

STATE OF COLORADO

Bill Ritter, Jr., Governor
James B. Martin, Executive Director

Dedicated to protecting and improving the health and environment of the people of Colorado

COLORADO AIR QUALITY CONTROL COMMISSION

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**Colorado Department
of Public Health
and Environment**

NOTICE OF PUBLIC RULEMAKING HEARING BEFORE THE COLORADO AIR QUALITY CONTROL COMMISSION

Regarding proposed revisions to:
Regulation Number 10
CRITERIA FOR ANALYSIS OF CONFORMITY

SUBJECT:

The Air Quality Control Commission will hold a public rulemaking hearing to consider the Division's proposed revisions to Regulation Number 10 regarding the latest federal changes to the transportation conformity program and to formalize Colorado specific practices regarding the implementation of the program. The proposed rule also corrects minor typographical, grammatical and formatting errors.

FEDERAL REQUIREMENTS:

The federal act does not require the Commission to make any of the rule revisions that are the subject of this Notice of Public Rulemaking Hearing. A proposed Statement of Basis, Specific Statutory Authority, and Purpose and a regulatory analysis (if one has been requested) will be available for inspection no later than five (5) days prior to the hearing. The proposed language for the rule revision is attached to and made a part of this notice.

HEARING SCHEDULE:

DATE: November 20, 2008
TIME: 9:00 AM
PLACE: Colorado Department of Public Health & Environment
4300 Cherry Creek Drive South, Sabin Conference Room
Denver, Colorado 80246

*The hearing may be continued at such places and time as the Commission may announce.
Interested parties may contact the Commission Office at 303-692-3476 to confirm meeting dates
and times.*

PUBLIC COMMENT:

The Commission encourages all interested persons to provide their views either orally at the hearing or in writing prior to or at the hearing. The Commission especially solicits comments and analyses from persons who will incur directly some cost or benefit from the proposed revisions. Public testimony will be taken as close to the start of the hearing as possible and during the hearing as necessary. Written and/or electronic submissions prior to the hearing are requested to allow review prior to presentation at the hearing. Written and/or electronic submissions should be mailed to the Commission Office at least 14 days prior to the hearing.

PARTY STATUS:

In order to obtain party status at the hearing, compliance with several requirements as defined in the Commissions Procedural Rules is necessary. A petition for party status must be filed by electronic mail with the Office of the Air Quality Control Commission no later than close of business on **September 15, 2008**. The petition must: *1) identify the applicant; 2) provide the name, address, telephone and facsimile numbers, and email address of the applicants representative; and 3) briefly summarize what, if any, policy, factual, and legal issues the applicant has with the proposal(s) as of the time of filing the application.* Electronically mailed copies must also be received, by this same date, by the Division staff person and the Assistant Attorneys General representing the Division and the Commission identified below. Any person may petition the Commission to file documents in paper copy format if they are unable for any reason to not comply with the requirements of 1.3.8(2) of the Commissions Procedural Rules. An original and a specified number of paper copies must be filed in the Office of the Air Quality Control Commission, Colorado Department of Public Health and Environment, 4300 Cherry Creek Drive South, Denver, Colorado 80246.

Individuals may also obtain party status through the submittal of an initial alternative rule to the proposed rule. The submittal of an alternative proposal must be accompanied by an electronic copy of the initial alternative proposed rule and all other associated documents as required by the Commission's procedural rules and must be filed by electronic mail with the Office of the Commission by the date specified for party status requests. Initial alternative rules must also be filed by electronic mail with the Division staff person and with each of the Assistant Attorneys General.

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Requests received beyond the above stated deadline shall only be considered upon a written motion for good cause shown. The Commission reserves the right to deny party status to anyone that does not comply with the Commission's procedural rules.

STATUS CONFERENCE:

A status conference will be held **September 19th at 1:00 p.m.**, at the Department of Public Health and Environment to ascertain and discuss the issues involved, and to ensure that parties are making all necessary efforts to discuss and resolve such issues prior to the submission of prehearing statements. Attendance at this status conference is mandatory for anyone who has requested party status.

PREHEARING CONFERENCE/PREHEARING STATEMENTS:

Attendance at the prehearing conference is mandatory for all parties to this hearing. A prehearing conference will be held **October 22, 2008 at 1:00 p.m.** in the Commission Offices at 4300 Cherry Creek Drive South, Denver. All parties must submit by electronic mail a preliminary prehearing statement to the Commission Office by close of business **October 17, 2008**. In addition, electronically mailed copies of these documents must be delivered by that date to all persons who have requested party status. A copy of the prehearing statement must also be electronically mailed to the Division point of contact and each of the Assistant Attorney's General identified above by close of business **October 17, 2008**. Any revisions to the prehearing statement must be submitted to the Administrator of the Commission at the prehearing conference and by electronic mail to the Commission Office on the day of the prehearing conference. Any exhibit included in the prehearing statements will be electronically mailed to individual Commissioners for review prior to the hearing, provided the party files electronic copies of such exhibit. Rebuttals to the prehearing statement may be submitted to the Commission Office and all other parties by close of business **October 30, 2008**.

EXCEPTIONS TO FILE DOCUMENTS BY ELECTRONIC MAIL

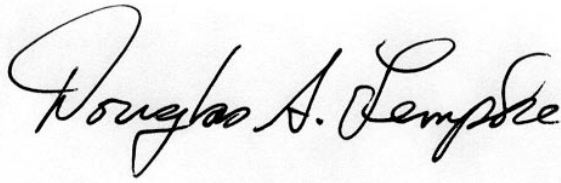
The Commission's Procedural Rules provide for an exception to file documents by electronic mail. If granted an exception to electronic filing pursuant to the provisions of 1.3.8(3) of the Commissions Procedural Rules, the applicant for party status shall file an original and fifteen copies of the prehearing statement in the Office of the Air Quality Control Commission, and shall also deliver copies to each other party, applicant for party status, the Assistant Attorneys General representing the Commission and Division, and the Division staff person for the proceedings, by electronic mail or as otherwise provided by the exception granted under Subsection 1.3.8(3), by that same day.

STATUTORY AUTHORITY FOR THE COMMISSION'S ACTIONS:

The Commission proposes to consider these regulatory changes pursuant to its authority under the provisions of § 25-7-105(1), C.R.S. The rulemaking hearing will be conducted in accordance with sections 24-4-103 and 25-7-110, C.R.S., as amended, the Procedural Rules of the Commission and as otherwise stated in this notice. This list of statutory authority is not intended as an exhaustive list of the Commission's statutory authority to act in this matter.

Dated this 27th day of August 2008 at Denver, Colorado

Colorado Air Quality Control Commission

A handwritten signature in black ink, reading "Douglas A. Lempke". The signature is written in a cursive style with a large, stylized 'D' and 'L'.

Douglas A. Lempke, Administrator

DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

Air Quality Control Commission

REGULATION ~~NO.~~NUMBER 10

CRITERIA FOR ANALYSIS OF CONFORMITY

5 CCR 1001-12

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

I. Incorporation of the Federal Rule

The provisions of Title 40, Part 51, Subpart W, and Title 40, Section 6.303, of the Code of Federal Regulations, (July 1, 1994), promulgated by the US Environmental Protection Agency (EPA) are hereby incorporated by reference by the Air Quality Control Commission and made part of the Colorado Air Quality Control Commission Regulations.

Materials incorporated by reference are those in existence as of the dates indicated and do not include later amendments. The material incorporated by reference is available for public inspection during regular business hours at the Office of the Commission, located at 4300 Cherry Creek Drive, ~~S.~~South, Denver, CO ~~80222~~80246-1530, or may be examined at any state publications depository library. Parties wishing to inspect these materials ~~could~~ should contact the Technical Secretary of the Commission, located at the Office of the Commission.

II. Statement of Basis, Specific Statutory Authority and Purpose

II.A. October 17, 1996, Part A, General Conformity

Background

This statement of Basis, Specific Statutory Authority and Purpose complies with the requirements of the Administrative Procedures Act, C.R.S. 1973, Section 24-4-103(4) for adopted or modified regulation.

Basis

The EPA has promulgated rules to ensure that Federal actions conform to the appropriate State Implementation Plan (SIP). Conformity to a SIP is defined in the Clean Air Act as meaning conformity to a SIP's purpose of eliminating or reducing the severity and number of violations of the National Ambient Air Quality Standards (NAAQS) and achieving expeditious attainment of such standards. The Federal agency responsible for the action is required to determine if its actions conform to the applicable SIP. Colorado is required, through federal rule, to submit to EPA revisions to the SIP establishing conformity criteria and procedures consistent with federal rule.

Statutory Authority

The general authority for this regulation is contained in the Colorado Air Pollution Prevention and Control Act, Section 25-7-105(1)(a), which requires the Commission to promulgate a state implementation plan which will assure attainment and maintenance of the NAAQS. This regulation incorporates the federal requirements, and does not go further than the requirements.

Purpose

The purpose of the rule is to implement Section 176(c) of the Clean Air Act, which requires that all federal actions conform to an applicable implementation plan developed pursuant to Section 110 and Part D of the Act. The Commission is incorporating the EPA rule by reference in order to comply with the federal requirements.

PART B Conformity to State Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit Act

I. Purpose, applicability and incorporation of material by reference

- I.A. The purpose of this Part B of Regulation ~~No-Number~~ 10 is to implement a State Implementation Plan (SIP) governing transportation conformity determinations, including the establishment of ~~and to establish a state-specific~~ interagency consultation procedures, and addressing the obtainment and enforceability of written commitments to certain transportation control measures and project mitigation and control measures, as required by 40 CFR 51.390, as published at 62 ~~Fed. Reg.~~ Federal Register 158 (August 15, 1997), and as amended through 73 Federal Register 4439, January 24, 2008.
- I.B. This rule shall have the same applicability as 40 CFR, Part 93, as published at 62 ~~Fed. Reg.~~ Federal Register 158 (August 15, 1997), and as amended through 73 Federal Register 4439, January 24, 2008. In general, such federal requirements apply to transportation projects, transportation improvement programs, regional transportation plans, and State Implementation Plans.
- I.C. The Colorado Air Quality Control Commission hereby adopts and incorporates by reference the provisions of 40 CFR, Part 93, as published at 62 ~~Fed. Reg.~~ Federal Register 158 (August 15, 1997), and as amended through 73 Federal Register 4439, January 24, 2008. Materials incorporated by reference are those in existence as of the date of this regulation and do not include later amendments. ~~-~~ The material incorporated by reference is available for public inspection during regular business hours at the Office of the Commission, located at 4300 Cherry Creek Drive South, Denver, Colorado 80222, or may be examined at any state publications depository library. Parties wishing to inspect these materials should contact the Technical Secretary of the Commission, located at the Office of the Commission.

II. Requirement to comply with the Federal rule

Any person making a transportation conformity determination or adopting or approving a regionally significant project shall comply with the provisions of ~~part Title~~ 40 CFR, ~~part Part~~ 93.

~~subpart Subpart A, which rules are incorporated into 101(c) of this regulation by reference, except as follows:~~

II.A. The interagency consultation procedures established in § IV of this document specify Colorado procedures and shall apply in ~~lieu of addition to~~ the consultation procedures established in 40 CFR 93.105 (a) through ~~(c)(e)~~. ~~Any reference to 40 CFR 93.105, to subsections (a) through (c) of 40 CFR 93.105, in the incorporated federal rules shall be construed to mean § IV of this Regulation No. 10. In particular:~~

~~II.A.1. Any reference to 40 CFR 93.105(c)(1)(i) in the incorporated federal rules shall be construed to mean § IV.C.1.a. for requirements related to regional emissions analyses, and to § IV.C.3. for requirements related to hot-spot analyses;~~

~~II.A.2. Any reference to 40 CFR 93.105(c)(1)(iii) in the incorporated federal rules shall be construed to mean § IV.C.1.c.; and~~

~~II.A.3. Any reference to 40 CFR 93.105(c)(1)(vi) in the incorporated federal rules shall be construed to mean § IV.C.1.e.~~

~~II.B. 40 CFR 93.102(d) shall not apply.~~

II.B. Colorado-specific provisions in Section V of this document that require obtainment of and fulfillment of written commitments to SIP control measures not included in a transportation plan or TIP shall apply, pursuant to 40 CFR 93.122(a)(4)(ii).

II.C Colorado-specific provisions in Section VI of this document regarding design concept and scope and enforceability of project-level mitigation and control measures shall apply, pursuant to 40 CFR 93.125(c).

III. Definitions

In addition to the federal rule definitions incorporated by reference, the following terms are defined or further delineated:

~~Adopt or approve a regionally significant highway or transit project. For purposes of 40 CFR 93.121, the adoption or approval of a regionally significant project is never later than the execution of a contract for site preparation, or final action by an elected or appointed commission or administrator directing lower-level personnel to proceed.~~

CDOT means the Colorado Department of Transportation.

Commission means the ~~air-Air quality-Quality control-Control commission-Commission~~ as defined in § 25-7-103(7), C.R.S.

Division means ~~the Air Pollution Control Division, pursuant to § 25-7-111, C.R.S.,~~

LPA means Lead Planning Agency, which shall be the agency charged, together with the Division, with the duty of developing the State Implementation Plan (SIP) for any nonattainment or maintenance area. Unless otherwise appointed by the Governor, the LPA for the Denver

nonattainment area shall be the Regional Air Quality Council; the LPA for the Colorado Springs nonattainment area shall be the Pikes Peak Area Council of Governments; the LPA for the Ft. Collins, ~~Loveland~~, and Greeley nonattainment areas shall be the North Front Range Transportation and Air Quality Planning Council, also known as the North Front Range MPO. The requirements of this rule shall also apply to any successors of such LPAs, and to any LPA that is subsequently created for any area, or that otherwise assumes the duties and obligations of the LPAs identified in this definition. The Division, in consultation with the municipal and county governments within the affected nonattainment area, shall perform any duty or obligation assigned to the LPA for the Longmont nonattainment area, and for any area for which there is no LPA or for which the LPA is unwilling or unable to perform such duty or obligation.

~~Metropolitan planning area means the geographic area in which the metropolitan transportation planning process required by 23 U.S.C. 134 and section 8 of the Federal Transit Act must be carried out.~~

Metropolitan planning organization (MPO) is that organization designated as being responsible, together with the State, for conducting the continuing, cooperative, and comprehensive planning process under 23 U.S.C. 134 and 49 U.S.C. 1607. It is the forum for cooperative transportation decision-making. ~~For purposes of this rule, the MPO for the Denver and Longmont nonattainment areas shall be the Denver Regional Council of Governments (DRCOG), the MPO for the Colorado Springs nonattainment area shall be the Pikes Peak Area Council of Governments (PPACG), and the MPO for the Fort Collins and Greeley nonattainment areas shall be the North Front Range Transportation and Air Quality Planning Council (NERTAQPC). The requirements of this rule shall also apply to any successors of such MPOs, any MPO that is subsequently created for any area, any MPO for any other area that becomes a nonattainment area, or any MPO that otherwise assumes the duties and obligations of the MPOs identified in this definition.~~

Regionally significant project means:

~~(1) in any nonattainment area that is within a metropolitan planning area, a transportation project (other than an exempt project) that is on a facility which serves regional transportation needs (such as access to and from the area outside of the region, major activity centers in the region, major planned developments such as new retail malls, sports complexes, etc., or transportation terminals, as well as most terminals themselves) and would normally be included in the modeling of a metropolitan area's transportation network, including at a minimum all principal arterial highways and all fixed guideway transit facilities that offer an alternative to regional highway travel.~~

~~(2) in all nonattainment areas outside of metropolitan planning areas, a transportation project (other than an exempt project) that is on a facility which serves regional transportation needs (such as access to and from the area outside of the region, major activity centers in the region, major planned developments such as new retail malls, sports complexes, etc., or transportation terminals, as well as most terminals themselves) and that could reasonably be included in the regional emissions analysis in such nonattainment area, including at a minimum all principal arterial highways and all fixed guideway transit facilities that offer an alternative to regional highway travel.~~

IV. Interagency Consultation

IV.A. Roles and Responsibilities

- IV.A.1. This rule sets out the minimum requirements for interagency consultation (Federal, State, regional and local) and resolution of conflicts. Representatives of the MPOs, local transit agency, the Division, the LPA and CDOT shall undertake an interagency consultation process in accordance with this section with each other and with local or regional offices of EPA, FHWA, and FTA on the development of the implementation plan, the list of TCMs in the applicable implementation plan, the transportation plan, the TIP, and all conformity determinations required by this rule. The MPO shall provide notice of any revisions to the preceding documents through the normal planning process. The interagency consultation process shall apply to any revisions of the preceding documents that could affect conformity.
- IV.A.2. It shall be the role and responsibility of each agency identified as a lead agency to prepare the final document and to ensure the adequacy of the interagency consultation process. Designation as a lead agency for any decision item shall mean that such agency shall be responsible for making the final decision on such decision item, except that any such decision shall be subject to the dispute resolution process set out in § IV.H.
- IV.A.3. In each nonattainment area, CDOT, the LPA, the Division, the MPO, local transit agency, and other agencies, as appropriate, may develop a written agreement pursuant to § IV.G. that outlines the specific roles and responsibilities of various participants in the interagency consultation process for the preparation of SIPs, transportation plans, TIPs and conformity determinations. In the absence of such a written agreement, in addition to the other duties specified in this rule, the specific roles and responsibilities of the various participants in the interagency consultation process shall be as follows:
- IV.A.3.a. Division shall be responsible for: (A) emissions inventories; (B) air quality modeling; (C) performing attainment demonstrations; (D) assisting the LPA in the development of pollutant specific implementation plan revisions; (E) providing technical and policy input on emissions budgets; and (F) updating motor vehicle emissions factors.
- IV.A.3.b. The LPA, or the Division if there is no LPA, shall: (A) develop pollutant-specific state implementation plans for submittal to the Commission; and (B) prepare emissions budgets.
- IV.A.3.c. The MPO shall: (A) develop transportation plans and TIPs, and shall make conformity determinations on transportation plans and TIPs within the applicable area, and shall be the lead agency for the development of such plans and TIPs, and for such conformity determinations; ~~(B) evaluate TCM transportation impacts;~~ ~~(B)~~ develop transportation and socioeconomic data and planning assumptions and provide such data and planning assumptions to the Division for use in air quality analysis; ~~(C)~~ . perform transportation modeling and documentation of timely implementation of TCMs needed for conformity

assessments and SIP development; and (D) monitor regionally significant projects, and ensure that all disclosed, or otherwise known, regionally significant projects are included in the regional emissions analysis; The MPO may: ~~(E)~~(E)-provide technical and policy input on emissions budgets; and provide technical and policy input on emissions budgets; and (F) evaluate TCM impacts on transportation, as needed. perform transportation modeling and documentation of timely implementation of TCMs needed for conformity assessments and SIP development.

IV.A.3.d. CDOT shall: (A) provide technical input on proposed revisions to motor vehicle emissions factors, ~~(B) distribute draft and final project environmental documents to other agencies for projects on which CDOT performs a conformity determination;~~ (B) convene air quality technical review meetings on specific projects when requested by other agencies or as needed, ~~and (C)~~ comment on transportation control measures and other aspects of the SIP that may affect the operation, construction or maintenance of the transportation system.

IV.A.3.e. In addition to the duties and responsibilities identified in paragraph d. above, for FHWA/FTA projects located outside of metropolitan planning areas, CDOT shall: (A) perform the required conformity evaluation for such projects, and shall be the lead agency for such evaluations; ~~(B)- provide technical and policy input on emissions budgets; (C) develop socioeconomic data and planning assumptions for use in air quality analysis to determine conformity of projects in consultation with the affected municipal and county governments; and (D) perform transportation modeling, regional emissions analyses and documentation of timely implementation of TCMS needed for conformity assessments.~~ CDOT may via formal agreement arrange to have other qualified organizations, including MPO's, perform such conformity determination tasks.

IV.A.3.f. The Commission shall be responsible for promulgating revisions to the SIP and for determining whether a conformity determination should be appealed to the Governor.

IV.B. Establishing a forum for consultation

IV.B.1. Minimum Consultation Requirements.

IV.B.1.a. The MPO ~~shall~~ establish and maintain a forum, herein referred to as the ~~Review Team~~Review team review team, for regular consultation. The MPO may establish a committee, or use existing committees, to perform the tasks assigned to the Review Team~~Review team~~, provided the agencies identified in subparagraph IV.B.1.b., below, have an opportunity to participate. ~~A Review Team established by CDOT may serve other functions related to the FHWA/FTA project and may be combined with other advisory committees established to evaluate the~~

~~project including, but not limited to, functions and committees necessary to perform NEPA analyses.~~ Conference calls or written correspondence may be used to hold the meetings required by this rule upon the concurrence of the Division and any affected LPA. The ~~R~~review ~~T~~eam shall comply with the minimum requirements set out in paragraph c. below, except that, outside of metro planning areas, CDOT shall perform the functions assigned to the MPO.

IV.B.1.b. The ~~R~~review ~~T~~eam shall consist, at a minimum, of the ~~—MPO as lead agency~~, the local transit agency, the Division, CDOT, and the LPA. In addition, the ~~R~~review ~~T~~eam shall include EPA, FHWA and the FTA for the topics identified in ~~subsection~~ Subsection C.1. The agencies on the ~~review team~~review team may appoint individual staff members, of any organizational level, to participate in the ~~R~~review ~~T~~eam.

IV.B.1.c. The ~~R~~review ~~T~~eam established pursuant to paragraphs a. and b. shall comply with the following minimum requirements:

IV.B.1.c.(1) The MPO consultation process shall begin early enough for the ~~R~~review ~~T~~eam to adequately review and provide meaningful input on ~~all drafts of the final document and major supporting documents.~~ ~~The MPO must provide the participants an opportunity to review copies of~~ draft transportation plans, TIPs and conformity determinations, including supporting documents, ~~and shall provide at least 30 days for the submission of comments on the draft document prior to adoption by the MPO.~~

IV.B.1.c.(2) A schedule of meetings or a process for providing adequate notice of subsequent meetings shall be developed as part of the consultation process. The schedule of meetings shall be frequent enough to address all significant issues in a timely fashion.

IV.B.1.c.(3) The MPO shall establish an agenda for each meeting, and shall include in such agenda any issue or item upon the request of any member.

IV.B.1.c.(4) Any member may, at any time, request a meeting through the consultation process. Upon such a request, the MPO should schedule a meeting as soon as practicable.

IV.B.1.c.(5) The MPO shall respond in written form to written comments received from any of the members of the ~~R~~review ~~T~~eam, copying all review team members.

~~IV.~~ IV.C. Topics for consultation

IV.C.1. The ~~R~~review ~~T~~eam shall address the following topics in the manner provided.
~~Outside of the metropolitan planning areas, CDOT shall perform the tasks assigned to the MPO.~~

IV.C.1.a. Evaluating and choosing a model (or models) and associated methods and assumptions to be used in regional emissions analyses.

The MPO shall be responsible for selecting the transportation modeling procedures to be used within its modeling domain. The Division shall be responsible for selecting the emissions or air quality modeling procedures used for performing regional emissions analyses for conformity determinations and for SIP revisions.

IV.C.1.b. Determining which minor arterials and other transportation projects should be considered "regionally significant" for the purposes of regional emissions analysis (in addition to those functionally classified as principal arterial or higher or fixed guideway systems or extensions that offer an alternative to regional highway travel), and which projects should be considered to have a significant change in design concept and scope from the transportation plan or TIP.

~~The MPO shall consult with the other participants on the following matters, and shall:~~
The review team shall:

IV.C.1.b.(1) ~~As part of its regular review process or as part of the Review Team, R~~review the transportation network and identify minor arterials that serve regional transportation needs.

IV.C.1.b.(2) ~~As part of its regular review process or as part of the consultation forum R,~~review the transportation projects disclosed to the MPO pursuant to § IV.E., and all transportation projects otherwise known to the members that may be regionally significant projects, and identify as regionally significant those projects that are on a facility which serves regional transportation needs and that would normally be included in the modeling of the metropolitan area's transportation network.

IV.C.1.b.(3) ~~Determine whether there has been a~~Identify any significant changes in design concept and scope of any project from the transportation plan, ~~or~~ TIP, or regional emissions analysis supporting the conformity determination for a conforming TIP, upon the request of any participant in the consultation process, or any recipient of funds designated under ~~title~~Title 23 or the Federal Transit Act with authority to adopt or approve of the subject regionally significant project.

IV.C.1.c. Evaluating whether projects otherwise exempted from meeting the requirements of this subpart (see 40 CFR §§ 93.126 and 93.127)

should be treated as non-exempt in cases where potential emissions impacts may exist for any reason.

IV.C.1.c.(1) ~~In each metropolitan planning area, the MPO shall, as part of its regular consultation process, or -A~~at the request of any participant in the consultation process, the review team shall determine whether projects otherwise exempt from meeting the requirements of this subpart should be treated as non-exempt in cases where potential emissions impacts may exist for any reason.

IV.C.1.c.(2) For each non-attainment area that is outside of a metropolitan planning area, CDOT shall consult with the ~~R~~review ~~T~~eam to identify categories of exempt projects that should be treated as non-exempt for such area.

IV.C.1.d. Making a determination, as required by 40 CFR § 93.113(c)(1), whether past obstacles to implementation of TCMs which are behind the schedule established in the applicable implementation plan have been identified and are being overcome, and whether State and local agencies with influence over approvals or funding for TCMs are giving maximum priority to approval or funding for TCMs.

IV.C.1.d.(1) The LPA and the Division shall provide the MPO with information necessary to develop a list of the TCMs which are in the applicable implementation plan. The LPA may also request that the MPO, CDOT, the public transit agency, or any other agency responsible for implementing such a TCM reaffirm the commitment to implement the applicable TCM pursuant to the schedule.

IV.C.1.d.(2) The MPO, after consultation with the other participants in the consultation process shall determine whether past obstacles to implementation of TCMs which are behind the schedule established in the applicable implementation plan have been identified and are being overcome, and whether State and local agencies with influence over approvals or funding for TCMs are giving maximum priority to approval or funding for TCMs. For each such determination, the MPO shall identify the past obstacles, the steps taken to overcome such obstacles, the State and local agencies with influence over approvals or funding, the basis for finding that such agencies are giving maximum priority to such approval or funding, and a revised schedule for the implementation of the TCM.

IV.C.1.d.(3) The MPO shall report a determination that past obstacles to implementation of a TCM which is behind schedule have not been identified or are not being overcome, or that State and local agencies with influence over approvals or funding of

such TCMs are not giving maximum priority to approval or funding for TCMs, to the agency sponsoring the TCM, the Division, the Commission and the Governor. The Commission may schedule the matter for a hearing to remove or replace such TCMs.

IV.C.1.e. Notification of transportation plan or TIP revisions or amendments which merely add or delete exempt projects listed in 40 CFR § 93.126, or 93.127.

The MPO shall provide notice through the normal planning process, prior to consideration of any proposed amendment that adds or deletes exempt projects listed in 40 CFR §§ 93.126, or 93.127 to or from the transportation plan or TIP.

IV.C.1.f. Process for providing final documents and supporting information to each agency after approval or adoption.

The MPO shall transmit final TIP ~~§§~~ and transportation plans to participants in the consultation process.

IV.C.1.g. Choosing conformity tests and methodologies for isolated rural nonattainment areas, as required by 40 CFR § 93.109(g)(2)(iii)-(l).

The Division and CDOT shall choose, in consultation with the members of the ~~R~~review ~~T~~eam, the requirements and methodologies to be used to comply with 40 CFR § 93.109. If the Division and CDOT cannot agree, the issue shall be referred to the Commission for review at a public meeting pursuant to § IV.H. The Commission may escalate the matter to the Governor as provided in § IV.H.

IV.C.2. The ~~R~~review ~~T~~eam shall address the following topics in the manner provided. Outside of the metropolitan planning areas, CDOT shall perform the tasks assigned to the MPO, excepting conformity determination tasks that it contracts out to other qualified entities.-

IV.C.2.a. Evaluating events which will trigger new conformity determinations in addition to those triggering events established in 40 CFR 93.104.

IV.C.2.a.(1) The MPO may identify events ~~which will~~ that would trigger new conformity determinations in addition to those triggering events established in 40 CFR § 93.104 and the pollutant specific SIPs. Alternatively, the Commission may promulgate regulations or revise the SIP to identify events ~~which will~~ that would trigger a new conformity determination.

IV.C.2.a.(2) The MPO will consult with the ~~R~~review ~~T~~eam to evaluate whether events ~~which~~ that may trigger a new conformity determination pursuant to 40 CFR § 93.104 or a pollutant specific SIP have occurred.

IV.C.2.b. Consulting on emissions analysis for transportation activities
which that cross the borders of MPOs or nonattainment areas or basins.

In the event that contiguous MPOs are created within the state, the affected MPOs shall, in consultation with the participants in the consultation process, establish a consultation procedure for consulting on emissions analyses for transportation activities which that cross the borders of MPOs or nonattainment areas or air basins.

IV.C.2.c. Determining conformity of projects outside the metropolitan area
and within the nonattainment or maintenance area.

In the event that a nonattainment or maintenance area is created in the state that includes a metropolitan planning area or areas, but such metropolitan planning area(s) do(es) not include the entire nonattainment or maintenance area, the affected MPO(s), in consultation with the participants in the consultation process, shall establish a consultation procedure for consulting on emissions analyses for transportation activities which that cross the borders of MPOs or nonattainment areas or air basins.

IV.C.2.d. Process for consulting on the design, schedule, and funding of
research and data collection efforts and regional transportation model
development by the MPO.

The MPO, in consultation with the Review Team shall determine the design, schedule and funding of significant research and data collection efforts and regional transportation model development.

IV.C.3. (3) Hot-spot analysis: (1) Evaluating and choosing a model (or models) and
associated methods and assumptions to be used in hot-spot modeling; and (2)
identifying, as required by 40 CFR § 93.123(b), projects located at sites in PM₁₀
nonattainment or maintenance areas which that have vehicle and roadway
emission and dispersion characteristics which are essentially identical to those at
sites which have where violations have been verified by monitoring, and
therefore require quantitative PM₁₀ pollutant hot-spot analysis. CDOT, the
APCD, USEPA, and USDOT will:

IV.C.3.a. CDOT and the Division shall jointly establish a Review Team to
review the characteristics of PM₁₀ hot spots to determine which types
of projects should be evaluated for localized PM₁₀ hot spots. CDOT,
subject to concurrence by the Division, shall identify the projects or
categories of projects that shall be evaluated for potential localized PM₁₀
hot spots.

IV.C.3.b. CDOT and the Division shall establish a Review Team to
evaluate and choose a model (or models) and associated methods and
assumptions to be used in hot-spot analyses. CDOT shall be
responsible for selecting the hot spot model to be used for conformity
determinations.

IV.D. Process for assuming the location and design concept and scope of projects ~~which are~~ disclosed to the MPO as required by paragraph (eE) of this section but whose sponsors have not yet decided these features in sufficient detail to perform the regional emissions analysis according to the requirements of 40 CFR § 93.122.

IV.D.1. The MPO shall contact the sponsor of any project disclosed to the MPO pursuant to § IV.E., but whose sponsors have not yet decided these features in sufficient detail to perform the regional emissions analysis according to the requirements of 40 CFR § 93.122, and shall request that such sponsor develop the location and design concept and scope of the project for the purpose of including the project in the regional emissions analysis.

IV.D.2. If the sponsor is unwilling or unable to provide these features to the MPO in a timely fashion, the MPO shall propose reasonable assumptions about such features, and shall provide CDOT, the Division, the LPA, the project sponsor, and any recipient of funds designated under ~~title-Title~~ 23 U.S.C. or the Federal Transit Act that has the authority to adopt or approve of the project, with a written description of the proposed assumptions. Following consultation with such agencies the MPO shall make assumptions about the location and design concept and scope of the project that are reasonably calculated to estimate the emissions associated with such project. Such assumptions shall be based on the information and comments about the project received by the MPO.

IV.E. Process to ensure that plans for construction of regionally significant projects which are not FHWA/FTA projects (including projects for which alternative locations, design concept and scope, or the no-build options are still being considered), including those by recipients of funds designated under ~~title-Title~~ 23 U.S.C. or the Federal Transit Act, are disclosed on a regular basis, and to ensure that any changes to those plans are immediately disclosed.

Prior to conducting a conformity analysis, the MPO shall ensure that CDOT and each municipality, county and public transit agency within the metropolitan planning area, and each special district, improvement authority and regional agency with the authority to adopt or approve of transportation projects within the metropolitan planning area, are notified of the requirement to include regionally-significant projects, and changes to plans for such projects, in the regional emissions analysis.

IV.F. Consultation procedures for development of State Implementation Plans

IV.F.1. Minimum Consultation Requirements - SIP development and revision.

In each nonattainment or maintenance area, the LPA or the Division shall establish and maintain a ~~R~~review ~~T~~eam for regular consultation to ensure that the transportation community is involved in the development of the implementation plans. Such ~~R~~review ~~T~~eam shall also be established to develop and review any SIP revision that includes a new or revised mobile source emissions budget, or that requires a new or revised attainment or maintenance demonstration. The ~~R~~review ~~T~~eam may be part of a larger consultation procedure established by the LPA or Division to include all sectors of the

community (in addition to the transportation community). The consultation procedure shall comply with the minimum requirements listed below. If the ~~R~~review ~~T~~eam is established by the Division, the Division shall perform the tasks assigned to the LPA.

IV.F.1.a. The ~~R~~review ~~T~~eam shall consist of representatives of the MPO, the Division, CDOT, the EPA, FHWA, FTA, and the public transit agency.

IV.F.1.b. The LPA shall begin consultation meetings early enough in the process for ~~R~~review ~~T~~eam members to adequately review the modeling used to support the SIP, and to review the proposed control measures. The LPA must provide an opportunity to review copies of the draft implementation plan, including supporting documents, to the other members of the ~~Review Team~~review team, and shall provide at least thirty days for the submission of comments on the draft SIP prior to adoption by the LPA.

IV.F.1.c. A schedule of meetings or a process for providing adequate notice of subsequent meetings shall be developed as part of the consultation process. The schedule of meetings shall be frequent enough to address all significant issues in a timely fashion.

IV.F.1.d. The LPA shall establish an agenda for each meeting, and shall include in such agenda any issue or item upon the request of any participant.

IV.F.1.e. Any member may, at any time, request a meeting to consult with the LPA and the other participants. Upon such a request the LPA should schedule a meeting as soon as practicable.

IV.F.1.f. The LPA shall respond in written form to written comments received from any of the participants.

IV.F.1.g. SIPs and SIP revisions proposed by the LPA shall be subject to final approval by the Commission following a public hearing. The Division shall provide final copies of any SIP or SIP revision to the MPO, CDOT, the LPA, the public transit agency, the EPA, the FHWA, and FTA.

IV.F.2. The LPA shall submit a list of TCMs included in the proposed SIP to the MPO, CDOT and each affected local agency or other sponsoring agency at least thirty days prior to approval of the SIP or SIP revision by the governing board of the LPA.

IV.F.3. The SIP development procedures set out in this § IV.F. shall be in addition to any other rules or regulations applicable to SIP development or SIP revisions. Nothing in this § IV.F. shall be construed to supersede, alter or amend such other rules, or to incorporate such other requirements into the SIP.

IV.G. Agreements further describing consultation procedures

IV.G.1. The Division may enter into written agreements with the members of the ~~Review Team~~review team to clarify and further develop the procedures for conformity determinations described in this § IV. The Division may also enter into written agreements with the LPA and members of the committee established pursuant to § IV.F. to further clarify or develop the SIP development procedures. The members of the ~~Review Team~~review team may, by mutual agreement, delegate the tasks assigned to them under this rule to other members. Any member of the ~~review team~~review team delegating a task shall conduct reasonable oversight of the delegated task as necessary to ensure proper performance.

IV.G.2. Nothing in this regulation shall be construed to relieve the parties of the obligations set out in agreements entered into prior to the effective date of this rule, except to the extent that the provisions of such agreements are inconsistent with this rule. The Commission and Division shall continue membership on any MPO committee or council as provided in any such agreements.

IV.H. Review of Conformity Determinations by Air Quality Control Commission and resolution of conflicts.

IV.H.1. Each conformity determination on a TIP or plan shall be presented to the Commission for its review prior to submittal to FHWA.

IV.H.2. Upon request of any member of the ~~Review Team~~review team, a conformity determination on an FHWA project located outside of a metropolitan planning area shall be presented to the Commission prior to submittal to FHWA if there is a conflict that cannot be resolved by the ~~Review Team~~review team. The request for such review must be filed as soon as practicable and shall not be filed any later than the first regularly scheduled Commission meeting following the final conformity determination.

IV.H.3. The Commission intends to conduct public meetings to review conformity determinations in accordance with the applicable provisions of the Air Quality Control Commission Procedural Rules, and reserves the right to schedule such meetings as permitted by the Commission's schedule and as necessary to comply with such procedural rules. However, this paragraph shall not be construed to incorporate such procedural rules into the SIP. No violation of such procedural rules shall be construed as a violation of the SIP, except where such procedural rules otherwise have been incorporated into the SIP.

IV.H.4. Conflicts among State agencies or between State agencies and an MPO may be escalated to the Governor as provided in 40 CFR § 93.105(d). The fourteen calendar-days in which to appeal a conflict to the Governor shall commence upon review of a final conformity determination by the Commission pursuant to this ~~subsection~~Subsection H., except as provided below:

IV.H.4.a. The Commission may extend the beginning of the time to escalate a conflict to the next regularly-scheduled Commission meeting if the entity making the conformity determination amends such

determination during the fourteen-day period preceding the Commission meeting.

IV.H.4.b. Upon the agreement and concurrence of the entity making the conformity determination, the Commission may extend the beginning of the time to escalate a conflict as necessary to accommodate further consultation among the agencies.

IV.H.4.c. For purposes of project level conformity determinations in isolated rural nonattainment and maintenance areas, a "final conformity determination" shall be taken to mean CDOT's completed conformity analysis and recommended finding of conformity to FHWA.

V. Emission reduction credit for certain control measures.

V.A. Pursuant to 40 CFR § 93.122(a)(4), emissions reduction credit from implementation plan control measures that are not included in the transportation plan and TIP and that do not require a regulatory action in order to be implemented may not be included in the emissions analysis unless the conformity determination includes written commitments to implementation from the appropriate entities.

V.B. Any entity making a written commitment to perform a control measure not included in the transportation plan or TIP shall fulfill such written commitment if the control measure is used for emissions reduction credit in a regional emissions analysis.

VI. Enforceability of design concept and scope and project-level mitigation and control measures.

VI.A. Pursuant to 40 CFR §93.125 (c), Where project-level mitigation is conditional to a positive conformity determination, written commitments to such mitigation measures must be obtained. Project sponsors shall comply with these commitments.

VII. Statements of Basis, Specific Statutory Authority, and Purpose

VII.A. October 15, 1998

The change to Regulation ~~No.~~ 10, "Criteria for Analysis of Conformity," Part B, "Transportation Conformity" will establish criteria and procedures for making conformity determinations on transportation plans, transportation improvement programs (TIPs), FHWA/FTA projects, and consultation procedures for major revisions to the State Implementation Plan (SIP).

Federal Requirements

Pursuant to 40 CFR § 51.390, Colorado must submit to the EPA and the U.S. Department of Transportation (DOT), a revision to the SIP to establish criteria and

procedures for DOT, metropolitan planning organizations (MPOs), and state and local transportation and air quality agencies to assess the conformity of transportation plans, programs, and projects, consistent with the requirements of 40 CFR, ~~part-Part~~ 93, ~~subpart-Subpart~~ A.

The states may incorporate the substantive criteria for making conformity determinations set out in the federal rule, into the state rule by reference. The rule adopted by the Commission takes advantage of this opportunity and incorporates the criteria in 40 CFR ~~part-Part~~ 93, ~~subpart-Subpart~~ A by reference.

The federal rule also requires the states to develop procedures for interagency consultation on transportation conformity determinations, and for SIP revisions. The federal rule establishes minimum requirements for such consultation procedures, but does not actually establish any procedures. Pursuant to 40 CFR § 51.390 and 93.105, the states must develop and adopt such procedures, and submit the procedures to EPA for inclusion in the SIP. The rule adopted by the Commission establishes procedures for interagency consultation, and addresses each of the topics required by 40 CFR § 93.105. The consultation procedure established in the rule is intended to create a meaningful interagency consultation process that complies with the federal requirements, but that provides the flexibility necessary to meet the needs of the Colorado Department of Transportation and the various MPOs in the State. The interagency consultation requirements track the minimum federal requirements, and are not otherwise more stringent than the federal requirements.

The only provision in the rule that differs from the federal rule is the definition of the term “regionally significant project” contained in the state rule. The state rule includes a definition applicable to rural nonattainment areas that do not conduct modeling of the area’s transportation network. The federal rule appears to assume that all nonattainment areas conduct such modeling. The specific definition in the rule for rural areas is necessary to reconcile the federal rule with the general practice in rural nonattainment areas, but is not more stringent than federal requirements.

Contested Issues

One MPO urged the Commission to adopt a rule requiring a public meeting to be held prior to final action by the MPO. The rule is written to allow flexibility, so that MPOs have the option of coming to the Commission either before or after their governing board takes final action on the conformity determination. However, the Commission strongly encourages the MPOs to submit a draft conformity determination to the AQCC for comment, so that the MPO can take the Commission’s comments into account as early in the process as possible.

Statutory authority.

The transportation conformity rule is adopted under the Commission’s general authority to adopt a SIP under § 25-7-105(1), C.R.S. (1997).

Findings pursuant to § 25-7-110.8

The portion of the rule incorporating the federal criteria for making conformity determinations is exempt from the requirements of § 25-7-110.8, C.R.S. (1997). The consultation requirements are administrative in nature, and are exempt from the requirements of § 25-7-110.8(1)(b), C.R.S. The interagency consultation requirements establish a procedure for ensuring that the federal, state and local air quality agencies charged with protecting human health and the environment are consulted during the transportation conformity process. In this way, the rule will bring about reductions in risks to human health or the environment that will justify the cost of implementation of the rule. The rule adopted by the Commission complies with the minimum federal requirements and maximizes the air quality benefits of the regulation in the most cost-effective manner. No other party proposed any alternative rule that would accomplish this result in a more cost-effective manner.

VII. B. November 20, 2008

Transportation Conformity Update

Background

This Statement of Basis, Specific Statutory Authority and Purpose complies with the requirements of the Administrative Procedures Act, Section 24-4-103, C.R.S. and the Colorado Air Pollution Prevention and Control Act, Section 25-7-110.5, C.R.S.

Basis and Purpose

These revisions to "Part B, "Transportation Conformity," update the Regulation to incorporate by reference revisions to the federal rule, and to recognize Colorado-specific practices.

The incorporations by reference adopt revisions to federal conformity regulations adopted by the EPA since 1997. Most of these revisions have streamlined processes and relaxed requirements.

The revisions -add language that addresses, 40 CFR Part 93.122(a)(4)(ii), regarding obtaining and ensuring the fulfillment of written commitments to SIP control measures needed to achieve or maintain national ambient air quality standards that are not included in transportation plans or programs. These revisions also add language that addresses Part 93.125(c),-regarding obtaining and ensuring the fulfillment of written commitments to transportation project mitigation measures. These are not new federal provisions, but they are newly required to be "addressed," i.e., made explicit in state conformity implementation plans.

These revisions also make non-substantive changes including correcting citations, clarifying language and striking of unnecessary or confusing language.

Federal Requirements

Pursuant to 40 CFR § 51.390, Colorado must submit to the EPA and the U.S. Department of Transportation (DOT), a revision to the SIP to establish criteria and procedures for DOT, metropolitan planning organizations (MPOs), and state and local transportation and air quality agencies to assess the conformity of transportation plans, programs, and projects, consistent with the requirements of 40 CFR, Part 93, Subpart A. The states may incorporate the substantive criteria for making conformity determinations set out in the federal rule, into the state rule by reference. The rule adopted by the Commission takes advantage of this opportunity and incorporates the criteria in 40 CFR Part 93, Subpart A by reference.

The federal rule also requires the states to develop procedures for interagency consultation on transportation conformity determinations, and for SIP revisions. The federal rule establishes minimum requirements for such consultation procedures, and requires States to establish these consultation procedures. Pursuant to 40 CFR § 51.390 and 93.105, the states must develop and adopt such procedures, and submit the procedures to EPA for inclusion in the SIP. Pursuant to 40 CFR 93.122(a)(4)(ii) and 93.125(c), States must also address the obtainment and enforceability of written commitments to SIP control measures not included in transportation plan as well as transportation project mitigation measures.

Statutory authority.

This transportation conformity rule is adopted under the Commission's general authority to adopt a SIP under § 25-7-105(1), C.R.S. (1997).

Findings pursuant to § 25-7-110.8

The portion of the rule incorporating the federal criteria for making conformity determinations is exempt from the requirements of § 25-7-110.8, C.R.S. (1997). The revisions addressing written commitments to SIP control measures **not contained in transportation plans and project-level mitigation conditional to a conformity determination** track the requirements in federal rules and are mandated by federal law. These revisions provide for written commitment to incorporate mitigation measures into project design for transportation projects. Mitigation measures are **frequently necessary to reduce localized emissions associated with transportation project construction, but rarely relied upon for conformity determinations.** Where such commitments are necessary for a positive conformity determination, **they must be enforced so as to** reduce risks to human health or the environment, **which justifies** the cost of implementation of the rule. The rule adopted by the Commission complies with the minimum federal requirements and maximizes the air quality benefits of the regulation in the most cost-effective manner. No other party proposed any alternative rule that would accomplish this result in a more cost-effective manner.