GENERAL CONFORMITY GUIDANCE:

QUESTIONS AND ANSWERS

Office of Air Quality Planning and Standards
(MD-15)
U.S. Environmental Protection Agency
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INTRODUCTION

The final general conformity rules were promulgated November 30, 1993, 58 FR 63214. This question and answer guidance document contains issues raised at the general conformity workshop held in Virginia on March 7-8, 1994, and deals with questions frequently asked of EPA regarding conformity.

The guidance represents EPA's interpretation of the general conformity rule. Federal agencies should be advised that it is the responsibility of each agency to make its own conformity determinations for its actions and to be able to justify its own application of the conformity requirements.

As new issues arise, this document will be revised as appropriate. EPA will keep the general conformity questions and answers (Q's and A's) in the Policy and Guidance section of Title I on the CAAA bulletin board of the TTN and will update it as necessary.

TABLE OF CONTENTS

Overview of Air Quality Management 1

Background of General Conformity 3

Applicability 6

Criteria for Conformity Determination 19

Procedures 26

Mitigation 29

Transportation Conformity 30

State Agency Concerns 32

Conformity Determination and NEPA 36

OVERVIEW OF AIR QUALITY MANAGEMENT

State Implementation Plan (SIP)

1. What is EPA's average approval time for a SIP once it has been submitted to a regional office?

A: The Act allows EPA two months from the time a SIP is submitted to determine if the plan is complete. After determining that a SIP is complete, EPA then has one year to approve that SIP. EPA risks litigation if it fails to meet this time frame.

2. Is a State allowed to enforce provisions of its SIP before a final SIP approval has been granted by EPA?

A: Yes, if the State has already adopted the rule that it has submitted to EPA as part of its SIP and made it effective. Both State and Federal requirements would apply in such an interim period. However, section 93.151 of the Federal general conformity rule prohibits State conformity rules from being more stringent than EPA's conformity rules, unless the more stringent State rule applies equally to Federal and non-Federal entities. Therefore, if EPA ultimately determines that any State rules are more stringent than EPA's rule, the State could not proceed in any subsequent State enforcement actions, since those portions would be invalid.

3. What happens, after a SIP is submitted for approval, if EPA determines that emissions were not estimated accurately? Is there any provision for corrective actions?

A: If EPA is aware of the discrepancies between the actual emissions inventory and the emissions in the SIP, it may ask the State to modify the SIP before approving it. EPA may also disapprove the SIP. If after approving the SIP it was determined that the inventory contained a significant error, EPA would probably ask the State to revise the SIP to correct the emissions inventory.

4. Additional guidance on State SIP revisions submittal is needed.

A: Federal agencies should consult with the appropriate State and local agencies regarding matters related to the SIPs; EPA Regional Office air program staff can also provide answers to specific questions. The SIP process is mandated under Title I, specifically section 110, and part D. However, the development and adoption processes differ from State to State.

Area Classification

5. In view of the meteorological dynamics, and the possibility that air quality monitors may be located too close to emissions sources, why are so few air quality exceedances allowed before an area "violates" the NAAQS and is classified as nonattainment?

A: The reason that so few exceedances can cause a violation of the standard is due to the way the standard itself was written into regulation. 40 CFR part 50 defines what constitutes a violation of the standard. The number of exceedances that constitute a violation was set when EPA set the air quality standards. The number was based on health effects observed at approximately the same concentrations occurring over the frequencies that are covered in the standard itself. The Act requires that the standards be reviewed periodically; EPA is currently reviewing standards for ozone and PM-10. The location of air quality monitors is carefully regulated as described in 40 CFR part 58.

BACKGROUND OF GENERAL CONFORMITY

Statutory Obligation

1. Why did EPA promulgate this rule?

A: This rule was a statutory obligation under section 176(c)(4) of the 1990 Amendments as set forth by Congress. Extensive meetings before the proposed and final rules were conducted by EPA with interest groups including, the building industry, environmental groups, STAPPA/ALAPCO, and diverse Federal agencies, to solicit and incorporate their input.

2. Why is section 176 necessary if Federal activities are treated just like private activities under section 118?

A: Section 176 authorizes EPA and the States to regulate Federal activities to a greater extent than they regulate private activities. All activities, private, State and Federal, must comply with specific SIP requirements and obtain pre-construction permits, if applicable. However, pursuant to section 176, only Federal agencies are required, as an additional matter, to determine, prior to taking that action, that such action, when taken, will conform to the SIP.

Attainment/Unclassifiable Areas

3. Will EPA promulgate a rule for attainment/unclassifiable areas? When?

A: It was announced in the final rulemaking that the current conformity rule only applies to nonattainment areas. A separate rulemaking process would establish a conformity rule for attainment/unclassifiable areas. No schedule has been established yet for writing this rule.

4. How will the fact that attainment/unclassifiable areas are not required to submit a SIP affect the rule for these areas?

A: EPA's current rule only applies to nonattainment and maintenance areas. Any subsequent conformity rule would establish relevant conformity criteria and procedures for attainment/unclassifiable areas.

State Obligations

5. Do States need to adopt regulations or include other requirements in the SIP that relate to general conformity?

A: States need to adopt rules or regulations or have SIP requirements that bind the Federal agencies making the conformity determination to compliance with the methods indicated in the SIP. In most cases, States may adopt regulations; however, States that have authority to issue executive orders or similar powers that are binding without the need for a rulemaking may elect to do so.

6. How would EPA suggest that States track projects using emissions budgets when the emissions budgets cover growth for all projects (Federal and State) and general conformity only applies to Federal projects? (Moreover, it is conceivable that projects occurring later in time may find that budgeted emissions have been spent by earlier projects and the later projects would be exceeding the emissions budget.)

A: States are required to track their emissions over time for certain types of areas, for example, in ozone nonattainment areas classified as serious and above. Reasonable Further Progress (RFP) must be tracked and periodic emission inventories must be reported. The tracking exercise determines if the areas are making the required reductions in emissions. However, it is the responsibility of each State to determine the best way to collect information on emission changes on a periodic basis. If the State wants to establish criteria for the use of the emissions budget (*e.g.*, to prevent a first-come, first-serve scenario), it is free to do so.

Applicability

7. Why does the general conformity rule relieve actions resulting in relatively high *de minimis* emission levels while the transportation conformity requires a conformity analysis for every highway and transit project regardless of their sizes?

A: Under the general conformity rule, conformity determinations are made on a project-by-project basis. However, in an effort to limit time and resources invested by agencies in making determinations for thousands of Federal actions annually, EPA included the *de minimis* levels in the rule to serve as cutoff points to focus on those Federal actions likely to have the most significant impacts on air quality. In transportation conformity, the whole transportation plan and transportation program are subject to a conformity determination. If emissions reductions are required, those reductions should be made at the program level. As far as the transportation project itself is concerned, the transportation conformity rule requires only that the project come from a conforming plan, which could include both projects with significant emissions increases and projects with

emissions decreases, and then that an air quality modeling analysis be conducted locally at the project level to decide whether the transportation project conforms.

Criteria

8. What constitutes an approved SIP for general conformity demonstration purposes?

A: The SIP that has been most recently approved by EPA should be used in the general conformity determination process. If a SIP revision has been adopted by a State and submitted to EPA but has not been approved by EPA at the time of the conformity analysis, it cannot be used for general conformity determinations. However, a State may commit to revise the SIP to accommodate the action. In such a case, the State is actually committing to changing the SIP; whether or not the SIP to be revised has been approved or not does not become an issue.

9. Which party is responsible for identifying a project in the SIP?

A: States are not usually required to ask Federal agencies to identify specific projects for inclusion in the SIP. On the other hand, State agencies follow a public process in developing and adopting attainment demonstrations. The EPA encourages the Federal agencies to contact the State and local air quality agencies and notify those agencies of any projects that need a conformity determination so that they can be specifically included in an attainment demonstration. This process is a very straightforward method of determining conformity.

Future Information

10. How is it possible to receive copies of new guidance as it is developed, including questions and answers documents?

A: Contact your appropriate EPA Regional Office as necessary.

APPLICABILITY

General

1. How do you decide when a general conformity determination is required?

A: Before any approval is given for an action to go forward, an agency must apply the applicability requirements to a proposed Federal action to determine if a conformity determination is required. The applicability analysis can be completed concurrently with the NEPA analysis. It probably would occur during the environmental assessment. The specific timing would be determined by the Federal agency.

2. What is the difference between indirect and direct emissions and what are the implications of classifying the emissions?

A: Direct emissions are those emissions caused by or initiated by the Federal action and occur at the same time and place as the action. Such emissions include, for example, operational emissions of a Federal facility or the emissions from dredging equipment used in a section 404 permit action. Indirect emissions are those caused by the Federal action, but may occur later in time and/or may be farther removed in distance from the action itself. Direct and indirect emissions must be reasonably foreseeable and the Federal agency must be able to practicably control them as part of its continuing program responsibility. It must also be possible to locate and quantify direct and indirect emissions at the time a conformity determination is made. The Federal agency is not obligated to account for possible emissions that might result from the Federal action, but cannot be specifically identified, quantified or located.

3. Can you address the issue of "potential to emit" versus "actual emissions"?

A: Only those emissions from the project that are reasonably foreseeable should be identified at the time the conformity determination is made (*i.e.*, the location of emissions must be known and they must be quantifiable). The analyses should consider the greatest expected level of direct and indirect emissions. Potential indirect emissions that are possible, but not known and quantifiable, need not be considered.

4. Are the U.S. territories of Puerto Rico and Guam subject to the general conformity rule?

A: There are PM-10 nonattainment areas in Puerto Rico and SO_2 nonattainment areas in Guam. Those territories are treated as States for the purpose of air quality control. Thus, the general conformity rule does apply in the nonattainment or maintenance areas in these territories.

5. How do Indian tribe programs conform? How much should States and EPA budget for this?

A: The Act includes a section that requires EPA to promulgate regulations and procedures for treating tribes as States for the purposes of air quality. However, those regulations have not yet been developed. The general conformity rule applies in all nonattainment areas. The Bureau of Indian Affairs (BIA) will be responsible for determining the conformity of its actions in nonattainment areas on tribal lands. Tribes will be involved through the public participation process.

6. Several States feel that aircraft emissions should not be considered in conformity determinations because these emissions are part of the planned growth of the area. Do these emissions need a conformity determination?

A: It is the State's decision as to whether emissions from aircraft operations are accounted for in the SIP emissions budget because they are part of the planned growth of an area. A conformity determination is necessary for any aircraft emissions that are above *de minimis* levels, regionally significant, or not otherwise exempt. Inclusion in the SIP emissions budget is one of the criteria that can be used for demonstrating conformity after it is determined that a conformity determination is needed.

7. For a border station, should vehicle traffic that is backed up across the border into Mexico or Canada be considered in the conformity determination?

A: Since the emissions are generated outside the United States and thus not in a nonattainment or maintenance area, the rule does not apply to this source of emissions.

8. Assume that condominiums were developed on private land adjacent to a ski resort project that is on Federal land. Is such development subject to the conformity rules?

A: Generally no, since the Federal agency leasing the land for the ski resort has no control over the private land. However, if the agency could condition adjacent development on approval of the ski area lease and did so, then it would have to be considered for conformity.

9. Which conformity rule would apply to a commuter rail project to be built over leased tracks?

A: This depends on (1) whether funding or approval under the Federal Transit Act is required (which would require a conformity determination under the transportation conformity rule) or whether another Federal agency action is involved (which would be covered under the general conformity rule); (2) who is leasing the tracks (if a private owner is leasing the tracks to a private rail company, conformity may not apply); and (3) whether other Federal approvals (*e.g.*, a section 404 permit) are needed. As a practical matter, if any

significant number of commuters will use the train, the metropolitan planning agency (MPO) would include it in its transportation modeling and its effects would be included in the transportation conformity determination. In some cases, each rule would apply to different portions of the project.

10. Does grandfathering apply for a project in an attainment area that has been redesignated nonattainment when an environmental analysis had been completed prior to the effective date of the rule?

A: If a final NEPA analysis has been completed by January 31, 1994, the action is grandfathered and the rule would not apply. The rule does not specifically address the case where an attainment area is redesignated as nonattainment at some future point in time after the date of rule promulgation.

11. Will Disney's Project America be subject to the general and/or transportation conformity rules if the project uses Federal land and financial incentives from Federal agencies?

A: Any highway or transit projects associated with Disney's Project America are subject to the transportation conformity rule if they require funding or approval by the Federal Highway Administration or the Federal Transit Administration under title 23 U.S.C. or the Federal Transit Act. The highway improvements associated with the Disney Project at the present time would be subject to the transportation conformity rule. If any project occurs at least in part on Federal land, it is subject to the general conformity rule. In addition, if Federal funding is used, or if any Federal approval is needed [*i.e.*, a section 404 permit under the Clean Water Act (CWA)], the general conformity rule may apply. An applicability analysis would be necessary to determine whether a conformity determination is needed.

Actions Exempt from Conformity

12. Section 93.153(d)(4) of the rule states that "alterations and additions of existing structures as specifically required by new or existing applicable environmental legislation or environmental regulations" are exempt from the conformity requirements. Would upgrading of a wastewater facility by the addition of secondary wastewater treatment facilities in response to the Clean Water Act requirements be subject to the requirements of the rule?

A: As long as the upgrade did not entail any increase in capacity of the water treatment facility, the action would not be subject to conformity. However, if the upgrade of the facility involved an expansion of the capacity, then the expansion would become subject to the rule.

13. Does a State NSR or PSD program that may be more stringent than the Federal program have to be Federally-approved in order to qualify it as an exemption under the conformity rule?

A: In order for a State NSR permit program to be Federally enforceable, it has to be Federally approved. Even if a State NSR or PSD program is more stringent than the Federal NSR or PSD program but is not Federally-approved, then the fact that an activity receives a State permit is not enough to qualify as an exemption under the general conformity rule. EPA has to review the State program to ensure that it complies with Federal requirements.

14. Does rulemaking require a conformity determination?

A: No, rulemaking is exempt from the conformity determination process. Section 93.153(c)(iii) states that "rulemaking and policy development and issuance" are not subject to conformity.

15. Does a base closure require a conformity determination?

A: If the base closure involves only sale of property, and the military is no longer maintaining authority over the base, a conformity determination is not required. Exemption XIX under section 93.153(c)(2) of the rule states that "actions (or portions thereof) associated with transfers of land, facilities, title and real properties through an enforceable contract or lease agreement where the delivery of the deed is required to occur promptly after a specific, reasonable condition is met, such as promptly after the land is certified as meeting the requirements of CERCLA, and where the Federal agency does not retain continuing authority to control emissions associated with the lands, facilities, title or real properties" are exempt from the conformity process. However, if the military leases the base and sets conditions regarding the future use of the base, then a conformity determination is required.

16. Are emissions from CERCLA's non-National Priority List (non-NPL) sites exempt from the general conformity determination?

A: Yes, to the extent that direct emissions from the cleanup activities on non-NPL sites are permitted under NSR or emissions are exempt from other regulations under CERCLA by the statute itself. Emissions not so addressed, though, are subject to conformity. Although EPA can spend Superfund money only on NPL sites, other agencies, such as the Department of Defense, can take action on non-NPL sites.

17. How does the rule apply to wildfire-response time?

A: Responses to wildfires are considered emergency actions and as such are exempted from the conformity requirements.

18. The United States, the State of Utah, and Salt Lake City want the 2002 Winter Olympics to be held in Salt Lake City. If the United States Forest Service (USFS) does not provide downhill ski slopes, the Olympics must be hosted elsewhere. Can the USFS get an exemption of the rule?

A: If the USFS was to approve the expansion of an already existing ski resort for the purpose of hosting the Olympics, this action would be subject to a conformity determination.

Area Classification

19. How does the general conformity rule apply to nonclassifiable/unclassifiable areas?

A: For ozone and CO purposes, nonclassifiable areas are areas which are designated nonattainment and are classified as "incomplete data" ozone areas or "not classified" CO areas. Because they are nonattainment areas, they are subject to the conformity rule. Other "unclassifiable" areas are areas which are actually designated "Unclassifiable or Attainment," and as such, are not subject to the current general (or transportation) conformity rule.

20. Does the rule apply to activity that occurs in attainment areas that could impact nonattainment areas?

A: If an activity in an attainment area causes indirect emission increases within a nonattainment area, they may have to be analyzed. The current nonattainment rule does not indicate how this situation should be dealt with. Until EPA issues guidance on this, or addresses this instance in an attainment area rule on conformity, Federal agencies should make their own decisions as to how the rule applies to attainment areas with respect to this scenario.

21. Does the rule apply to Class I areas?

A: If a Class I area is in a nonattainment or maintenance area, then the conformity requirements would apply. In addition, Class I areas located within a radius of 100 km from the area where the Federal action is taking place are subject to the public participation process, and the Federal land manager should be notified of the proposed action, the draft conformity determination, and the final conformity determination.

Regional Significance

22. When determining regional significance, ten percent of what emissions should be considered?

A: The total nonattainment or maintenance area's emissions inventory should be considered for the specific pollutant or precursor. Any milestone emissions inventory in the applicable SIP should also be considered (through RFP, attainment and/or maintenance demonstrations).

23. Does the ten percent threshold of regionally significant actions used in determining applicability include emissions from mobile sources?

A: Yes, all emissions from stationary, area, and mobile sources should be included.

24. What should be done to comply specifically when in a nonattainment area but below *de minimis* levels?

A: If an action is in a nonattainment area and the total emissions are below *de minimis* levels, a determination of whether the project is regionally significant is still needed. If it is not regionally significant, then the conformity requirements do not apply to this project based on its projected emissions. No official reporting of *de minimis* actions is required. An agency may choose to keep records, for its own purposes, of *de minimis* actions and the reasons for the *de minimis* classification.

Calculation of De Minimis Levels and De Minimis Determination

25. How can a State track *de minimis* increases in the emissions budget monitoring system if the State does not have access to the Federal agency's analysis determining that the action is below *de minimis* levels?

A: The rule does not require the development of a system for tracking Federal actions. States can obtain the information they need on *de minimis* increases through NEPA or the Freedom of Information Act (FOIA); in addition, the ongoing updates of an area's emissions inventory and transportation model conducted by the MPO will reflect increases in traffic due to increases in Federal activities.

26. How do we determine *de minimis* without doing complicated emissions studies?

A: Historical analysis of similar actions could be used in cases where the proposed projects are similar in size and scope to previous projects. More complex projects may require more detailed activity analyses to determine whether emissions exceed *de minimis* levels. NEPA analyses may provide the necessary emissions studies.

27. Are the *de minimis* levels calculated as the difference between emissions from the proposed action and the baseline emission levels?

A: The *de minimis* levels are established in section 93.153(b) and vary according to the type of pollutant and severity of the nonattainment area. These are levels established in the rule and are consistent for all conformity determinations (unless the State chooses to set lower *de minimis* levels and apply the conformity requirements to nonfederal as well as Federal entities). The calculation of total project emissions is made and compared to these *de minimis* cutoffs. If the emissions for a pollutant are above *de minimis*, the project requires a conformity determination. All emissions from the project must be analyzed and found to conform, not only those above the *de minimis* levels.

28. Are *de minimis* determinations non-rebuttable?

A: Not all *de minimis* determinations are non-rebuttable. There are two types of exemptions under the *de minimis* process. First, actions with total direct and indirect emissions actually below the *de minimis* level [section 93.153(c)(1)]; *de minimis* determinations for these actions are rebuttable. Second, actions that EPA declared as being below *de minimis* levels in the final rule [section 93.153(c)(2)]; *de minimis* determinations for these actions are non-rebuttable.

29. Can a Federal agency make changes to its proposed action so that its emissions would fall below *de minimis* levels as a way to get around the conformity determination process and the use of mitigation measures as part of that process?

A: As long as the changes to the proposed action are made up front before the action occurs, the Federal agency can take measures to reduce its emissions from the proposed action to in fact be below *de minimis* levels and, thus, the rule would not apply. The changes must be State or Federally enforceable to guarantee that emissions would be below *de minimis* in the future as well as in the present. This is not "mitigation" under the rule because the rule does not apply to projects that are below *de minimis* levels. However, if the Federal agency cannot bring the emissions from its action to below *de minimis* levels, then it has to go through the conformity determination process. As part of this process, mitigation measures may be identified. These measures, however, should be used to reduce the emissions from the action down to zero and not just to below *de minimis* as is the case when the Federal agency decides up front, before the action occurs, to reduce its emissions to below *de minimis* levels. If at any time the emissions from the project in fact exceed *de minimis* levels, the project would be required to have a conformity determination.

30. Should the emission inventory of the nonattainment area be compared to the project itself to determine applicability?

A: Emissions from the project should first be compared to the relevant *de minimis* levels. If the project is not *de minimis*, no comparison to the SIP emission inventory is necessary for applicability purposes (a conformity determination must then be made for the action because it is not *de minimis*). If the project is found to be *de minimis*, the emissions from the project should be compared to the SIP emission inventory to determine whether the project is regionally significant.

31. In a base realignment case where personnel from one base are moved to another base in the same air quality management district, could net emissions be used to determine if the action is below *de minimis* levels?

A: Yes, as long as both bases are in the same nonattainment area and the Federal action affects both bases; double counting of emission decreases must be avoided.

32. For ozone, are VOC and NO_x emissions added to determine if the action exceeds *de minimis* levels?

A: No, each of the ozone precursors should be examined independently of the other.

33. In calculating *de minimis* levels for applicability purposes, does the area's nonattainment status for one criteria pollutant make the *de minimis* threshold for other criteria pollutants relevant?

A: No. The Federal agency must only consider the nonattainment pollutants from the action.

Indirect Emissions

34. How is "control" defined in "indirect emissions under the control of the Federal agency"?

A: "Control" means the ability to regulate in some way the emissions from the Federal action. The ability to regulate may be demonstrated directly such as through the use of emissions control equipment on a smokestack, or indirectly such as through the implementation of regulations or conditions on the nature of the activity that may be established in permits or approvals or by the design of the action. An example of control includes the ability of a Federal agency to control the level of vehicle emissions by controlling the size of the parking facility and setting requirements for employee trip reductions.

35. Would emissions to and from a ski recreational area be considered under Federal control?

A: It is EPA's interpretation that emissions to and from a ski recreational area are considered under Federal control where the agency has the ability to practically control these emissions through approval of the project design. For example, the ski resort will have parking designed to accommodate a specific number of vehicles and/or a requirement for shuttle buses. The number of lifts provided by the resort will also limit the number of people that will commute to the resort. However, it is up to each Federal agency to review its own unique legal authority and determine what emission-generating activities it has the ability to control.

36. If 2,000 new office jobs are established at a location with existing office space, must the emissions from the 2,000 commuters be considered in a general conformity determination if the emissions are above *de minimis* levels?

A: Emissions from commuters are indirect emissions which must be considered in a general conformity determination. However, one way to demonstrate general conformity is to consider the action as part of a conforming transportation plan and TIP (according to the transportation conformity rule). The transportation plan and TIP's conformity determination is often based on transportation modeling which makes assumptions about employment levels, based partly on an area's available office space. If it can be shown that the transportation plan and TIP's conformity determination was based on modeling which assumed a level of employment that accounted for the 2,000 new jobs (*e.g.*, the model assumed maximum utilization of existing office space and corresponding employment), the emissions resulting from the commuters could be considered to satisfy the general conformity test.

37. Are vehicle emissions generated from Federal employees commuting to their work place assumed to be reasonably foreseeable?

A: Yes.

38. In the case of base realignment where personnel from one base are moved to another, is the Federal agency accountable for emissions from personnel commuting to the new base?

A: The preamble to the rule indicates that employee trips to and from a Federal project are to be included in the emissions calculations. The Federal agency can impose measures that may affect the emissions from such trips. Consequently the agency has the ability to control these indirect emissions and they should be considered for conformity purposes.

39. A Federal property is developed by a private developer. The property was transferred to the private developer by deed and only a small portion of the property remained under Federal control. Is the Federal agency responsible for the emissions from the private development, specifically non-Federal employee vehicles and construction emissions?

A: The Federal agency is only responsible for the emissions that occur on the portion of the land that remained under Federal control. The Federal agency therefore may not be responsible for the emissions resulting from the private development since the land was transferred to the developer by deed.

40. Do emissions produced by a contractor providing goods and services to a Federal agency qualify as indirect emissions?

A: Emissions from a contractor qualify as indirect emissions if the contractor is located at the Federal facility on Federal land. However, if the agency is buying goods and services that are produced at the contractor's facility, the situation becomes one of Federal procurement. During the rulemaking process, the agencies could not reach a consensus on this issue. The preamble to the rule indicated that there will be future rulemaking that will cover procurement. Until then, the Federal agencies are to interpret the rule as they choose.

Bubbling Activities

41. Are bubbling activities allowed under the conformity rule?

A: If both actions are in the same nonattainment area, the emissions decreases from one action could be used to offset the VOC or NO_x emissions increases from the other action. If two different agencies have responsibility for those separate actions, both agencies must commit to offsetting the emissions increases and these commitments must be federally enforceable.

42. Are bubbling activities and emissions offsets from two different activities allowed under the conformity rule if the two activities are not occurring within the same time frame?

A: Offsets have to occur at the same time as the emission increases for which the offsets are necessary (*e.g.*, emission increases from base realignments cannot be offset with emission reductions that would occur from future base closures unless the actions were timed in such a way so that there is no increase in emissions at any time). For more information, refer to EPA's Economic Incentive Program Rules.

Segmentation

43. Could a project be broken down into segments so that each segment would be below *de minimis* levels when the project as a whole exceeds the *de minimis* levels?

A: No, all reasonably foreseeable emissions must be included for the project as a whole in determining applicability. However, if there are emissions from a project that are truly not foreseeable, then a Federal agency may be able to claim that their action is below *de minimis* levels and therefore exempt. If a person or agency believes that the Federal agency is not being forthright in their calculation of total emissions, then that information could be requested under the Freedom of Information Act. Once any emissions become foreseeable, a conformity determination would be necessary.

44. If a military base is leasing portions of its land to both city and private developers for various purposes, including landfills, wastewater treatment, and mining operations, must all emissions from the activities be considered for conformity purposes?

A: All the emissions from activities that are part of the lease should be considered. For example, in the case of the wastewater treatment plant, all emissions from the plant are considered direct emissions. Emissions from sanitation trucks entering the facility are considered indirect emissions. Where all the activities occur as part of one project, all reasonably foreseeable emissions must be considered in one conformity determination.

45. Regarding Federal land management plans that include more than one planned burn, would the conformity rule's *de minimis* levels apply to each burn or to all burns together as addressed in the land management plan?

A: To the extent that emissions from all or some of the burns were reasonably foreseeable at the time the plan was developed, the cumulative effect should be considered. However, if emissions from certain prescribed burns were not reasonably foreseeable at the time the plan was developed, then each of those burns would have to be compared separately to the *de minimis* levels once the emissions become foreseeable to determine whether a conformity determination is required at the time the individual Federal actions are taken.

Enforcement

46. Since *de minimis* actions require no documentation, how does EPA monitor the Federal agencies to ensure that abuses do not occur?

A: A conformity determination is a requirement that is imposed on the Federal agencies by the Clean Air Act. They must make their own determination according to the criteria outlined in the rule promulgated by EPA. Although documentation of *de minimis* determinations is not required, EPA will undoubtedly be reviewing some actions of

particular environmental interest. Moreover, as with any other Federal requirement, agencies are subject to litigation from and examination by interest groups. Finally, even though the conformity rule does not require documentation of *de minimis* decisions, the disclosure requirements of NEPA may.

Following the adoption by States and the approval by EPA of SIP revisions, both States and EPA will have enforcement authority. For more information on State policy options on this issue, refer to question 8 in the *State Agency Concerns* section.

Applicability to Prescribed Burning

47. Would prescribed burning programs at historical acreage and fuel levels (no increase) be considered *de minimis*?

A: Paragraph "c" of the applicability section covers "continuing and recurring activities such as permit renewals where activities conducted will be similar in scope and operation to activities currently being conducted." If the prescribed burning program is an ongoing program of a set number of acres per year in the same general geographic area, an action to continue the program at or below the existing level would be considered per se *de minimis* under section 91.853(c)(2)(ii) of the rule and would be exempt from the conformity rules. Should a conformity determination be required, paragraph (5)(C)(iv) of section 93.158 of the rule allows conformity determinations to be based on the finding that the activity is occurring at baseline levels. However, if there are prescribed burning goals in a land management plan without a specific program of ongoing burns, or if the burns occur in a different geographic area, it may be questionable whether the action is continuing or recurring, or whether the Federal agency will be re-initiating an action previously terminated for some reason. In addition, if the annual acreage goal exceeded the historic average goals, the action is not automatically *de minimis* and emissions from the burns should be compared to the rule's *de minimis* levels to determine if a conformity determination is required.

48. If a prescribed burn is approved and permitted by a State agency, must a separate conformity determination also be made by the Federal agency?

A: If the prescribed burn results in emissions above *de minimis* levels, a conformity determination would be required by the Federal agency even if the State agency made a separate determination. One of the criteria that Federal agencies can use as a basis for a conformity determination is inclusion of the activity in the SIP if the SIP is approved or promulgated by EPA. If a State agency's approval is pursuant to the requirements in the SIP, and emissions are accounted for in the attainment demonstration, the Federal agency can make its own conformity determination on that basis.

49. Is a conformity analysis required where emissions from an activity occur in a different season than the season during which the NAAQS of the relevant pollutant is violated? (For example, prescribed burning in the summer results in PM-10 emissions, but the PM-10 24-hour air quality standard is violated in the winter.)

A: A conformity determination is required for any non-exempt action in a nonattainment area. However, if the attainment demonstration indicates that the air quality analysis for all seasons shows that 24-hour air quality violations are expected to occur in the winter only and the analysis notes that prescribed burning in the summer has been considered as part of the SIPs attainment demonstrations, then a positive conformity determination can be made provided that the analysis in the State's demonstration accounts for and includes the magnitude of prescribed burning proposed by the Federal land manager. Specifically, the preamble to the general conformity rule states that "if a burn occurs during a time of year when a nonattainment area does not experience violations of the NAAQS and the applicable SIP's attainment demonstration specifically reflects that finding, then such a burn may be determined to conform pursuant to section 93.158(a)(1)." However, if the SIP does not account for the burning and the proposed burning emissions are above the rule's *de minimis* levels, then the Federal land manager must determine conformity through one of the rule's other conformity criteria.

50. How does the rule apply to prescribed burns in land management plans?

A: If prescribed burns are included in a conforming land management plan, then individual conformity determinations are not required for the individual burns. However, in order for positive conformity determinations to be made at the land management plan level, the location of the burns in the nonattainment area must be known and their emissions must be quantifiable.

CRITERIA FOR CONFORMITY DETERMINATION

General

1. Are there/will there be any additional guidance or emphasis on determination of conformity in maintenance areas?

A: The criteria for determining conformity in maintenance areas established under the rule are identical to those for nonattainment areas.

2. How do you determine which conformity criteria in section 93.158(a) to use?

A: It is up to each Federal agency to decide on the appropriate criteria, given the type of emissions (i.e., pollutant) and availability of options for the particular area. Clearly, the simplest way of demonstrating conformity is for the project emissions to be included in the SIP demonstration or the emissions budget. However, these may not be options in the nonattainment area where the Federal action is occurring. In such situations, it is incumbent on the Federal agency to determine other means of demonstrating conformity. It is advised that the Federal agency consult with the State and local air officials early in the conformity decision-making process to determine the appropriate criteria to use and to assure that the most up-to-date models, emission factors, and population estimates are being used.

3. Must a Federal agency determine conformity by only <u>one</u> of the criteria listed in section 93.158?

A: No, a combination of criteria may be used to get a project to conform.

4. How is conformity determined on tribal lands?

A: An action requiring a conformity determination should conform to the applicable Tribal Implementation Plan (TIP). If a TIP does not exist, the action would have to conform to the applicable SIP.

Baseline Emissions

5. To determine a net increase in emissions, a baseline level of emissions is required. How do you determine the appropriate baseline level? What time frame should be used to determine baseline year?

A: For purposes of section 93.158(a)(5)(iv), where EPA has not approved a revision to the relevant SIP attainment or maintenance demonstration since 1990, the baseline emissions reflect the historical activity levels that occurred in the geographic area affected by the

proposed Federal action during one of the following: (1) calendar year 1990, (2) the calendar year that is the basis for the designation (or where the designation is based on multiple years, the most representative year,), if a designation is promulgated in 40 CFR part 81; or (3) the year of the baseline inventory in the PM-10 applicable SIP.

6. Are Federal agencies required to use the calendar year 1990 whenever possible?

A: The rule allows the agencies to choose between 1990 and the calendar year(s) that was (were) the basis for designation, or the year of the applicable PM-10 baseline inventory.

7. Should a determination proceed if an approved SIP is not available and very little baseline information is available?

A: Where EPA has not approved a revision to the relevant SIP attainment or maintenance demonstration since 1990, the total of direct and indirect emissions from the action for the future years may be compared with the baseline emissions as described in section 91.158(a)(iv)(A) and (B). If the base year activity data are not credible, then another option should be used to show conformity.

8. In section 93.158(a)(5)(iv), how is "most representative year" defined in "where the classification is based on multiple years, the most representative year...?" Can the average of multiple years be used as the most representative year or should one of the multiple years be used as the most representative year?

A: The rule does not specify how the Federal agencies must define "representative." The Federal agencies may provide their own interpretation of "most representative year" in a way that does not conflict with the provisions of section 93.158(a)(5)(iv) or with the preamble to the March 15, 1993 proposal.

Emission Offsets

9. In military base realignment, our experience has been that there is no particular way of offsetting CO emissions. How could military bases be realigned without a practical solution to the CO problem in CO nonattainment areas? What background concentrations should be used?

A: CO offsets from large stationary sources should also be considered. In some cases, offsets would not be needed; (*e.g.*, where CO is determined to be a problem at the local area level only.) If no offsets/mitigation measures are available and dispersion modeling shows that the realignment will cause or increase the severity of CO violations, a positive conformity determination cannot be made. However, the Department of Defense (DOD) may get a commitment from the State to revise the SIP. Available CO mitigation measures may include measures to reduce commuting (*i.e.*, ride-sharing, flexible work

hours, vanpooling, free transit passes, parking surcharges, telecommuting, etc.), the use of alternative fuels, vehicle scrappage programs, and more stringent I/M programs.

For background CO concentrations, EPA's modeling guidelines recommend the application of the Urban Airshed Model. Local and State air quality agencies and EPA regional offices can also provide information on appropriate background concentrations.

10. Since Federal actions must not cause or contribute to any violation of the NAAQS, can a Federal project that contributes to short-term NAAQS violations but offsets these exceedances in the long-term go forward?

A: If the project is contributing to a new violation of the NAAQS or it is increasing the frequency or severity of existing violations, it does not conform, regardless of when these violations take place.

11. Are offsets always accompanied by a SIP revision?

A: EPA does not require that offsets be accompanied by a SIP revision. The preamble to the general conformity rule states that all offsets must be quantifiable; consistent with the applicable SIP attainment and RFP demonstrations; surplus to reductions required by, and credited to, other applicable SIP provisions; enforceable at both the State and Federal levels; and permanent within the time frame specified by the program.

12. If an action results in emissions that are above *de minimis* levels and the offset criteria of the rule were to be used to determine conformity, should all the emissions from the action be offset or just those emissions that are above the *de minimis* levels?

A: The offset provision in the rule applies to all the total net increase in emissions from the action for a particular criteria pollutant. Emissions should be offset so that there is no net increase in emissions from that action. It is not enough to offset emissions to the *de minimis* levels. For more information on offsets and bubbling, refer to questions 41 and 42 of the *Applicability* section.

Emission Budgets

13. For general conformity, could the emissions budget be treated as official even before a SIP has been approved by EPA?

A: No, the rule refers to the applicable SIP. Thus, in order to rely on the emissions budget, EPA must approve an area's RFP plan or attainment or maintenance demonstration after 1990.

14. How can a conformity determination be made in 1994 knowing that a Federal Implementation Plan (FIP) is coming up in 1995?

A: Conformity determinations which are based on a SIP budget must use the approved budget which is in place at the time, even if a new budget is forthcoming. After a FIP is imposed, the conformity determination can be made comparing the action to the FIP budget to make a positive conformity determination. If there is no approved attainment demonstration developed by the State or no final FIP attainment demonstration, then the action would have to be shown to conform using a criteria that does not rely on an emissions budget.

15. How are emissions budgets created?

A: It is up to the State to establish an emissions budget for each criteria pollutant in a nonattainment or maintenance area. The budgets should include emissions from stationary, mobile, and area sources and there should be a means of tracking project emissions and allocating the budget by the State. EPA is currently working on developing additional guidance in this area.

16. How can emissions budgets apply to the Coast Guard?

A: Once a State has an emissions budget for the criteria pollutants in a nonattainment or maintenance area, the Coast Guard, or any other affected Federal agency, could apply to the State to use part of the budget to accommodate the emissions from the agency's project.

17. If a Federal project's emissions were not specifically accounted for or identified in the SIP, can the State commitment approach under section 93.158(a)(v)(i)(B) be used? If the answer is yes, then why can a Federal agency not use a SIP budget that specifically accounts for or identifies the project even if the SIP budget had not yet been approved by EPA?

A: A Federal agency can use a SIP budget that specifically accounts for or identifies the project even if the SIP budget had not yet been approved by EPA only if the State meets the requirements of the commitment listed in section 93.158(a)(5)(i) to ensure that the emission reductions occur before the Federal action proceeds.

Construction Activities

18. If construction activities together with other emissions from a project exceeded *de minimis* levels and a conformity determination is required, could construction emissions be offset on a temporary basis?

A: Yes, because such offsets would satisfy the requirement that no net increase in emissions will occur during the time period in which emissions would occur.

19. Should short-term emissions associated with the construction of a Federal project be included in the emissions calculations for the purpose of a conformity determination?

A: Yes, temporary emissions are not exempt from general conformity. However, these emissions only have to be accounted for (*e.g.*, through offsets, or mitigation) during the construction phase and not over the time frame of the project.

Emissions Calculation Procedures

20. How does the Federal agency calculate emissions? Should the methodologies used in the State's SIP be used?

A: Section 93.159 of the rule lists the adopted guideline documents that should be used in calculating emissions. Methodologies used in estimating emissions for conformity determinations should be consistent with the methodologies used in the development of the SIP to the extent possible. Where there is a conflict, the documents listed in section 93.159 should generally be used since they are expected to be the most accurate.

Emissions Specified in SIP

21. Could you apply section 93.158(a)(1) in combination with any of the provisions of section 93.158(a)(5) to determine conformity?

A: Yes, since the rule reads "For any criteria pollutant..." This language clearly means, for example, that if a SIP has accounted for all of the ozone emissions from a project, then the project is in conformity for ozone. Other criteria may be used to show conformity for other emissions.

22. If a State's smoke management plan is specifically identified in a SIP by name, would emissions generated from this management plan be included in the SIP?

A: If the SIP references a smoke management plan by name and the SIP states that emissions from this management plan are accounted for in the attainment or maintenance demonstration and the smoke management plan is an enforceable measure, then the SIP could be used to determine conformity. However, if the plan is mentioned in the SIP without accounting for emissions from the burns, then the SIP could not be used to determine conformity.

23. For a positive conformity finding, project emissions can be accounted for in the applicable SIP. Does this mean that if a State accommodates a Federal action in its attainment demonstration plan, that Federal action cannot proceed until EPA approves the SIP?

A: If the Federal agency chooses to use the SIP option for demonstrating conformity, then it must wait until the SIP is approved. However, the rule includes other criteria that can be used separately or in combination in order to make a positive conformity determination, including a written commitment to change the SIP in the future pursuant to section 93.158(a)(5)(i)(B) of the rule; the commitment option does not need prior EPA approval. If a State commits to revise its SIP to accommodate the emissions from a Federal action, the additional emission reductions the State commits to must occur before the Federal action proceeds.

State Commitment

24. If a State commits to revise the SIP to accommodate a certain project but fails to do so, could sanctions be imposed on that State?

A: Yes, such a scenario is treated as a "SIP call" under section 110(K)(5) of the Act, where the State acknowledges that the SIP is inadequate (93.158(a)(5)(i)(c))(58 FR 63258). A SIP call is an enforceable process; however, the statute allows EPA to set the deadline for a State to submit a revised SIP in response to a SIP call, provided it is within 18 months. For conformity determinations, EPA has set a SIP submittal deadline of no later than 18 months, or sooner if a State commits to revise the SIP in a shorter period of time. If the State fails to revise the SIP by the scheduled date, the mandatory sanctions process begins by EPA making a section 179(a) finding that the State failed to submit a SIP in response to the SIP call. Under section 179, if the State does not submit a complete plan to EPA within 18 months of the finding, then one of the two sanctions available applies, as selected by EPA. If the deficiency is still not corrected six months later, then the second sanction applies. Two sanctions are available: a 2-to-1 emission offset sanction and a highway finding sanction. EPA will provide an opportunity for public comment before applying mandatory sanctions in response to a State's failure to respond to a SIP call.

Mitigation

25. If mitigation measures were to be applied, should they result in emissions reductions to the *de minimis* levels or should the action be mitigated so that there is no net increase in emissions?

A: Once it has been determined that a conformity determination is needed because emissions from the Federal action exceed *de minimis* levels, mitigation measures, in combination with emissions offsets, if selected as the conformity criteria option, should result in no

net increase in emissions rather than just reducing the emissions to the *de minimis* levels. Alternatively, where a Federal action includes in its project definition sufficient emission reduction measures so that the Federal action is below *de minimis* levels, then the action does not need a conformity determination provided such reduction measures are in place at the time emissions result from the project so that the action is in fact *de minimis* at all times.

Enforcement

26. What happens if emissions are above *de minimis* levels and an agency still proceeds or must proceed with an action?

A: The rule states that an agency is prohibited from proceeding with an action if it is above *de minimis* levels and does not conform to the applicable implementation plan. If the agency proceeds with an action and the action does not conform, the agency would be subject to citizen's suit and the penalties imposed by the court. In addition, following State adoption of the conformity rules into their SIPs, such agency actions could be subject to State enforcement actions which may include, for example, a $25,000 per day fine.

Air Quality Modeling

27. When is modeling appropriate for a conformity determination?

A: If the emissions budget and the SIP attainment demonstration options do not account for the project emissions, then the Federal agency might consider using air quality modeling to demonstrate conformity for CO, PM-10, SO_2, and lead. The appropriate model will depend on the type of pollutant and specific situation. The local and State air agencies should be consulted when selecting applicable air quality models.

Water Projects

28. How do sewage plants conform?

A: If the action involves a regional wastewater project and the project is sized to meet only the needs of population projections that are in the applicable SIP, then the project conforms. However, if the current population projections used for the project are greater than those in the approved SIP, then one of the other criteria must be used to demonstrate conformity.

PROCEDURES

Public Participation

1. Must the applicability analysis be made public?

A: If the proposed action was found to result in emissions below *de minimis* levels or if a conformity determination is not required, then it is not obligatory to make the applicability analysis public under this rule. However, if a draft conformity determination is made and the applicability analysis is requested, it must be made available. In any case, the public is free to request and the Federal agency is obligated to provide the applicability analysis under the Freedom of Information Act. NEPA's disclosure requirements may also require publication of the information supporting the applicability analysis, even if the conformity rule does not.

2. Does the rule exempt classified projects from the public participation and reporting requirements?

A: The rule does not provide for such exemptions. However, according to the rule, Federal agencies can develop their own list of exempt actions pursuant to procedures in the rule [sections 93.153(f) and (g)]. Although exempt actions are not subject to public participation requirements, exempt actions created by Federal agencies are only presumed to conform and could be rebutted by any interested party.

3. If a national forest has 15-20 prescribed fires planned, would they have to go through public involvement procedures for each?

A: If they could predict to the level of the nonattainment area the location of the burns, they could group those reasonably foreseeable emissions together, and conduct one public participation process. However, if the emissions from the burns were not reasonably foreseeable, a separate public participation process would have to be conducted at the project level.

4. When must the public participation process and requirements be addressed?

A: The public participation requirements must be fulfilled once it is determined that the emissions from an action are above *de minimis* levels or are regionally significant and a conformity determination is required. The draft conformity determination must be made public and the procedures in section 93.156 must be followed.

Recurring Actions

5. How often should recurring actions that require a conformity determination be reviewed?

A: Revision of a conformity determination is not required if the recurring action fits within any of the exempt categories listed in the rule, such as recurring activities with no increase in activity levels, as described in section 93.1537(c)(2)(ii).

Inter-Agency Issues

6. Is there a conflict-resolution process in the conformity rule?

A: No, but Federal projects cannot be implemented unless all the agencies with jurisdiction over the project find the project to conform.

7. What stimulus and procedures are available for developing an inter-agency review committee?

A: The stimulus for inter-agency review is the fact that without the agreement of all parties with jurisdiction over the project, the project cannot go forward. Procedures for inter-agency review are not provided for in the conformity rules. However, agencies may choose to adopt a NEPA-like review process where one agency is designated as the lead agency and the others are cooperating agencies. Nonetheless, all agencies must make their own conformity determinations.

8. What is the difference between "adopting an agency's analysis" and "an agency making its own determination?"

A: If a Federal action is subject to the conformity rule, the Federal agency must decide whether a conformity determination should be made. For example, if two different Federal agencies have jurisdiction over the same Federal project, one agency cannot rely on the fact that the other agency made a positive conformity determination and forego making its own conformity determination. If one agency makes a positive determination, the other agency should either go through its own conformity analysis and make its own conformity determination or choose to adopt by reference or other means, the analysis, assumptions, and conclusions made by the first agency, as long as this analysis includes the entire scope of the project. If each of the agencies has jurisdiction over parts of the emissions from that action, then each agency must complete its own analysis and make separate conformity determinations for the portion of the action over which it has responsibility.

9. In a lease action of an Air Force base (AFB), what agency is responsible for making a conformity determination?

A: If the Air Force leases the base and maintains a continuing authority over the base through the lease, then the Air Force must make a conformity determination for the actions that will occur on the base as a result of the lease. In addition, if another Federal agency supports the activity (or a portion of it), it too must make a conformity determination for that portion of the activity for which it is responsible. For example, if the base is leased to a local municipality for aviation activity requiring an FAA permit, both the FAA and the Air Force would be required to make conformity determinations.

It is possible that only a portion of the base may be leased for a specific activity, such as a municipal solid waste treatment plant. In this instance, the Air Force would be responsible for making a conformity determination for the direct and indirect emissions associated with the plant.

Exemptions from the conformity requirements for the lease of a military base apply as stated in section 93.153(c)(2)(xix) of the rule for lease agreements "where the delivery of the deed is required to occur promptly after a specific, reasonable condition is met, such as promptly after the land is certified as meeting the requirements of CERCLA, and where the Federal agency does not retain continuing authority to control emissions associated with the lands, facilities, title, or real properties."

Reporting Requirements

10. What are the requirements of notification of *de minimis* decisions.

A: There are no reporting requirements for actions determined to be *de minimis*.

11. How can States have access to analyses of *de minimis* projects and other non-applicable projects (in order to see if segmenting is occurring, in order to track the emissions)?

A: States can request whatever documentation exists through the Freedom of Information Act. In addition, the State may choose, as a matter of policy, to require Federal agencies to report the emissions from all projects as part of the State procedures necessary to receive an allocation of an emissions budget or in order for the State to commit to revising the SIP to accommodate a project.

12. Does the draft conformity determination have to be described in the newspaper notice or just an announcement of the draft determination made?

A: The nature of the action and the draft determination must be described.

MITIGATION

Implementation of Mitigation Measures

1. Before a final conformity determination, should the mitigation measures be in place or should they be merely identified? Is there a reasonable time frame?

A: Mitigation measures need not be in place, but it is also not sufficient to merely identify them. Section 93.160 requires the process for implementation and enforcement to be described, including an explicit implementation schedule; written commitments for mitigation; and conditions on the approval of the action requiring implementation of the mitigation measure. Mitigation measures should be in place before emissions from the project start.

2. What happens if a Federal agency fails to complete or implement the mitigation measures identified as part of its general conformity determination?

A: Mitigation measures identified as part of the approved SIP conformity determination process become SIP requirements and traditional SIP enforcement tools will apply regardless of what party committed to mitigate.

3. If mitigation measures identified as part of a conformity determination were altered or changed after the determination was completed, would a new determination be required?

A: If the new mitigation measures are replacing previous ones that cannot be implemented, and they continue to support the conformity determination by resulting in an equal or better emissions reduction and air quality improvement, then a new conformity determination is not necessary. However, any changes in mitigation measures are subject to the reporting and public participation requirements of the rule (section 93.160(e)).

Indirect Emissions

4. How could indirect emissions be controlled?

A: It would depend on the nature of the indirect emissions. If, for instance, the indirect emissions were from vehicle emissions coming to the site, it would be possible to control indirect emissions by such things as design of the size and location of parking facilities, shuttle buses, or parking fees. If permits or approvals were required for activities that would result in indirect emissions, they could be conditioned on meeting certain emissions-limiting criteria. It is up to the Federal agency to examine each situation for the most reasonable means of limiting emissions that would be under the agency's control.

TRANSPORTATION CONFORMITY

Relationship of Transportation and General Conformity

1. How do the transportation and general conformity rules work together?

A. If the action (or portion of it) is subject to the transportation conformity rule, then the action (or portion) is presumed to conform. If the action (or portion of it) is not subject to the transportation conformity rule but is specifically included in a current conforming transportation plan and transportation improvement program (TIP), then documentation of this is sufficient to determine that the action (or portion) conforms under the general conformity rule. However, any project emissions not accounted for under the transportation conformity regulations would have to be analyzed according to the requirements set forth by the general conformity rule. As an example, if an airport expansion had been planned and emissions from vehicles commuting to and from the airport were already estimated and incorporated into the transportation plan and TIP and found to conform, these emissions would not have to be re-analyzed under the general conformity requirements. However, once vehicles enter the airport area, new emissions from vehicles picking up and discharging passengers, from shuttle buses, and parking lots and aircraft emissions would have to be considered under general conformity as new emissions of the airport expansion project.

2. What is EPA's position on a State choosing to include airports, for example, under transportation conformity rather than general conformity?

A: Emissions resulting from commuting to and from the airport may be considered through the transportation conformity process. However, any emissions associated with the airport itself will have to be considered as part of the general conformity determination. Non-highway or transit emissions cannot be covered by EPA's transportation conformity rule.

3. Should commuters to and from a new office location be considered in transportation conformity? Would redistributing trips be considered in an existing transportation plan?

A: The MPO should be able to answer this question after it examines the conformity analysis done for the transportation plan and TIP. When transportation activity is modeled for the purpose of transportation conformity, the modeling process estimates trips that are generated due to office buildings, retail space, etc. If the modeling process considers the new office building, then no modeling is needed for the purpose of general conformity. Nevertheless, the general conformity determination must document that the emissions have been accounted for in the existing transportation plan and TIP. If the modeling does not consider the new office building, then new transportation modeling should be completed and the estimated emissions should be accounted for in the general conformity

determination. There must be evidence that the employment assumptions in the MPO's transportation model included the new office location.

STATE AGENCY CONCERNS

State Conformity Rules

1. Can a State adopt the general conformity rule into its SIP by reference?

A: Yes, if under State law, the adoption procedure is legally enforceable and this procedure is in compliance with other State rulemaking procedures.

2. Does the rule allow a State to develop conformity rules that are more stringent than the Federal rule?

A: The State conformity rules can be more stringent than the Federal rule only if they are applied equally to Federal and non-Federal actions. If a State elects to make one (or more) aspect(s) of the rule more stringent, the entire rule with all its requirements must apply to non-Federal as well as Federal entities.

3. Can a State apply more stringent conformity requirements to a particular type of action without having to apply the entire conformity rule to all non-Federal entities for all actions?

A: A State may elect to apply more stringent conformity requirements to a particular type of activity with the following caveats: the activity must be one that is performed by some non-Federal entities and the rule must then apply to all the non-Federal entities that perform the activity. For example, if prescribed burning is conducted by Federal, State, Local, and private entities, then more stringent conformity requirements may be applied to prescribed burning actions, as long as all Federal and non-Federal parties (*i.e.*, State, local, and private) are required to make conformity determinations for such actions.

4. Can a State adopt the Federal conformity rule without revision?

A: Yes, there are no requirements in the rule for the States to develop conformity rules with additional provisions beyond what is presented in the Federal rule. Therefore, if a State chooses, it can adopt EPA's rule wholesale.

5. Can a State reduce the *de minimis* levels required for conformity determinations?

A: The rule has a provision for State stringency which would allow more stringent measures, *e.g.*, lower *de minimis* levels, than is proposed in the Federal rule, but only if these measures as well as all other rule requirements were applied to both Federal and non-Federal entities.

Enforcement

6. At what point or points are the Federal Agency's actions subject to court challenge?

A: Generally, a court challenge can start after a final conformity determination is made.

7. What legal recourse does a State have if a Federal agency does not implement the mitigation measures identified in its conformity determination?

A: The legal recourse depends on what a State establishes in its general conformity rule. The general conformity rule requires a SIP revision that a State can enforce, but each State can choose its own enforcement mechanisms. Aside from what a State establishes in its SIP revision, the rule does not provide the States with any special authorities for enforcement.

8. EPA has made the statement that it is not an enforcer of the conformity rule. To what extent does a State have to develop enforcement provisions?

A: The SIPs that States should submit for EPA's approval must be enforceable by those States. EPA has the authority under section 113 of the Act to enforce any rule that was promulgated by EPA under the Act. Once a SIP is approved by EPA, it becomes enforceable under section 304 by citizen suits. (While EPA is unlikely to bring enforcement action against other Federal agencies, there may be instances where EPA may enter into a Federal Facility Agreement with an agency in an attempt to alter that agency's operating practices.) For more information, refer to question 46 of the *Applicability* section.

9. What recourse does a State have if it does not agree with a certain conformity determination?

A: The State can enforce the SIP conformity requirements.

10. Does EPA expect the States to enforce the rule?

A: Upon adoption of SIP conformity rules, States need to have the authority and resources to enforce their regulations. This is one of the requirements for the approval of a SIP. The State decides whether and how to actually enforce regulations.

11. Do the States have the authority to implement their regulations over Federal facilities?

A: Yes, section 176(c) requires EPA to promulgate a rule establishing criteria and procedures for Federal agencies to use in demonstrating conformity of their actions. States are then required to incorporate conformity rules in their SIPs. Any State rules must be enforceable by the State in order to be approved by EPA into the SIP. Federal agencies

must comply with all SIP requirements, including State regulations, under section 118 of the Act.

Rule Implementation and Conformity Review

12. Who will review the different conformity SIPs and who will be in a position to provide continuing guidance on conformity issues?

A: Conformity SIPs will be reviewed and approved or disapproved by EPA. Questions relating to general conformity should be addressed to the EPA regional offices.

13. When completing a conformity determination, who should the Federal agencies consult first?

A: Federal agencies should first work with the State/local air agencies to obtain the applicable emission factors and attainment emission inventories (for regional significance determinations) necessary to determine applicability, and the MPO's to obtain any traffic or demographic data needed for the analysis. Agencies are not required to notify EPA until the draft conformity determination has already been completed, unless non-EPA approved and published emission factors or modeling techniques are to be used. However, agencies should feel free to contact the regional offices at any time during the conformity process.

14. How will EPA and the States coordinate the implementation of conformity?

A: Each State must develop its own conformity SIP which it will submit to the regional EPA office for review and approval. The EPA regional offices will be available to both the Federal agencies and the States to answer questions on individual conformity determinations and provide general guidance.

Criteria

15. If a State's conformity SIPs are not to be submitted until November 30, 1994, what criteria can conformity determinations be based on in the meantime?

A: Section 93.151 of the general conformity rule addresses this issue. Once a revised SIP that includes conformity rules is submitted and approved by EPA, State rules can be applied. Until EPA approves the State rules, the Federal rule at 40 CFR part 93 should be applied. If only part of the State rules are approved, those parts can be applied; Federal conformity regulations would continue to apply only for the portion, if any, of the State's conformity provisions that is not approved by EPA.

16. If a Federal action has been regularly occurring for over ten years, but the State's emissions inventory and SIP have not previously accounted for the emissions from this action due to an oversight, should this action be considered an ongoing activity requiring a SIP revision, or is this action considered a new source?

A: Inclusion in or exclusion from the SIP has nothing to do with whether an activity is ongoing or whether an action can be exempt from conformity under section 93.153(c)(2)(ii) of the rule. This is determined by the nature and extent of the activity. If it has not been included in the SIP, this does not require a SIP revision or a finding that this is a new activity; it merely means that the option of demonstrating conformity through inclusion in the SIP cannot be used for a conformity determination where one is required.

17. Are States required to make a determination about whether a Federal action exceeds an emissions budget?

A: If a Federal agency wants to use the emissions budget test as a means of demonstrating conformity, then the Federal agency would so request; the State is not required to make a determination about whether the action exceeds the emissions budget for the nonattainment pollutants. In addition, there is nothing in the rule that automatically requires States to identify emissions budgets for criteria pollutants which exist in SIP's or allowable emissions. Without State-established emissions budgets, however, it would not be possible for a Federal agency to use this option to demonstrate conformity. All SIPs have source-specific allowable emissions, but SIPs do not in all cases identify specific areawide emissions budgets.

CONFORMITY DETERMINATION AND NEPA

Regional Significance

1. If emissions from an action are regionally significant, does such an action trigger a significant impact under NEPA?

A: Not necessarily, since the definition of regionally significant in conformity applies only in this context and is not the same as the NEPA definition. NEPA requires an Environmental Impact Statement for major Federal actions significantly affecting the quality of the human environment. However, finding that emissions from an action are regionally significant under the conformity rule may indicate that the project also has significant impact under NEPA.

Interface Between Conformity Rule and NEPA

2. Can a conformity determination for an adverse impact project be completed separately from a NEPA document?

A: Yes, the rule does not require linking the conformity determination and the NEPA process. However, such linkage is allowed under the rule. In some instances, such linkage may be efficient and convenient.

3. To what extent can and should the conformity and NEPA processes be integrated? How do we integrate conformity and NEPA?

A: It is up to each agency to determine the best ways, given the individual situation, to integrate the conformity and NEPA processes. There are certain requirements for NEPA, such as the development of alternative actions, that are not required under conformity. As previously indicated, it may not make sense to perform a conformity analysis for all alternatives, but only for the one actually selected. At a minimum, at the point in the NEPA process when the specific action is determined, the air quality analyses for conformity should be done. Another point at which the two processes might overlap is in a joint notification and public participation process (assuring that the requirements for each regulation are met).

4. If the conformity analysis parallels the NEPA analysis, would each alternative have to be determined to conform?

A: A conformity determination is not required for each alternative, only the one that the Federal agency ultimately approves, permits or funds.

5. Will categorical exclusions from NEPA also be excluded from conformity?

A: No.

6. If all prescribed burnings for an area are approved in a NEPA document, but exact emissions were not included in the analysis, would those prescribed fires still be considered to conform under the grandfather portion of the rule? For example, the burning was reported as number of acres not as tons of emissions?

A: No. The action can only be grandfathered if the analysis in the NEPA document included an analysis of emissions within the nonattainment area that determined whether the NAAQS was violated or not.