirement (23 CFR 450). Therefore, inclusion of the substitute or additional TCM in a fiscally constrained metropolitan plan and TIP generally would serve as sufficient evidence that adequate resources are available to implement the TCM. It is possible that situations will arise where an MPO would need to make a TCM substitution and revise its TIP to remove the original TCM and add the substitute TCM simultaneously. In such situations the MPO should use the consultation process to reach agreement on the details of these simultaneous actions.

However, if the TCM is not federally funded or is not part of the plan and TIP, the implementing agency should provide additional information on the availability and commitment of adequate resources as necessary to implement the substitute TCM.

**5.14 What is necessary in order for an MPO or other implementing agency to demonstrate that there is adequate authority under state or local law to implement, monitor and enforce the substitute or additional TCM?**

Generally, inclusion of the substitute or additional TCM in a metropolitan area's plan and TIP, or in the case of a rural area, inclusion of the substitute TCM in the Statewide Transportation Improvement Program (STIP), would indicate that the implementing agency had legal authority to carry out the project. However, if the TCM is not federally funded or is not part of the plan and TIP, the implementing agency should provide additional information on its legal authority to implement the substitute TCM.

Because the substitute or additional TCM becomes part of the approved SIP for the area, Clean Air Act sections 113 and 179(a) grant EPA the authority to enforce the implementation of such a TCM. Implementation of the substitute and additional TCMs may also be enforced by citizen suits under Clean Air Act section 304.

**5.15 What agencies would be involved in the collaborative process used to develop substitute and additional TCMs?**

The agencies involved in the collaborative process used to develop substitute and additional TCMs would be similar to the group that participates in the area's conformity interagency consultation process. The involved agencies would include the state and local air quality and transportation agencies. The MPO and all of the jurisdictions affected by the substitution or addition that is being considered should also be involved. The process must also include the EPA regional office, who would be responsible for keeping the Administrator informed prior to the Administrator's delegation of concurrence to the Regional Administrator, and should also include the relevant FHWA and the FTA offices. Early consultation with federal agencies is essential to facilitate



subsequent concurrence on each substitution by EPA, and on conformity determinations based in part on timely implementation of substituted TCMs by FHWA and FTA.

**5.16 What is necessary in order to demonstrate that the collaborative process used to develop substitute and additional TCMs included reasonable public notice and opportunity for comment?**

Reasonable public notice and a public comment period must be provided when the TCM substitution or addition is made. The public has to be provided access to all material relevant to the substitution, and all public comments submitted have to be considered and responded to. The state and/or local air agency should ensure that the TCM substitution process complies with all applicable laws and regulations for public participation including state or local sunshine laws. Copies of any prepared supporting documentation should be sent to the EPA regional office, which would be responsible for keeping the Administrator informed prior to the Administrator's delegation of concurrence to the Regional Administrator, FHWA division office, the FTA regional office and any other relevant state and local air and transportation agencies. Because EPA's concurrence on a specific substitution or addition would be EPA's conclusion that the substitution or addition complies with the requirements set forth in SAFETEA-LU, commenters should be made aware through the announcement that they should submit comments not only on whether the state should concur on the substitution or addition but also on whether EPA should concur with that substitution or addition.

**5.17 How do the involved agencies indicate their concurrence on the substitution or addition?**

Following the close of the comment period, the state or local air agency and MPO as appropriate would summarize the comments received and prepare responses. Those agencies along with the EPA regional office should review the comments and responses and all material related to the substitution or addition. If the substitution or addition fulfills all of the requirements specified in SAFETEA-LU, the state air agency and EPA would each indicate its concurrence by sending a letter to the MPO and each other (i.e., the state air agency would send its letter to the EPA and vice versa). The MPO would indicate its concurrence by resolution of the MPO's policy body. A substitution or addition could not go into effect unless EPA, the state air agency and the MPO have all concurred on the substitution. Within 90 days of its concurrence, the state air agency must submit the substitute or additional control measure and all supporting information to the EPA regional office so that the TCM can be incorporated in the codified applicable SIP.

Agencies should use their consultation process to establish the exact point in the process that concurrence will be given so that it meets SAFETEA-LU's requirements. SAFETEA-LU requires that concurrence by the air agency and EPA occur after equivalency of the substitute measure(s) is demonstrated and the SAFETEA-LU conference report clarifies that "adoption occurs when the MPO, state air agency and EPA concur that all four of the general requirements in subparagraph (A) of the provision

have been fulfilled." Therefore, concurrence would have to occur sufficiently late in the process so that the agencies are sure that all four criteria have been met.

### **5.18 When can an MPO make a conformity determination based on a substitution?**

An MPO can make a conformity determination based on a substitution as soon as the MPO, the state air pollution control agency and EPA have concurred on the substitution. Once all of these agencies have concurred, the substitute TCM is considered to be adopted. Once adopted under this process, the substitute TCM becomes part of the federally enforceable SIP for the area. The adoption of the substitute TCM also serves to remove the original TCM from the federally enforceable SIP. Therefore, once the adoption occurs, the original TCM is no longer subject to the Clean Air Act and transportation conformity rule requirements for timely implementation of TCMs. It should be noted that the original TCM remains in the approved SIP and subject to the timely implementation requirements until the replacement TCM is adopted. Subsequent to adoption, EPA will incorporate the substitute or new TCM(s) into the federal codification of the SIP to clarify which TCMs are part of the federally enforceable SIP.

### **5.19 What action will EPA take to incorporate the substitute or additional TCM into the codified SIP?**

Once a state has submitted the substitute or additional TCM to EPA for incorporation in the codified applicable SIP, EPA will need to update the Code of Federal Regulations (CFR) to reflect the changes to the SIP. This would be done through the publication of a notice in the Federal Register. When a state that has been converted to the "SIP notebook system"<sup>7</sup> substitutes or adds a non-regulatory TCM through the process established by SAFETEA-LU, EPA would publish an informational notice in the rules section of the Federal Register to update the CFR. In states that have not yet been converted to the notebook system, or for TCMs that require regulations to be implemented, EPA would need to take a final action in the Federal Register to incorporate the substitute or additional TCM into the CFR.

Since EPA will have concurred on any substitutions or additions that comply with the procedure established by SAFETEA-LU, EPA would take the final action incorporating the specific substitution or addition into the CFR without additional notice-and-comment rulemaking. EPA believes that it would have good cause under the Administrative Procedure Act to take these actions without additional opportunity for public comment because the substitution or addition was made through the process established by

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<sup>7</sup> The notebook system for compiling SIPs is a process under which EPA revises 40 CFR Part 52 by: 1) revising charts listed in the Identification of Plan section; 2) submitting State regulatory revisions for incorporation by reference into the SIP by means of a revised annual compilation (generally in a looseleaf notebook) of all State regulations listed in these Identification of Plan charts rather than by piecemeal regulation updates; and 3) updating the list of non-regulatory measures in the State's SIP through the use of an informational notice in the rules section of the Federal Register. Non-regulatory measures are not incorporated by reference into the Code of Federal Regulations; therefore, these materials are maintained in the notebook for the State at the EPA regional office and in a notebook maintained in the Office of the Federal Register.

SAFETEA-LU, and because the public would have had the opportunity to comment on the specific substitution or addition during the public comment period on the specific substitution or addition.

**5.20 Is a conformity determination or a SIP revision required when a substitution is made or when a TCM is added?**

No, neither a conformity determination nor a SIP revision is required when an area makes a substitution or adds a new TCM to the approved SIP. However, if the plan and/or TIP need to be amended in order to implement the substitute TCM, all other transportation planning requirements would have to be met.

**5.21 What process should areas outside of metropolitan areas follow to implement this provision?**

For donut areas (i.e., those areas within a nonattainment or maintenance area but outside the metropolitan planning area), this provision should be implemented as above and the MPO associated with the donut area should concur in any substitution.

For isolated rural areas (i.e., those areas within a nonattainment or maintenance area that does not contain any metropolitan area), this provision should be implemented as above, except the state DOT should concur on the substitution or addition because there is no MPO in such an area.

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## **Section 6: Lapse of Conformity**

*SAFETEA-LU section 6011(e) reads as follows:*

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

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

“(10) Lapse.--In this subsection, the term ‘lapse’ means that the conformity determination for a transportation plan or transportation improvement program has expired, and thus there is no currently conforming transportation plan or transportation improvement program.”.

### **6.1 What does this provision do?**

If a nonattainment or maintenance area is not able to determine conformity for its transportation plan and/or TIP by a prescribed conformity deadline, this provision allows an additional 12 months from the missed deadline for the area to correct the problem before a conformity lapse occurs. This provision also provides a statutory definition for the term “conformity lapse.”

### **6.2 When does the provision take effect?**

The provision took effect on August 10, 2005, when SAFETEA-LU was signed into law.

### **6.3 To which “applicable deadlines” does this provision apply?**

This provision applies to two kinds of conformity determination deadlines: 1) the deadlines resulting from the requirement to determine conformity for the transportation plan and TIP at regular intervals; and 2) the deadlines resulting from the requirement to redetermine transportation plan/TIP conformity within two years of an EPA action establishing a new motor vehicle emissions budget.

The regular interval for redetermining conformity has now been amended to four years to coincide with the interval for updating the transportation plan and TIP. During the transition to the new SAFETEA-LU planning requirements, the conformity lapse grace period provision applies to the old three-year and two-year intervals for updating and determining conformity for transportation plans and TIPs, respectively.

The requirement to redetermine conformity after a new motor vehicle emissions budget is established has also been amended by SAFETEA-LU. Previously, conformity needed to be determined within 18 months; SAFETEA-LU increases that period to two years. The requirement to redetermine conformity within two years of EPA's action establishing a new motor vehicle emissions budget applies to: a finding of adequacy; approval of a SIP with a budget that had not previously been found adequate; or promulgation of a federal implementation plan with a budget. (For a more thorough discussion of the deadlines, please refer to the "Frequency of Conformity Determination Updates" and "Conformity Redeterminations" sections of this interim guidance.)

#### **6.4 Does this provision apply to newly designated nonattainment areas?**

No. This provision does not apply to the deadline for newly designated nonattainment areas to make the initial transportation plan/TIP conformity determination within 12 months of the effective date of the nonattainment designation, as required under Clean Air Act section 176(c)(6) and 40 CFR 93.102(d). Thus, the restrictions of a conformity lapse will remain in effect for any nonattainment area for the 8-hour ozone standard that did not have a conforming transportation plan/TIP in place by June 15, 2005. For the fine particulate matter (PM<sub>2.5</sub>) standard, a lapse will occur for any PM<sub>2.5</sub> nonattainment area that does not have a conforming transportation plan/TIP by April 5, 2006. Although DOT and EPA will continue to use the term "lapse" to describe these situations, the statutory and regulatory definition of "lapse" does not cover the newly designated areas since no conformity determination was ever made.

#### **6.5 Does this provision apply to 'donut' areas (as defined in 40 CFR 93.101)?**

Yes. The conformity lapse grace period applies to donut areas in the same manner as it applies to metropolitan areas.

#### **6.6 How can projects be advanced pursuant to transportation planning requirements during the conformity lapse grace period?**

The 12-month conformity lapse grace period begins when the conformity determination required for a transportation plan or TIP is not made by the applicable deadline. During the grace period, the state or MPO may continue to advance projects as long as there is a valid STIP/TIP in place. Project-level conformity requirements must be met. Three specific scenarios are presented below to show how expiration of the plan and/or STIP/TIP at the time of the missed deadline affects the ability to advance projects:

1. If the transportation plan has expired, but the STIP/TIP are still in effect, the nonattainment or maintenance area can continue to authorize and take action on projects in the STIP/TIP throughout the duration of the grace period or the duration of the STIP/TIP, whichever is shorter. The TIP and affected portion of the STIP cannot be amended once the transportation plan expires. Prior to plan expiration, MPOs and

states should ensure their STIP/TIP have the desired projects from their transportation plan to continue to operate during the conformity lapse grace period.

2. If the transportation plan is still in effect, but the STIP/TIP have expired, FHWA/FTA cannot authorize projects. In order to advance projects, a new STIP/TIP must be developed containing only non-exempt and/or exempt projects that are consistent with the transportation plan. A conformity determination must be made for the new TIP unless it includes only exempt projects or TCMs in an approved SIP. For example, including a non-exempt project from the out-years of the transportation plan in the new TIP would require a conformity determination.
3. If both the transportation plan and the STIP/TIP have expired, FHWA/FTA will not authorize projects.

### **6.7 Can conformity lapse grace periods accumulate, one after another, in a given area?**

No. If an area fails to meet an applicable deadline for the transportation plan or TIP, and then while in the conformity lapse grace period also fails to meet an applicable deadline for the other document, there will only be one 12-month grace period, running from the date of the first missed deadline.

Similarly, for example, an area that misses its four-year conformity determination clock gets a 12-month grace period from that point. If during the grace period, the area misses a two-year clock running because new budgets were established, the grace period continues to run from the date of the first missed deadline.

### **6.8 What happens if an area misses the two-year trigger to redetermine conformity after an EPA action establishing a new motor vehicle emissions budget?**

If, after two years, an area is unable to demonstrate conformity using the new emissions budget, and the transportation plan and STIP/TIP are still in effect, then the area will enter the conformity lapse grace period. The area can continue advancing projects in the existing transportation planning documents as long as project-level conformity requirements are met.

### **6.9 If a nonattainment or maintenance area has subarea budgets and one subarea is in a lapse grace period, can other subareas make conformity determinations?**

Yes, if an area has subarea budgets and one subarea is in a lapse grace period, other subareas can continue to make conformity determinations because the subarea in the lapse grace period does not enter a conformity lapse until the end of the 12-month grace period.

### **6.10 What happens at the end of the 12-month conformity lapse grace period?**

A conformity lapse will occur if an area is unable to demonstrate conformity of its transportation plan and TIP at the end of the grace period. The restrictions on the types of projects that can proceed during a conformity lapse did not change with SAFETEA-LU. Please see the joint guidance memorandum issued by FHWA and FTA in January 2002 ([http://www.fhwa.dot.gov/environment/conformity/con\\_guid.htm](http://www.fhwa.dot.gov/environment/conformity/con_guid.htm)) and the April 9, 2003, FTA revised procedures for a conformity lapse (<http://www.fhwa.dot.gov/environment/conformity/ftalapse.htm>) for more information about advancing projects during a conformity lapse.

### **6.11 Can project-level conformity be determined and final environmental documents be approved during the conformity lapse grace period?**

Yes. Records of decision, FONSI, and CEs may be approved during the grace period. Projects must meet all applicable project-level conformity requirements, including any required hot-spot analyses, and must come from the previously conforming transportation plan and TIP. In donut areas, projects must have been included in the regional emissions analysis supporting the previously conforming transportation plan and TIP of the associated MPO.

### **6.12 Can regionally significant non-federal projects be approved during the grace period?**

Yes. However, the project must have been included in the regional emissions analysis supporting the previously conforming transportation plan and TIP.



## **Section 7: Inclusion of Criteria and Procedures in SIP**

*SAFETEA-LU section 6011(f)(4) reads as follows:*

(f) Conforming Amendments.--Section 176(c)(4) of the Clean Air Act (42 U.S.C. 7506(c)(4)) (as amended by subsection (b)) is amended--  
(4) by striking subparagraph (E) (as redesignated by paragraph (1)) and inserting the following:

“(E) Inclusion of criteria and procedures in sip.--Not later than 2 years after the date of enactment of the SAFETEA-LU the procedures under subparagraph (A) shall include a requirement that each state include in the state implementation plan criteria and procedures for consultation required by subparagraph (D)(i), and enforcement and enforceability (pursuant to sections 93.125(c) and 93.122(a)(4)(ii) of title 40, Code of Federal Regulations) in accordance with the Administrator's criteria and procedures for consultation, enforcement and enforceability.”.

### **7.1 What does this provision do?**

This provision streamlines the requirements for state conformity SIPs.<sup>8</sup> Prior to SAFETEA-LU being signed into law, states were required to address all of the federal conformity rule’s provisions in their conformity SIPs. Most of the sections of the federal rule were required to be copied verbatim from the federal rule into a state’s SIP, as previously required under 40 CFR 51.390(d). States were also required to tailor all or portions of the following three sections of the federal rule to meet their state’s individual circumstances:

- 40 CFR 93.105, which addresses consultation procedures;
- 40 CFR 93.122(a)(4)(ii), which addresses written commitments to control measures that are not included in an MPO’s plan and TIP that must be obtained prior to a conformity determination and the requirement that such commitments must be fulfilled; and
- 40 CFR 93.125(c), which addresses written commitments to mitigation measures that must be obtained prior to a project-level conformity determination, and the requirement that project sponsors must comply with such commitments.

Now, under SAFETEA-LU, states are required to address and tailor only these three sections of the conformity rule in their conformity SIPs. In general, states are no longer required to submit conformity SIP revisions that address the other sections of the conformity rule, except for limited cases that are described below.

### **7.2 When does this provision apply?**

This provision took effect on August 10, 2005, when SAFETEA-LU was signed into law.

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<sup>8</sup> Conformity SIPs are different from control strategy SIPs or maintenance plans, as they only include state conformity procedures and not motor vehicle emissions budgets or air quality demonstrations.

### **7.3 Are any new conformity SIP deadlines created by SAFETEA-LU?**

No. SAFETEA-LU does not create any new deadlines for conformity SIPs. Any nonattainment or maintenance area that has missed earlier deadlines to submit conformity SIP revisions (e.g., after previous conformity rulemakings, or new nonattainment designations) continues to be subject to these previous deadlines, but only in regard to the three provisions now required under SAFETEA-LU.

In addition, states are required to submit a conformity SIP revision due to any future rulemaking that substantively changes the three specified sections in the current conformity rule. For example, SAFETEA-LU requires EPA to complete a rulemaking reflecting all SAFETEA-LU conformity provisions by August 10, 2007. If EPA substantively changes any of the three specified provisions in that rulemaking, a conformity SIP revision would be required one year from the publication date of the SAFETEA-LU final conformity rule (40 CFR 51.390(a)).

### **7.4 How does SAFETEA-LU impact areas that have not previously submitted or approved conformity SIPs?**

States that do not currently have submitted or approved conformity SIPs are only required to address the three provisions listed in SAFETEA-LU in their conformity SIPs according to any existing conformity SIP deadline, as described in the previous question.

Once a state has an approved conformity SIP that addresses only the three sections that SAFETEA-LU requires, the state would only revise its conformity SIP if either EPA revises the conformity rule and it affects one of these sections, or the state elects to revise how it addresses one of these three provisions. Any future changes to the federal conformity rules beyond these three provisions would take effect immediately in all states that have only these three provisions in their approved conformity SIP.

### **7.5 How does SAFETEA-LU impact areas that have previously submitted or approved conformity SIPs?**

States that have previously approved conformity SIPs that decide to eliminate the provisions that are no longer mandatory will need to go through a formal SIP revision process to eliminate those provisions from their SIPs. EPA will have to conduct rulemaking to approve the changes to the states' conformity SIPs. EPA will act expeditiously to approve these revisions. EPA will consider using either parallel processing or direct final approval to expedite the approval of such SIP revisions. Such SIP revisions should not be controversial since the provisions are no longer required by the Clean Air Act as amended by SAFETEA-LU.

A state with a previously approved conformity SIP may decide to retain all or some of the federal rule in its SIP. In such a case, the state should be aware that the conformity determinations in the state continue to be governed by the state's conformity SIP. Such a

state would need to revise its conformity SIP when EPA makes changes to the federal rule in order to have those changes apply in the state. For more information please refer to EPA's November 2004 Conformity SIP Guidance which is found at:

<http://www.epa.gov/otaq/transp/conform/policy.htm>.

In addition, some states have submitted conformity SIPs to EPA for approval, but EPA may not have acted on these revisions yet. These states may write their EPA regional office and request that EPA approve only the three provisions that are required to be included in their SIPs and that EPA take no action on the remainder of the submission. States could also leave the full conformity SIP pending before EPA for rulemaking action, however as noted above if EPA approves the full SIP states would need subsequent SIP revisions to coordinate their SIPs with any future changes to the federal conformity rules.

**7.6 How does this provision affect the 12-month conformity SIP submission clocks that were started by the July 1, 2004, and May 6, 2005, final conformity rules?**

EPA and DOT believe that those clocks have been eliminated because those rulemakings did not contain any substantive revisions to any of the three sections of the rule that states are now required to address in their SIPs.

It should be noted that both final rules made very minor changes to section 93.105. The July 2004 final rule changed a reference to a later section of the conformity rule and the May 2005 rule contained a technical correction to a reference to a section of DOT's regulations. EPA and DOT do not believe that either of those changes is significant enough by itself to warrant states being required to update their conformity SIPs within 12 months of the publication of those final rules.

**7.7 How does this provision affect EPA's November 2004 conformity SIP guidance?**

EPA intends to revise this guidance in the near future in order to make it consistent with the revised conformity SIP requirements contained in SAFETEA-LU.

**7.8 Can states continue to include provisions in their SIPs that are more stringent than the federal rule?**

Yes, states can continue to include provisions in their conformity SIPs that are more stringent than the federal rule as long as they apply equally to federal and non-federal entities, pursuant to 40 CFR 51.390(a). This aspect of the current conformity regulation is not affected by SAFETEA-LU.

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## APPENDIX

### Clean Air Act Section 176 As Amended by SAFETEA-LU

#### NOTES:

This appendix includes Clean Air Act section 176 as amended by SAFETEA-LU. EPA and US DOT are providing this document for informational purposes only as an official version of the revised section is not yet available.

The revised portions of this section of the Clean Air Act are shown in **bold**.

From the U.S. Code Online via GPO Access  
[wais.access.gpo.gov]  
[Laws in effect as of January 7, 2003]  
[Document not affected by Public Laws enacted between  
January 7, 2003 and February 12, 2003]  
[CITE: **42USC7506**]

TITLE 42--THE PUBLIC HEALTH AND WELFARE

CHAPTER 85--AIR POLLUTION PREVENTION AND CONTROL

SUBCHAPTER I--PROGRAMS AND ACTIVITIES

Part D--Plan Requirements for Nonattainment Areas

subpart 1--nonattainment areas in general

Sec. 7506. Limitations on certain Federal assistance

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

(c) Activities not conforming to approved or promulgated plans

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

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

(B) that such activities will not--

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(A) the transportation plans and programs--

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

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

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

(B) the transportation projects--

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

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

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

#### **(4) CRITERIA AND PROCEDURES FOR DETERMINING CONFORMITY**

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

**(B) TRANSPORTATION PLANS, PROGRAMS, AND PROJECTS—The Administrator, with the concurrence of the Secretary of Transportation, shall promulgate, and periodically update,** criteria and procedures for demonstrating and assuring conformity in the case of transportation plans, programs, and projects.

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

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

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

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

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

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

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

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

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

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

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

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

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



any pre-existing national ambient air quality standard for a pollutant for which a new or revised standard has been issued).

**(7) CONFORMITY HORIZON FOR TRANSPORTATION PLANS.—**

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

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

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

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

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

**(C) EXCEPTION.—**In any case in which an area has a revision to an implementation plan under section 175A(b) and the Administrator has found the motor vehicles emissions budgets from that revision to be adequate in accordance with section 93.118(e)(4) of title 40, Code of Federal Regulations (as in effect on October 1, 2004), or has approved the revision, the demonstration of conformity at the election of the metropolitan planning organization, after consultation with the air pollution control agency and solicitation of public comments and consideration of such comments, shall be required to extend only through the last year of the implementation plan required under section 175A(b).

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

**(E) AIR POLLUTION CONTROL AGENCY DEFINED.—**In this paragraph, the term ‘air pollution control agency’ means an air pollution control agency (as defined in section 302(b)) that is responsible for developing plans or controlling air pollution within the area covered by a transportation plan.

**(8) SUBSTITUTION OF TRANSPORTATION CONTROL MEASURES.—**

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

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

**(ii)** if the substitute control measures are implemented—

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

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

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

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

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

**(II) consultation with the Administrator; and**

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

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

**(B) ADOPTION.—**

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

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

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

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

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

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

**(ii) a revision of the implementation plan.**

**(E) CONTINUATION OF CONTROL MEASURE BEING REPLACED.—A control measure that is being replaced by a substitute control measure under this**

paragraph shall remain in effect until the substitute control measure is adopted by the State pursuant to subparagraph (B).

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

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

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

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\1\ So in original. Probably should be ``paragraph (5),".

\2\ See References in Text note below.

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

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

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

#### References in Text

Section 7505a of this title, referred to in subsec. (c)(6), was in the original ``section 175(A)" and was translated as reading ``section 175A", meaning section 175A of act July

14, 1955, which is classified to section 7505a of this title, to reflect the probable intent of Congress.

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

#### Codification

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

#### Amendments

2000--Subsec. (c)(6). Pub. L. 106-377 added par. (6).

1996--Subsec. (c)(4)(D). Pub. L. 104-260 added subpar. (D).

1995--Subsec. (c)(5). Pub. L. 104-59 added par. (5).

1990--Subsecs. (a), (b). Pub. L. 101-549, Sec. 110(4), struck out subsec. (a) which related to approval of projects or award of grants, and subsec. (b) which related to implementation of approved or promulgated plans.

Subsec. (c). Pub. L. 101-549, Sec. 101(f), designated existing provisions as par. (1), struck out "(1)", "(2)", "(3)", and "(4)" before "engage in", "support in", "license or", and "approve, any", respectively, substituted "conform to an implementation plan after it" for "conform to a plan after it", "conform to an implementation plan approved" for "conform to a plan approved", and "conformity to such an implementation plan shall" for "conformity to such a plan shall", inserted "Conformity to an implementation plan means--" followed immediately by subpars. (A) and (B) and closing provisions relating to determination of conformity being based on recent estimates of emissions and the determination of such estimates, and added pars. (2) to (4).

1977--Subsec. (a)(1). Pub. L. 95-190 inserted "national" before "primary".