

Transportation Conformity Guidance for the *South Coast II* Court Decision

Transportation Conformity Guidance for the *South Coast II* Court Decision

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

Transportation Conformity Guidance for the *South Coast II* Court Decision

1 *Introduction*

1.1 *Purpose of Guidance*

The U.S. Environmental Protection Agency (EPA) is issuing guidance to assist in implementation of the February 16, 2018, decision from the United States Court of Appeals for the District of Columbia Circuit in *South Coast Air Quality Mgmt. District v. EPA* (“*South Coast II*,” 882 F.3d 1138). This guidance addresses how transportation conformity determinations can be made in areas that were either nonattainment or maintenance for the 1997 ozone national ambient air quality standard (NAAQS) when that NAAQS was revoked, depending on their designations for subsequent ozone NAAQS.

This guidance is organized as follows:

- Section 1, Introduction
- Section 2, Orphan Areas
- Section 3, 2008 Ozone NAAQS Nonattainment and Maintenance Areas and 2015 Ozone NAAQS Nonattainment Areas
- Section 4, Examples

EPA has coordinated with the Department of Transportation (DOT) during the development of this guidance.

Clean Air Act (CAA) section 176(c) (42 U.S.C. 7506(c)) requires that federally funded or approved highway and transit activities are consistent with (“conform to”) the purpose of the State Implementation Plan (SIP). Conformity to the purpose of the SIP means that transportation activities will not cause or contribute to new air quality violations, worsen existing violations, or delay timely attainment of the relevant NAAQS or any interim milestones. 42 U.S.C. 7506(c)(1). EPA’s transportation conformity rules establish the criteria and procedures for determining whether metropolitan transportation plans, transportation improvement programs (TIPs), and federally supported highway and transit projects conform to the SIP. 40 CFR Parts 51.390 and 93.

1.2 Background on Court Decision

On February 16, 2018, the court issued its decision, *South Coast Air Quality Management District v. EPA*. This case involved a challenge to EPA’s final rule for implementing the 2008 ozone NAAQS, referred to as the 2008 ozone NAAQS SIP Requirements Rule. The court vacated portions of EPA’s 2008 ozone NAAQS SIP Requirements Rule, but upheld EPA’s revocation of the 1997 ozone NAAQS.¹

The court decision referred to the 1997 ozone NAAQS nonattainment or maintenance areas that were designated attainment for the 2008 ozone NAAQS as “orphan areas.”^{2,3} The court decision stated that transportation conformity applies for the revoked 1997 ozone NAAQS in these orphan areas. For areas that were nonattainment for the 1997 ozone NAAQS at the time it was revoked, the court stated that transportation conformity applies as an anti-backsliding measure. *South Coast*, 882 F.3d at 1149. For areas that were maintenance for the 1997 ozone NAAQS at the time it was revoked, the court stated that transportation conformity applies based on the court’s interpretation of Clean Air Act section 176(c)(5)(B). *Id.* at 1155.

On April 23, 2018, the Department of Justice filed a petition with the court on EPA’s behalf seeking rehearing of certain aspects of the decision by the three-judge panel that issued the decision, including portions of the decision that address transportation conformity requirements in the orphan areas. On September 14, 2018, the court agreed to stay its vacatur of the portion of EPA’s rule “that exempts orphan areas from transportation conformity” until February 16, 2019, and denied the other aspects of EPA’s rehearing request.⁴ As a result of the court’s September 2018 order, transportation conformity for the 1997 ozone NAAQS will again apply in orphan areas as of February 16, 2019. See Section 2.3 for more details on timing.

Based on our review of the court decision, EPA has concluded that the decision does not affect transportation conformity requirements for areas originally designated nonattainment for the more stringent 2008 ozone NAAQS (77 FR 30160, May 21, 2012), or areas designated nonattainment for the more stringent 2015 ozone NAAQS (83 FR 25776, June 4, 2018). These areas are discussed in more detail in Section 3 below.

1.3 Who can I contact for more information?

For questions concerning a particular ozone area, please contact the transportation conformity staff person responsible for this area at the appropriate EPA Regional Office, Federal Highway Administration (FHWA) division office or Federal Transit Administration (FTA) regional office:

¹ 882 F.3d 1138

² EPA’s designations for the 2008 ozone NAAQS were made on May 21, 2012 (77 FR 30160).

³ EPA is using the terms “orphan nonattainment area” and “orphan maintenance area” in this guidance because they were used in the court decision. These are not terms used in the Clean Air Act.

⁴ USCA Case No. 15-1115, Document #1750759, Filed September 14, 2018.

- A listing of the EPA Regions, the states they cover, and contact information for conformity staff can be found at the following website: www.epa.gov/state-and-local-transportation/epa-regional-contacts-regarding-state-and-local-transportation;
- Contact information for FHWA division offices can be found at: www.fhwa.dot.gov/about/field.cfm; and
- Contact information for FTA regional offices can be found at: www.transit.dot.gov/about/regional-offices/regional-offices.

General questions about this guidance can be directed to EPA's Office of Transportation and Air Quality: Laura Berry, berry.laura@epa.gov; or Astrid Terry, terry.astrid@epa.gov.

Additional information regarding the transportation conformity rule and associated guidance can be found on EPA's website at: www.epa.gov/state-and-local-transportation.

1.4 Does this guidance create any new requirements?

No, this guidance is based on CAA requirements, existing associated regulations, and aspects of the court decision and order, and does not create any new requirements. The CAA and EPA's regulations at 40 CFR Parts 51.390 and 93 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, the DOT, states, or the regulated community, and may not apply to a particular situation based upon the circumstances. EPA retains the discretion to consider and adopt approaches on a case-by-case basis that may differ from this guidance but still comply with the statute and applicable regulations. This guidance may be revised periodically without public notice.

2 Court Decision Guidance for Orphan Areas

2.1 Which areas are “orphan” areas?⁵

The court discussed transportation conformity-related aspects of its decision for “orphan” nonattainment and maintenance areas for the 1997 ozone NAAQS as follows:

- *Orphan maintenance areas* were defined in the court decision as areas that were maintenance areas for the 1997 ozone NAAQS at the time of its revocation (80 FR 12264, March 6, 2015) and were designated attainment for the 2008 ozone NAAQS in EPA’s original designations for this NAAQS (77 FR 30160, May 21, 2012). Table 2-1 lists the 63 complete orphan maintenance areas.
- *Orphan nonattainment areas* were defined in the court decision as areas that were designated as nonattainment for the 1997 ozone NAAQS at the time of its revocation (80 FR 12264, March 6, 2015) and were designated attainment for the 2008 ozone NAAQS in EPA’s original designations rule for this NAAQS (77 FR 30160, May 21, 2012). Table 2-2 lists the 9 complete orphan nonattainment areas.⁶

Note, area names that appear in italics in Table 2-1 and Table 2-2 are areas that were designated nonattainment for the 2015 ozone NAAQS either in part or in entirety; agencies in these areas should also refer to Section 3.3. Areas that are covered by multiple states are counted as one area in these tables.

⁵ For simplicity, in this guidance “2008 ozone NAAQS nonattainment and maintenance areas” and “1997 ozone NAAQS nonattainment and maintenance areas” are referred to as “2008 ozone NAAQS areas” and “1997 ozone NAAQS areas,” respectively.

⁶ Table 2-1 and Table 2-2 are based on information that is publicly available on EPA’s “Green Book” webpage (www.epa.gov/green-book).

Table 2-1: Orphan Maintenance Areas⁷

1997 Ozone NAAQS Area Name	State
<i>Allegan County</i>	MI
Altoona	PA
Beaumont-Port Arthur	TX
<i>Benton Harbor</i>	MI
Benzie County	MI
Birmingham	AL
Boston-Manchester-Portsmouth (SE)	NH
Canton-Massillon	OH
Cass County	MI
Charleston	WV
Clarksville-Hopkinsville	TN, KY
Clearfield and Indiana Counties	PA
Dayton-Springfield	OH
<i>Detroit-Ann Arbor</i>	MI
<i>Door County</i>	WI
Erie	PA
Evansville	IN
Flint	MI
Fort Wayne	IN
Franklin County	PA
Fredericksburg	VA
Grand Rapids	MI
Greene County	IN
Greene County	PA
Hancock, Knox, Lincoln and Waldo Counties	ME
Harrisburg-Lebanon-Carlisle	PA
Haywood and Swain Counties (Great Smoky National Park)	NC
Huntington-Ashland	WV, KY
Huron County	MI
Indianapolis	IN
Jackson County	IN
Johnstown	PA
Kalamazoo-Battle Creek	MI
Kent and Queen Anne's Counties	MD
Kewaunee County	WI
La Porte County	IN

⁷ Area names that appear in italics in Table 2-1 are areas that were designated nonattainment for the 2015 ozone NAAQS either in part or in entirety; agencies in these areas should also refer to Section 3.2.

1997 Ozone NAAQS Area Name	State
Lansing-East Lansing	MI
<i>Las Vegas</i>	<i>NV</i>
Lima	OH
<i>Louisville</i>	<i>KY, IN</i>
Macon	GA
Madison and Page Counties (Shenandoah National Park)	VA
<i>Manitowoc County</i>	<i>WI</i>
Mason County	MI
Muncie	IN
Murray County (Chattahoochee National Forest)	GA
<i>Muskegon</i>	<i>MI</i>
Norfolk-Virginia Beach-Newport News (Hampton Roads)	VA
Parkersburg-Marietta	WV, OH
Portland	ME
Raleigh-Durham-Chapel Hill	NC
Richmond-Petersburg	VA
Rocky Mount	NC
Scranton-Wilkes-Barre	PA
South Bend-Elkhart	IN
State College	PA
Steubenville-Weirton	OH, WV
Terre Haute	IN
Tioga County	PA
Toledo	OH
Wheeling	WV, OH
York	PA
Youngstown-Warren-Sharon	OH, PA

Table 2-2: Orphan Nonattainment Areas⁸

1997 Ozone NAAQS Area Name	State
Albany-Schenectady-Troy	NY
Buffalo-Niagara Falls	NY
Essex County (Whiteface Mountain)	NY
Jefferson County	NY
Poughkeepsie	NY
Providence (all of Rhode Island)	RI
Rochester	NY
Springfield (Western Massachusetts)	MA
<i>Sutter County (Sutter Buttes)</i>	<i>CA</i>

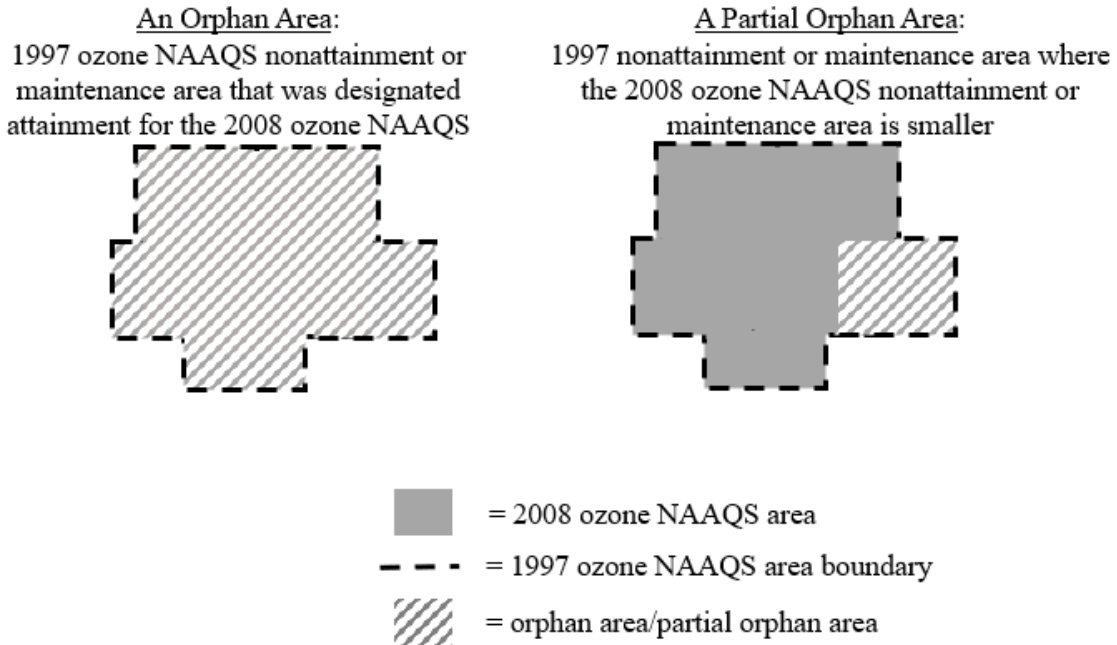
2.2 Which areas are partial “orphan” areas?

EPA reviewed the geographic boundaries of areas that were designated nonattainment or maintenance for the 1997 and 2008 ozone NAAQS.⁹ In addition to identifying orphan nonattainment and maintenance areas listed in Section 2.1, EPA identified ten areas that were nonattainment or maintenance areas for the 1997 ozone NAAQS at the time it was revoked that have a smaller boundary for the 2008 ozone NAAQS. In these cases, the entire 1997 ozone NAAQS area is not an orphan area because some part of it is nonattainment or maintenance for the 2008 ozone NAAQS; it is a partial orphan area because a portion of the area was not included within the boundary of the 2008 ozone NAAQS nonattainment or maintenance area. Figure 2-1 contrasts an orphan area (left side of the figure), with a partial orphan area (right side of the figure).

⁸ Area names that appear in italics in Table 2-2 are areas that were designated nonattainment for the 2015 ozone NAAQS either in part or in entirety; agencies in these areas should also refer to Section 3.2.

⁹ This information is available on EPA’s “Greenbook” web page, at www.epa.gov/green-book.

Figure 2-1: An Orphan Area and a Partial Orphan Area



The six areas that were maintenance for the 1997 ozone NAAQS at the time of revocation that are partial orphan areas are shown in Table 2-3. The four areas that were nonattainment for the 1997 ozone NAAQS at the time of revocation that are partial orphan areas are shown in Table 2-4. These tables provide the 1997 ozone NAAQS area names and list the counties in the orphan portion, i.e., the counties not covered by the 2008 ozone NAAQS nonattainment or maintenance area boundary. Note, area names that appear in italics in Table 2-3 and Table 2-4 are orphan areas that were designated nonattainment for the 2015 ozone NAAQS either in part or in entirety; agencies in these areas should also refer to Section 3.3. Areas that are covered by multiple states are counted as one area in these tables. Counties listed in the “Orphan Portion of the Area” column of these tables are whole counties, unless otherwise noted in the table.

Table 2-3: Partial Orphan Maintenance Areas

1997 Ozone NAAQS Area Name	State	Orphan Portion of the Area
Atlanta	GA	Barrow, Carroll, Hall, Spalding and Walton Counties
Charlotte-Gastonia-Rock Hill	NC, SC	Parts of Cabarrus, Gaston, Lincoln, Rowan and Union Counties in NC and part of York County, SC
Cincinnati-Hamilton	OH, KY, IN	Parts of Boone, Campbell and Kenton Counties in KY
Knoxville	TN	Jefferson, Loudon and Sevier Counties, part of Anderson County and part of Cocke County
<i>Milwaukee-Racine</i>	<i>WI</i>	Milwaukee, Ozaukee, Racine, Washington, and Waukesha Counties, and part of Kenosha County (i.e., the entire area, except for the eastern part of Kenosha County)
St. Louis	MO, IL	Jersey County, IL

Table 2-4: Partial Orphan Nonattainment Areas

1997 Ozone NAAQS Area Name	State	Orphan Portion of the Area
<i>Amador and Calaveras Counties (Central Mountain Counties)</i>	<i>CA</i>	Amador County
Boston-Lawrence-Worcester (Eastern Mass)	MA	Barnstable, Bristol, Essex, Middlesex, Nantucket, Norfolk, Plymouth, Suffolk, Worcester Counties (i.e., the entire area except for Dukes County)
<i>Mariposa and Tuolumne Counties (Southern Mountain Counties)</i>	<i>CA</i>	Tuolumne County
Philadelphia-Wilmington-Atlantic City	PA, NJ, MD, DE	Kent County, DE

In the remainder of this guidance, EPA uses the term “orphan areas” to include complete orphan areas as well as partial orphan areas.

2.3 When are transportation conformity determinations for the 1997 ozone NAAQS required in orphan areas?

On September 14, 2018, the court agreed to stay its vacatur of the transportation conformity portion of EPA's rule until February 16, 2019. As a result of the court's September 2018 order, transportation conformity is not required in orphan areas until February 16, 2019. Metropolitan transportation plans, TIPs, and projects in these areas can be updated and/or amended or approved without a conformity determination for the 1997 ozone NAAQS through February 15, 2019.

Transportation conformity for the 1997 ozone NAAQS will again apply in orphan areas as of February 16, 2019.

Beginning February 16, 2019, a transportation conformity determination for the 1997 ozone NAAQS will be needed in orphan areas for the following transportation activities:

- a new or amended metropolitan transportation plan or TIP (per 40 CFR 93.104(b) and (c));¹⁰
- a new non-exempt Federal Highway Administration/Federal Transit Administration (FHWA/FTA) project (per 40 CFR 93.104(d));¹¹
- a non-exempt FHWA/FTA project where conformity needs to be redetermined as described in 40 CFR 93.104(d), e.g., as a result of a significant change in the project's design concept and scope.

When the stay of the vacatur has ended (February 16, 2019), orphan areas with an MPO must meet the transportation conformity regulation's frequency requirements at 40 CFR 93.104, which describe when transportation conformity must be determined for metropolitan transportation plans, TIPs, and projects. A new conformity determination is required at least every four years for a new transportation plan and TIP starting on the date DOT makes a 1997 ozone NAAQS conformity determination (per 40 CFR 93.104(b)(3) and (c)(3)). For example, if DOT makes its 1997 ozone NAAQS conformity determination for an orphan area's transportation plan and TIP on December 1, 2018, the four-year requirement begins on that date.

EPA and DOT will provide technical assistance as needed to areas for conformity determinations for the 1997 ozone NAAQS. Please see Section 1.3 for contact information.

¹⁰ Requirements for orphan areas that are not associated with a metropolitan planning organization are found in 40 CFR 93.109(g), "Isolated rural nonattainment and maintenance areas." Isolated rural areas are discussed in this guidance in Section 2.7.

¹¹ "FHWA/FTA project" is defined in the conformity regulation at 40 CFR 93.101: "FHWA/FTA project, for the purpose of this subpart, is any highway or transit project which is proposed to receive funding assistance and approval through the Federal Air Highway program or the Federal mass transit program, or requires Federal Highway Administration (FHWA) or Federal Transit Administration (FTA) approval for some aspect of the project, such as connection to an interstate highway or deviation from applicable design standards on the interstate system."

2.4 What is required to demonstrate conformity of the metropolitan transportation plan and TIP for the 1997 ozone NAAQS in orphan areas?

The transportation conformity regulation at 40 CFR 93.109 sets forth the criteria and procedures for determining conformity. Table 1 in 40 CFR 93.109 lists the conformity criteria by transportation action. For the transportation plan and TIP, Table 1 includes the following criteria:

All Actions at all times:	
§93.110	Latest planning assumptions
§93.111	Latest emissions model
§93.112	Consultation
Transportation Plan:	
§93.113(b)	TCMs
§93.118 and/or §93.119	Emissions budget and/or Interim emissions
TIP:	
§93.113(c)	TCMs
§93.118 and/or §93.119	Emissions budget and/or Interim emissions

In orphan areas that have one or more MPOs,¹² transportation conformity for transportation plans and TIPs for the 1997 ozone NAAQS can be demonstrated without a regional emissions analysis pursuant to 40 CFR 93.109(c), “Regional conformity test requirements for all nonattainment and maintenance areas.” Paragraph (c) states:

This provision applies one year after the effective date of EPA’s nonattainment designation for a NAAQS in accordance with §93.102(d) and until the effective date of revocation of such NAAQS for an area.

The *South Coast II* court decision upheld EPA’s revocation of the 1997 ozone NAAQS, which was effective on April 6, 2015. EPA’s current transportation conformity regulation requires a regional emissions analysis only during the time period beginning one year after a nonattainment designation for a particular NAAQS until the effective date of revocation of that NAAQS (40 CFR 93.109(c)). Therefore, pursuant to this regulation, a regional emissions analysis is not required for conformity determinations for the 1997 ozone NAAQS because that NAAQS has been revoked (80 FR 12264).

¹² Areas with an MPO include nonattainment and maintenance areas that contain or are part of a metropolitan planning area, and donut areas, which are defined in 40 CFR 93.101 as those areas outside a metropolitan planning area boundary but inside the boundary of the nonattainment or maintenance area. For more information, see EPA’s “Guidance for Transportation Conformity Implementation in Multi-Jurisdictional Nonattainment and Maintenance Areas,” EPA-420-B-12-046, July 2012, available on EPA’s web page at: www.epa.gov/state-and-local-transportation/policy-and-technical-guidance-state-and-local-transportation#requirements

As no regional emissions analysis is required in orphan areas, there is no requirement to use the latest emissions model (40 CFR 93.111), or use either the emissions budget test or interim emissions test (40 CFR 93.118 and 93.119). Therefore, transportation conformity for the 1997 ozone NAAQS can be demonstrated by an MPO and DOT for transportation plans and TIPs by showing that the remaining criteria from Table 1 in 40 CFR 93.109, and 40 CFR 93.108, have been met:

- Use of the latest planning assumptions, per 40 CFR 93.110. These criteria generally apply to regional emissions analyses. In orphan areas, ensuring the latest planning assumptions are used applies to information about TCMs in an approved SIP (40 CFR 93.113);
- Consultation requirements, according to 40 CFR 93.112;
- Timely implementation of any approved SIP transportation control measures (TCMs), according to the requirements in 40 CFR 93.113; and
- Fiscal constraint, according to 40 CFR 93.108, which states that transportation plans and TIPs must be fiscally constrained consistent with DOT's metropolitan planning regulations at 23 CFR part 450.

Conformity determinations that have been made since the court decision for the 1997 ozone NAAQS in orphan areas that do include a regional emissions analysis are still valid, and do not have to be redone. Even though no regional emissions analysis is required after the effective date of the 1997 NAAQS revocation, such determinations met all applicable regulatory requirements.

EPA Regional Offices, in consultation with EPA's Office of Transportation and Air Quality, are available to provide additional technical assistance to the orphan areas based on their specific circumstances. See contact information in Section 1.3 of this guidance.

2.5 What options are there for determining conformity for the 1997 ozone NAAQS in a partial orphan area?

As described in Section 2.2, there are ten areas that have a smaller boundary for the 2008 ozone NAAQS than they had for the 1997 ozone NAAQS and thus are partial orphan areas.

In these areas, conformity can be determined either for just the orphan portion, i.e., the county or counties that make up the orphan portion, or for the entire former 1997 ozone NAAQS area. Either approach would address the *South Coast II* court decision that conformity applies for the 1997 ozone NAAQS in orphan areas, as well as the geographic applicability requirement in the conformity regulation at 40 CFR 93.102(b).

Please refer to Section 3 of this guidance for a discussion of determining conformity for the 2008 ozone NAAQS.

2.6 In orphan areas with an MPO, what is required to demonstrate conformity for the 1997 ozone NAAQS for a non-exempt project?

Transportation conformity applies to non-exempt FHWA/FTA projects. Such projects need a project-level conformity determination before they are adopted, accepted, approved, or funded, per 40 CFR 93.104(d). Beginning February 16, 2019, a non-exempt FHWA/FTA project (including a project phase) must be found to conform with the 1997 ozone NAAQS before it can be adopted, accepted, approved, or funded. For example, if a new phase of a non-exempt FHWA/FTA project needs FHWA/FTA approval after February 15, 2019, a project-level conformity determination is required before the new phase is approved, per CAA 176(c)(1) and 40 CFR 93.102(a)(1)(iii).

Table 1 in 40 CFR 93.109(b) lists the conformity criteria by transportation action. For a non-exempt FHWA-FTA project in an area with an MPO or a donut area, Table 1 includes the following criteria:

All Actions at all times:	
§93.110	Latest planning assumptions
§93.111	Latest emissions model
§93.112	Consultation
Project (From a Conforming Plan and TIP):	
§93.114	Currently conforming plan and TIP
§93.115	Project from a conforming plan and TIP
§93.116	CO, PM ₁₀ , and PM _{2.5} hot-spots
§93.117	PM ₁₀ , and PM _{2.5} control measures

The latest planning assumptions in 40 CFR 93.110 and latest emissions model in 40 CFR 93.111 apply to project-level conformity determinations where an analysis is required. As discussed in Section 2.4 above, a regional emissions analysis is not required for the 1997 ozone NAAQS in orphan areas. Furthermore, there is no hot-spot analysis requirement (40 CFR 93.116) for ozone NAAQS. The provision requiring compliance with PM₁₀ and PM_{2.5} control measures in an applicable SIP (40 CFR 93.117) applies only for PM NAAQS. In sum, for determining conformity of projects to the 1997 ozone NAAQS in orphan areas, the requirements at §§93.110, 93.111, 93.116, and 93.117 from Table 1 in 40 CFR 93.109 do not apply.

Transportation conformity for the 1997 ozone NAAQS can be demonstrated for a non-exempt FHWA/FTA project in a metropolitan or donut orphan area by showing that the remaining criteria from Table 1 in 40 CFR 93.109(b) have been met:

- Consultation requirements (40 CFR 93.112);
- There is a currently conforming transportation plan and TIP in place (40 CFR 93.114); and
- The project is from that transportation plan and TIP (40 CFR 93.115).

If a non-exempt FHWA/FTA project in a metropolitan or donut orphan area needs a new federal approval on or after February 16, 2019, (e.g., a National Environmental Policy Act approval), a conformity determination for the 1997 ozone NAAQS will be needed. If conformity for the 1997 ozone NAAQS of the metropolitan transportation plan and TIP that includes the project has not yet been determined, it would need to be determined (as described in Section 2.4) before the project could be found to conform.

EPA Regional Offices, in consultation with EPA’s Office of Transportation and Air Quality, are available to provide additional technical assistance to the orphan areas based on their specific circumstances. See contact information in Section 1.3 of this guidance.

2.7 What is required to demonstrate conformity for the 1997 ozone NAAQS in orphan areas that are isolated rural areas?

Isolated rural areas are those areas that do not have an MPO and whose projects are not part of the emissions analysis of any MPO’s metropolitan transportation plan or TIP.¹³ There are 14 isolated rural orphan maintenance areas and one isolated rural orphan nonattainment area, listed in Table 2-5. Note that these areas are a subset of the areas found in Table 2-1 and Table 2-2. The 1997 ozone NAAQS areas consist of entire counties unless otherwise noted in the table.

Table 2-5: Isolated Rural Orphan Areas

Status	1997 Ozone NAAQS Area Name	State
Maintenance	Benzie County	MI
	Door County	WI
	Greene County	IN
	Hancock, Knox, Lincoln, and Waldo Counties – all are partial counties	ME
	Haywood and Swain Counties (Great Smoky National Park) – both are partial counties	NC
	Huron County	MI
	Jackson County	IN
	Kent and Queen Anne’s Counties	MD
	Kewaunee County	WI
	Madison and Page Counties (Shenandoah National Park) – both are partial counties	VA
	Manitowoc County	WI
	Mason County	MI
	Murray County (Chattahoochee National Forest) – partial county	GA
Tioga County	PA	
Nonattainment	Essex County (Whiteface Mountain) – partial county	NY

¹³ The transportation conformity regulation at 40 CFR 93.101 provides a definition for isolated rural area.

There are also two areas with orphan portions that are isolated rural areas, listed in Table 2-6. Note that these areas are a subset of the areas in Table 2-4. All counties listed in Table 2-6 are made up of entire counties.

Table 2-6: Orphan Portions of Areas that Are Isolated Rural Areas

1997 Ozone NAAQS Area Name	State	Orphan Portion of the Area
Amador and Calaveras Counties (Central Mountain Counties)	CA	Amador County
Mariposa and Tuolumne Counties (Southern Mountain Counties)	CA	Tuolumne County

The transportation conformity regulation at 40 CFR 93.109(g) governs transportation conformity in isolated rural areas. Because these areas do not have metropolitan transportation plans and TIPs, conformity is done in isolated rural areas only when a non-exempt FHWA/FTA project in such an area needs funding or approval. Table 1 in 40 CFR 93.109(b) lists the conformity criteria by transportation action. For a non-exempt FHWA-FTA project in an isolated rural area, Table 1 includes the following criteria:

Table 1 – Conformity Criteria	
All Actions at all times:	
§93.110	Latest planning assumptions
§93.111	Latest emissions model
§93.112	Consultation
Project (Not From a Conforming Plan and TIP):	
§93.113(d)	TCMs
§93.114	Currently conforming plan and TIP
§93.116	CO, PM ₁₀ , and PM _{2.5} hot-spots
§93.117	PM ₁₀ , and PM _{2.5} control measures
§93.118 and/or	Emissions budget and/or Interim emissions
§93.119	

For the reasons described in Sections 2.4 and 2.6 above, the requirements at §§ 93.111, 93.116, 93.117, 93.118, and 93.119 from Table 1 in 40 CFR 93.109(b) do not apply for determining conformity of projects to the 1997 ozone NAAQS in isolated rural orphan areas.

If a non-exempt FHWA/FTA project needs approval in an orphan isolated rural area, transportation conformity for the 1997 ozone NAAQS can be demonstrated by showing that the remaining criteria have been met:

- Use of the latest planning assumptions, per 40 CFR 93.110. These criteria generally apply to regional emissions analyses. In orphan areas, ensuring the latest planning assumptions are used applies to information about TCMs in an approved SIP (40 CFR 93.113);
- Consultation requirements, according to 40 CFR 93.112; and

- Timely implementation of any approved SIP transportation control measures (TCMs), according to the requirements in 40 CFR 93.113.

2.8 How is conformity for the 1997 ozone NAAQS determined in multi-state areas that include an orphan area?

There are several multi-state 1997 ozone NAAQS nonattainment or maintenance areas where only one state contains an orphan portion, while the other states in the multi-state area do not (e.g., the St. Louis 1997 ozone NAAQS area has an orphan portion in Illinois but not in Missouri). In multi-state areas, when a state has a 1997 ozone NAAQS SIP for its portion of the nonattainment or maintenance area and EPA has either found the budgets in the SIP adequate, or has approved the SIP, conformity can be determined in that state independently of the other states.¹⁴ This continues to be the case for multi-state areas with an orphan portion for the 1997 ozone NAAQS, even though the emissions budget test is not necessary for determining conformity for the 1997 ozone NAAQS (see Section 2.4).

In the 1997 ozone NAAQS multi-state areas in Section 2.2, there are states whose portion of the area is covered in full by the 2008 ozone NAAQS nonattainment or maintenance area and therefore do not contain any orphan counties. In these states, ozone conformity requirements can be satisfied for the state's portion of the area by demonstrating conformity for only the 2008 ozone NAAQS (see Section 3.1), and only the state that contains the orphan portion would need to demonstrate conformity for the 1997 ozone NAAQS for the orphan portion.

¹⁴ States can operate independently for conformity because the CAA refers to conformity to a SIP. This is further explained in EPA's *Guidance for Transportation in Multi-Jurisdictional Nonattainment and Maintenance Areas*, EPA-420-B-12-046, found on EPA's web page at www.epa.gov/state-and-local-transportation/policy-and-technical-guidance-state-and-local-transportation.

3 2008 Ozone NAAQS and 2015 Ozone NAAQS Areas

3.1 What are the 2008 ozone NAAQS nonattainment or maintenance areas that were nonattainment or maintenance for the 1997 ozone NAAQS, and how is conformity demonstrated in these areas?

The court decision does not affect transportation conformity requirements for the 2008 ozone NAAQS. There are 42 2008 ozone NAAQS nonattainment and maintenance areas that were former 1997 ozone NAAQS nonattainment or maintenance areas. Of these areas, 32 have boundaries that are the same as or larger than the corresponding 1997 ozone NAAQS area. These 32 areas are listed in Table 3-1. Areas that are covered by multiple states are counted as one area in the table.

The remaining ten 2008 ozone NAAQS areas are smaller than the corresponding 1997 ozone NAAQS area. These ten areas are discussed in Section 3.2 and are adjacent to the partial orphan areas discussed in Section 2.2.

Figure 3-1 illustrates the two cases for 2008 ozone NAAQS areas: on the left side of the figure, the 2008 ozone NAAQS area boundary is identical to the 1997 ozone NAAQS boundary; on the right side, the boundary is smaller, creating a partial orphan area.

Figure 3-1: 2008 Ozone NAAQS Areas

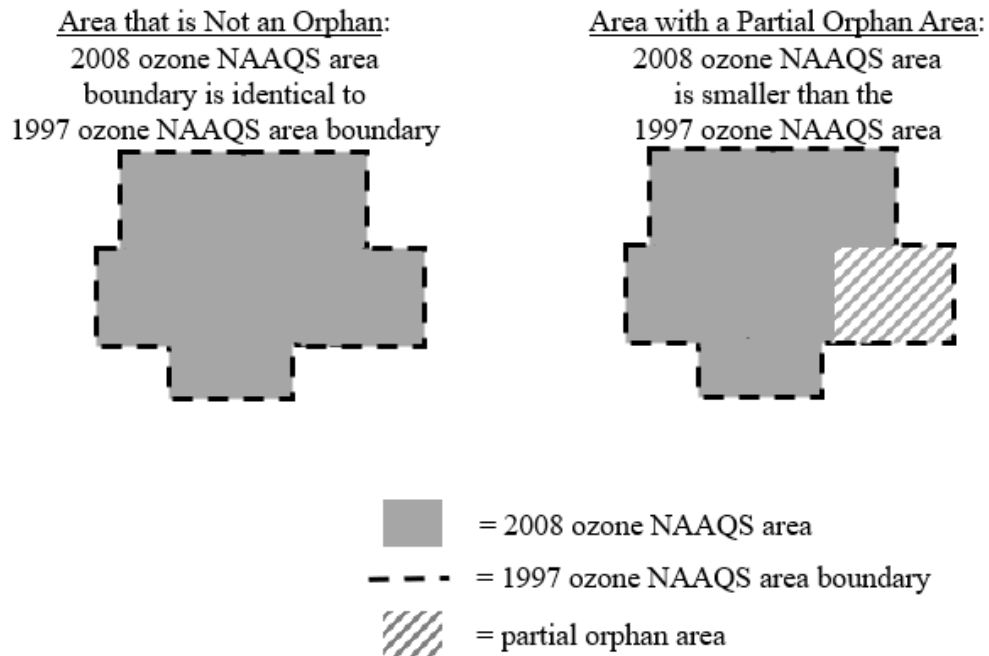


Table 3-1: 2008 Ozone NAAQS Nonattainment and Maintenance Areas that Were 1997 Ozone NAAQS Nonattainment or Maintenance Areas

2008 Ozone NAAQS Area Name	State
Allentown-Bethlehem-Easton	PA
Baltimore	MD
Baton Rouge	LA
Chico (Butte County)	CA
Cleveland-Akron-Lorain	OH
Columbus	OH
Dallas-Fort Worth	TX
Denver-Boulder-Greeley-Ft. Collins-Loveland	CO
Greater Connecticut	CT
Houston-Galveston-Brazoria	TX
Imperial County	CA
Jamestown	NY
Kern County (Eastern Kern)	CA
Lancaster	PA
Los Angeles-San Bernardino Counties (West Mojave Desert)	CA
Los Angeles-South Coast Air Basin	CA
Memphis	TN, MS, AR
Morongo Band of Mission Indians	CA
Nevada County (Western part)	CA
New York-N. New Jersey-Long Island	NY, NJ, CT
Pechanga Band of Luiseno Mission Indians of the Pechanga Reservation	CA
Phoenix-Mesa	AZ
Pittsburgh-Beaver Valley	PA
Reading	PA
Riverside County (Coachella Valley)	CA
Sacramento Metro	CA
San Diego County	CA
San Francisco Bay Area	CA
San Joaquin Valley	CA
Seaford	DE
Sheboygan County	WI
Ventura County	CA
Washington	DC, MD, VA

The 2008 ozone NAAQS nonattainment and maintenance areas listed in Table 3-1 must continue to fulfill transportation conformity requirements for ozone by demonstrating conformity for the 2008 ozone NAAQS for the geographic area covered by that NAAQS. Transportation conformity for the 1997 ozone NAAQS does not need to be demonstrated in the geographic area covered by the 2008 ozone NAAQS nonattainment or maintenance area boundary, as these are not orphan nonattainment or maintenance areas.

Therefore, 2008 ozone NAAQS areas can continue to make conformity determinations for transportation plans, TIPs, and projects for the 2008 ozone NAAQS as usual, i.e., as they have been doing, according to the requirements of the transportation conformity regulations at 40 CFR Part 93.

3.2 Which 2008 ozone NAAQS areas are adjacent to the partial orphan areas, and how is conformity determined in these areas?

As stated above, ten of the 2008 ozone NAAQS areas are smaller than the 1997 ozone NAAQS area, and these ten areas are listed in Table 3-2. These areas are adjacent to the partial orphan areas discussed in Section 2.2 and listed in Table 2-3 and Table 2-4. Areas that are covered by multiple states are counted as one area in Table 3-2.

As discussed in Section 3.1, the court decision does not affect transportation conformity requirements for the 2008 ozone NAAQS. The 2008 ozone NAAQS nonattainment and maintenance areas listed in Table 3-2 must continue to fulfill transportation conformity requirements for the 2008 ozone NAAQS, for the geographic area covered by that NAAQS.¹⁵

The agencies that address transportation conformity for these ten 2008 ozone NAAQS areas will also need to address transportation conformity for the 1997 ozone NAAQS in the partial orphan area, as described in Section 2 of this document. Please refer to Section 2 for guidance about determining conformity in orphan areas, and particularly Section 2.5 for options related to partial orphan areas.

¹⁵ If applicable, these areas already have the option to demonstrate conformity for the 2008 ozone NAAQS using the 1997 ozone NAAQS SIP motor vehicle emissions budgets for the geographic area covered by those budgets, per 40 CFR 93.109(c)(2)(ii)(B). In such a case, the 2008 ozone NAAQS conformity determination would satisfy the area's ozone conformity requirements.

Table 3-2: 2008 Ozone NAAQS Areas Adjacent to a Partial Orphan Area

2008 Ozone NAAQS Area Name/State	1997 Ozone NAAQS Name/State	Partial Orphan Area
Atlanta, GA	(same)	Barrow, Carroll, Hall, Spalding and Walton Counties
Calaveras County, CA	Amador and Calaveras Counties (Central Mountain Counties), CA	Amador County
Charlotte-Rock Hill, NC-SC	Charlotte-Gastonia-Rock Hill, NC-SC	Parts of Cabarrus, Gaston, Lincoln, Rowan and Union Counties in NC and part of York County, SC
Chicago-Naperville, IL-IN-WI (the portion of Kenosha County, WI in this area had been included in the 1997 ozone NAAQS area "Milwaukee-Racine, WI")	Milwaukee-Racine, WI	Milwaukee, Ozaukee, Racine, Washington, and Waukesha Counties, and part of Kenosha County (i.e., the entire area except the eastern part of Kenosha County)
Cincinnati, OH-KY-IN	Cincinnati-Hamilton, OH-KY-IN	Parts of Boone, Campbell and Kenton Counties in KY
Dukes County, MA	Boston-Lawrence-Worcester (Eastern Mass), MA	Barnstable, Bristol, Essex, Middlesex, Nantucket, Norfolk, Plymouth, Suffolk, Worcester Counties (i.e., the entire area except Dukes County)
Knoxville, TN	(same)	Jefferson, Loudon and Sevier Counties, part of Anderson County and part of Cocke County
Mariposa County, CA	Mariposa and Tuolumne Counties (Southern Mountain), CA	Tuolumne County
Philadelphia-Wilmington-Atlantic City, PA-NJ-MD-DE	(same)	Kent County, DE
St. Louis – St. Charles – Farmington, MO-IL	St. Louis, MO-IL	Jersey County, IL

3.3 What is required to demonstrate conformity for the 1997 ozone NAAQS in the orphan areas that were designated nonattainment for the 2015 ozone NAAQS?

EPA made nonattainment designations for the 2015 ozone NAAQS on June 4, 2018, for most areas (83 FR 25776) and July 25, 2018, for the San Antonio area.¹⁶ These designations occurred after the court decision of February 16, 2018. As such, these areas were not before the court in the *South Coast II* case. EPA’s nonattainment area designations for the 2015 ozone NAAQS were effective August 3, 2018 for most areas and September 25, 2018 for the San Antonio area, and transportation conformity for the 2015 ozone NAAQS applies one year after the effective date of these designations, on August 3 and September 25, 2019, respectively. Some of the nonattainment areas for the 2015 ozone NAAQS include areas that were considered orphan areas in the *South Coast II* case. These areas are listed below in Table 3-3.

Table 3-3: 2015 Ozone NAAQS Nonattainment Areas that Include an Orphan Area

2015 Ozone NAAQS Area	State
Allegan County	MI
Amador County	CA
Berrien County	MI
Detroit	MI
Door County	WI
Las Vegas	NV
Louisville	KY, IN
Manitowoc County	WI
Muskegon	MI
Northern Milwaukee/Ozaukee Shoreline	WI
Sutter Buttes	CA
Tuolumne County	CA

Once DOT’s conformity determination is made for the 2015 ozone NAAQS in these orphan areas, that determination will also demonstrate conformity for the 1997 ozone NAAQS in the area designated nonattainment for the 2015 ozone NAAQS, since the 1997 ozone NAAQS is less stringent than the 2015 ozone NAAQS. EPA believes that this approach is consistent with the court’s analysis supporting its decision that transportation conformity applies for the 1997 ozone NAAQS in orphan areas. Therefore, once an area is determining conformity for the more stringent 2015 ozone NAAQS, no demonstration for the less stringent 1997 ozone NAAQS is necessary.

Transportation conformity for the 2015 ozone NAAQS applies for most areas beginning August 3, 2019. As of that date, 2015 ozone NAAQS nonattainment areas with an MPO must have a transportation plan and TIP in place that has been demonstrated to conform for the 2015 ozone

¹⁶ EPA designated Bexar County, TX as nonattainment and the remaining 7 counties in the San Antonio area as attainment on July 25, 2018 (83 FR 35136), with an effective date of September 24, 2018.

NAAQS. Note that both the MPO and DOT would need to act on the conformity determination to fulfill the requirement, as described further in EPA’s transportation conformity guidance for the 2015 ozone NAAQS.¹⁷ However, 2015 ozone NAAQS nonattainment areas that include 1997 ozone NAAQS orphan areas may choose to demonstrate conformity of their transportation plans and TIP for the 2015 ozone NAAQS before August 3, 2019, in lieu of demonstrating conformity for the 1997 ozone NAAQS. As always, DOT’s conformity determination is the final action.

In cases where the 2015 ozone NAAQS nonattainment area boundary is smaller than the 1997 ozone NAAQS area boundary, areas should refer to Section 2.8 of this guidance for additional information on fulfilling transportation conformity requirements in those portions of a multi-state area not covered by the 2015 ozone NAAQS nonattainment area.

EPA Regional Offices, in consultation with EPA’s Office of Transportation and Air Quality, are available to provide additional technical assistance to the orphan areas based on their specific circumstances. See contact information in Section 1.3 of this guidance.

¹⁷ *Transportation Conformity Guidance for 2015 Ozone NAAQS Nonattainment Areas*, EPA-420-B-18-023, June 2018, available on EPA’s webpage at: www.epa.gov/state-and-local-transportation/policy-and-technical-guidance-state-and-local-transportation#requirements.

4 Examples

This section provides examples of where and when conformity applies for more than one ozone NAAQS due to the court decision.

4.1 Example 1: 2008 ozone NAAQS area that has the same boundary as the 1997 ozone NAAQS area

Example 1: 2008 ozone NAAQS area
boundary is identical to
1997 ozone NAAQS area boundary

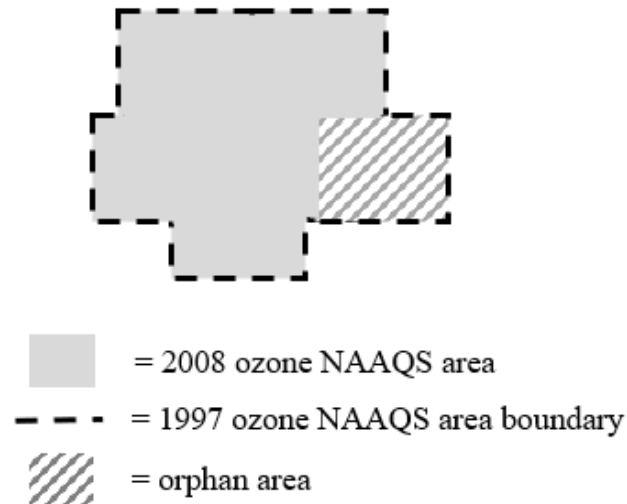


■ = 2008 ozone NAAQS area
- - - = 1997 ozone NAAQS area boundary

- **Where does conformity apply?**
 - Conformity applies in the 2008 ozone NAAQS area
- **When does conformity apply?**
 - Conformity applies for the 2008 ozone NAAQS now (requirement began on July 20, 2013 – see Section 3.1).
 - Conformity does not apply for the 1997 ozone NAAQS in these areas (see Section 3.1).

4.2 Example 2: 2008 ozone NAAQS area that is smaller than the 1997 ozone NAAQS area

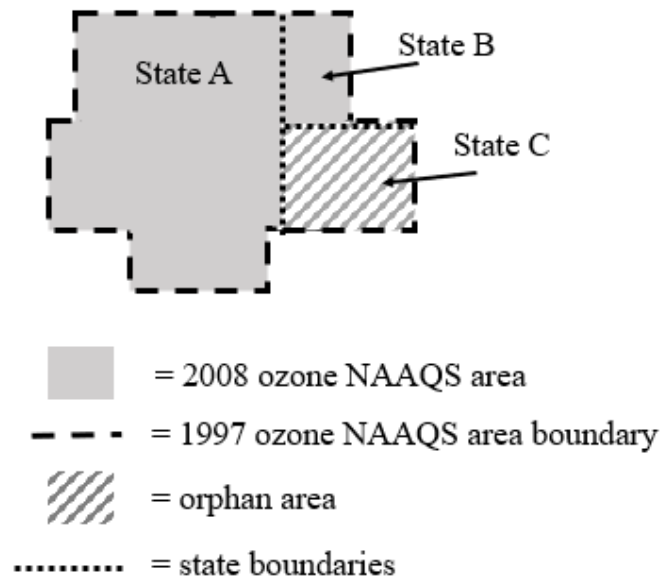
Example 2: 2008 ozone NAAQS area is smaller than the 1997 ozone NAAQS area boundary



- **Where does conformity apply?**
 - Conformity for the 2008 ozone NAAQS applies in the 2008 ozone NAAQS area (solid shaded area)
 - Conformity for the 1997 ozone NAAQS applies in the orphan area (striped area), or conformity for the 1997 ozone NAAQS can be demonstrated for the entire 1997 area (area within dashed border)
- **When does conformity apply?**
 - Conformity applies for the 2008 ozone NAAQS now (requirement began on July 20, 2013) - see Section 3.1).
 - Conformity applies for the 1997 ozone NAAQS on February 16, 2019 (see Section 2.3).

4.3 Example 3: A multi-state area

Example 3: A multi-state area with an orphan area

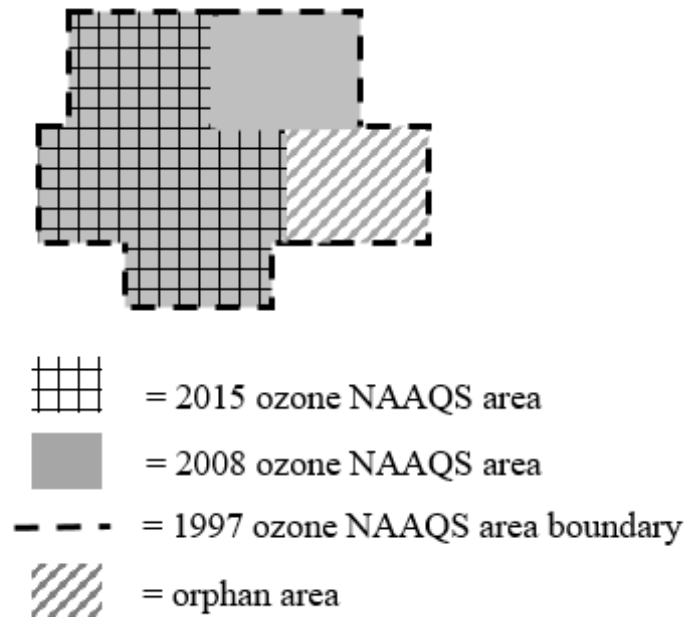


In this example, States A, B, and C each have their own approved SIP or adequate budgets from a submitted SIP that addresses either the 1997 or 2008 ozone NAAQS.

- **Where does conformity apply?**
 - Conformity for the 2008 ozone NAAQS applies in the 2008 ozone NAAQS area (solid shaded area), in States A and B.
 - Conformity for the 1997 ozone NAAQS applies in the orphan area (striped area), in State C.
- **When does conformity apply?**
 - Conformity applies for the 2008 ozone NAAQS now (requirement began on July 20, 2013 - see Section 3.1).
 - Conformity applies for the 1997 ozone NAAQS on February 16, 2019 (see Section 2.3).

4.4 Example 4: An area designated nonattainment for the 2015, 2008, and 1997 ozone NAAQS

Example 4: An Area Designated for All Three Ozone NAAQS



- **Where does conformity apply?**
 - Conformity for the 2015 ozone NAAQS applies in the 2015 ozone NAAQS area (gridded area)
 - Conformity for the 2008 ozone NAAQS applies in the 2008 ozone NAAQS area (gray shaded area, which includes the 2015 ozone NAAQS area)
 - Conformity for the 1997 ozone NAAQS applies in the orphan area (striped area), or conformity for the 1997 ozone NAAQS can be demonstrated for the entire 1997 ozone NAAQS area (area within dashed border).
- **When does conformity apply?**
 - Conformity applies for the 2015 ozone NAAQS beginning on August 3, 2019 (see Section 3.3).
 - Conformity applies for the 2008 ozone NAAQS now (the requirement began on July 20, 2013 – see Section 3.1).
 - Conformity applies for the 1997 ozone NAAQS on February 16, 2019 (see Section 2.3).