

## **§114.260. Transportation Conformity.**

(a) Purpose. The purpose of this section is to implement the requirements set forth in Title 40 of the Code of Federal Regulations (40 CFR) Part 93, Subpart A (relating to Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded, or Approved Under Title 23 United States Code or the Federal Transit Laws), which are the regulations developed by the EPA under the FCAA Amendments of 1990, §176(c). It includes policy, criteria, and procedures to demonstrate and assure conformity of transportation planning activities with the State Implementation Plan (SIP).

(b) Applicability. This section applies to transportation-related pollutants for which an area is designated nonattainment or is subject to a maintenance plan. The pollutants include ozone, carbon monoxide, nitrogen dioxide, particles with an aerodynamic diameter of ten micrometers (PM<sub>10</sub>) and smaller, and the precursors of those pollutants. The affected nonattainment and maintenance areas are listed in §101.1 of this title (relating to Definitions).

(c) CFR incorporation. The Transportation Conformity Rules, as specified in 40 CFR 93, Subpart A, (62 FR 43780) dated August 15, 1997, are incorporated by reference with the exception of §93.102(d) and §93.105. The requirements of §93.105 are addressed in this section.

(d) Consultation. Under 40 CFR, §93.105, regarding consultation, the following procedures shall be undertaken in nonattainment and maintenance areas before making conformity determinations and before adopting applicable SIP revisions.

### (1) General factors.

(A) For the purposes of this subsection, concerning consultation, the affected agencies shall include:

- (i) EPA;
- (ii) Federal Highway Administration (FHWA);
- (iii) Federal Transit Administration (FTA);
- (iv) Texas Department of Transportation (TxDOT);
- (v) metropolitan planning organizations (MPOs) in nonattainment or maintenance areas;
- (vi) local publicly-owned transit services in nonattainment or maintenance areas (the designated recipient of FTA §9 funds);
- (vii) Texas Natural Resource Conservation Commission (commission);
- (viii) local air quality agencies in nonattainment or maintenance areas (recipients of FCAA, §105 funds).

(B) All correspondence with the affected agencies in subparagraph (A) of this paragraph shall be addressed to the following designated points of contact:

- (i) MPO: executive director or designee;
- (ii) commission: executive director or designee;
- (iii) TxDOT: Director of Transportation Planning and Programming or designee;
- (iv) TxDOT: Director of Environmental Affairs Division or designee;
- (v) FHWA: Administrator of Texas Division or designee;
- (vi) FTA: Director of Office of Program Development or designee - FTA Region 6;
- (vii) EPA: Regional Administrator or designee - EPA Region 6,
- (viii) TxDOT District: District Engineer or designee;
- (ix) local publicly-owned transit services (the designated recipient of FTA §9 funds): General Manager or designee;
- (x) local air quality agencies (recipients of FCAA, §105 funds): Director or designee; and
- (xi) commission regions in nonattainment or maintenance areas: regional director or designee.

(2) Roles and responsibilities of affected agencies.

(A) The MPO, in cooperation with TxDOT and publicly owned transit services, shall consult with the agencies in paragraph (1)(A) of this subsection in the development of Metropolitan Transportation Plans (MTPs), Transportation Improvement Programs (TIPs), projects, technical analyses, travel demand or other modeling, and data collection. Specifically, the MPOs shall:

(i) allow the commission's Air Quality Planning and Assessment Division Director, or a designated representative, to be a voting member of technical committees on surface transportation and air quality in each nonattainment and maintenance area in order to consult directly with the particular committee during the development of the transportation plans, programs, and projects;

(ii) send information on time and location, an agenda, and supporting materials (including preliminary versions of MTPs and TIPs) for all regularly scheduled meetings on surface transportation or air quality to each of the agencies specified in paragraph (1)(B) of this subsection. This information shall be provided in accordance with the locally adopted public involvement process as required by 23 CFR, Part 450, §450.316(b)(1);

(iii) after preparation of final draft versions of MTPs and TIPs, and before adoption and approval by the affected governing body, ensure that the agencies specified in paragraph (1)(B) of this subsection receive a copy, and that they are included in the local area's public participation process as required by the Metropolitan Planning Rule, 23 CFR, §450.316(b)(1). Upon approval of MTPs and TIPs, MPOs shall distribute final approved copies of the documents to the agencies

specified in paragraph (1)(B) of this subsection;

(iv) for the purposes of regional emissions analysis, initiate a consultation process with the affected agencies specified in paragraph (1)(A) of this subsection during the development stage of new or revised MTPs and TIPs to determine which transportation projects should be considered regionally significant and which projects should be considered to have a significant change in design concept and scope from the effective MTP and TIP. Regionally significant projects will include, at a minimum, all facilities classified as principal arterial or higher, or fixed guideway systems or extensions that offer an alternative to regional highway travel. Also, these include minor arterials included in the travel demand modeling process which serve significant interregional and intraregional travel, and connect rural population centers not already served by a principal arterial, or connect with intermodal transportation terminals not already served by a principal arterial. A significant change in design concept and scope is defined as a revision of a project in the MTP or TIP that would significantly affect model speeds, vehicle miles traveled, or network connections. In addition to new facilities, examples include changes in the number of through lanes or length of project (more than one mile), access control, addition of major intermodal terminal facilities (such as new international bridges, park-and-ride lots, and transfer terminals), addition/deletion of interchanges, or changing between free and toll facilities. When a significant change in the design and scope of a project is proposed, the MPO shall document the rationale for the change and give the affected agencies specified in paragraph (1)(A) of this subsection a 30-day opportunity to comment on their rationale. The MPO shall consider the views of each agency that comments, and respond in writing before any final action on these issues. If the MPO receives no comments within 30 days, the MPO may assume concurrence by the agencies specified in paragraph (1)(A) of this subsection;

(v) include in the TIP a list of projects exempted from the requirements of a conformity determination under 40 CFR, Part 93, §93.126 and §93.127. The MPO shall consult with the affected agencies specified in paragraph (1)(A) of this subsection in determining if a project on the list has potentially adverse emissions for any reason, including whether or not the exempt project will interfere with implementation of an adopted transportation control measure (TCM). The MPO shall respond in writing to all comments within 30 days on final MTP and TIP documents. In addition, if no comments are received as part of the subsequent public involvement process for the TIP, the MPO may proceed with implementation of the exempt project.

(vi) notify the affected agencies specified in paragraph (1)(A) of this subsection in writing of any MTP or TIP revisions or amendments which add or delete the exempt projects identified in 40 CFR, §93.126;

(vii) as required by 40 CFR, §93.116 and §93.123, and in cooperation with TxDOT, make a preliminary identification of those projects located at sites in PM<sub>10</sub> nonattainment and maintenance areas that require quantitative PM<sub>10</sub> Hot Spot analyses. After these projects have been identified, the MPO shall submit a list of these projects and sufficient data to the agencies specified in paragraph (1)(A) of this subsection for review and comment;

(viii) before adoption of any new or substantially different methods or assumptions used in the Hot Spot or Regional Emissions Analysis, provide an opportunity for the agencies specified in paragraph (1)(A) of this subsection to review and comment;

(ix) in coordination with TxDOT and the local transit agencies, disclose all known, regionally significant, non-federal projects, even if the sponsor has not made a final decision on its implementation; include all disclosed, or otherwise known, regionally significant non-federal

projects in the regional emissions analysis for the nonattainment area; respond in writing to any comments that known plans for a regionally significant non-federal project have not been properly reflected in the regional emissions analysis; and have recipients of federal funds determine annually that their regionally significant non-federal projects are included in a conforming MTP or TIP, or are included in a regional emissions analysis of the MTP and TIP. The MPO shall consult with project sponsors to determine the non-federal projects' location and design concept and scope to be used in the regional emissions analysis, particularly for projects for which the sponsor does not report a single intent because the sponsor's alternatives selection process is not yet complete. If the MPO assumes a design concept and scope which is different from the sponsor's ultimate choice, the next regional emissions analysis for a conformity determination must reflect the most recent information regarding the project's design concept and scope;

(x) ensure timely TCM implementation and report on the implementation and emissions reductions status of adopted TCMs annually to the commission;

(xi) cooperatively share the responsibility for conducting conformity determinations on transportation activities which cross the borders of MPOs or nonattainment and maintenance areas. The affected MPOs will enter into a Memorandum of Agreement (MOA) which will define the effective boundary and the respective responsibilities of each MPO for regional emissions analysis. The MPOs will be responsible within their respective metropolitan area boundaries and, at their option, beyond to the boundaries of the nonattainment/maintenance areas, for regional emissions analysis. Adjacent MPOs or nonattainment/maintenance areas or basins will share information concerning air quality modeling assumptions and emission rates that affect both areas; and

(xii) for the purpose of determining the conformity of all projects outside the metropolitan planning area, but within the nonattainment or maintenance area, enter into an MOA involving the MPO and TxDOT for cooperative planning and analysis of projects.

(B) The commission, as the lead air quality planning agency, shall work in consultation with the agencies specified in paragraph (1)(A) of this subsection in developing applicable transportation related SIP revisions, air quality modeling, general emissions analysis, emissions inventory, and all related activities. Specifically, the commission shall:

(i) set agendas and schedule meetings to seek advice and comments from all agencies specified in paragraph (1)(A) of this subsection during preparation of applicable transportation related SIP revisions;

(ii) schedule public hearings in order to gather public input on the applicable transportation-related SIP revisions in accordance with 40 CFR, §51.102 and notify the agencies specified in paragraph (1)(B) of this subsection of the hearings;

(iii) provide copies of final documents, including applicable adopted or approved transportation related SIP revisions and supporting information, to all agencies specified in paragraph (1)(B) of this subsection; and

(iv) after consultation with the MPO regarding TCMs, distribute to all agencies specified in paragraph (1)(B) of this subsection and other interested persons the list of TCMs proposed for inclusion in the SIP. In consultation with the agencies specified in paragraph (1)(A) of this subsection, the commission shall determine whether past obstacles to implementation of TCMs have been identified and are being overcome, and determine whether the MPOs and the implementing agencies are

giving maximum priority to approval or funding for TCMs. Also, the commission shall consider, in consultation with the affected agencies, whether delays in TCM implementation necessitate a SIP revision to remove TCMs or to substitute TCMs or other emission reduction measures.

(v) consult with the applicable agencies specified in paragraph (1)(A) of this subsection, in order to cooperatively choose conformity tests and methodologies for isolated rural nonattainment and maintenance areas, as required by 40 CFR, §93.109(g)(2)(iii).

(C) Any group, entity, or individual planning to construct a regionally significant transportation project which is not an FHWA-FTA project (including projects for which alternative locations, design concept and scope, or the no-build option are still being considered) must disclose project plans to the MPO on a regular basis and disclose any changes to those plans immediately. This requirement also applies to recipients of funds designated under Title 23 U.S.C. or the Federal Transit Laws.

### (3) General procedures.

(A) The MPO, TxDOT, or the commission, as applicable, shall respond to comments of affected agencies on MTPs, TIPs, projects, or SIP revisions in accordance with the public involvement procedures that govern the involved action. The MPO, TxDOT, or the commission, as applicable, shall include all comments and the replies to those comments with final documents when they are submitted for adoption by the agency's governing board. In the event that comments are not adequately resolved, the procedures outlined in paragraph (4) of this subsection regarding conflict resolution shall apply.

(B) Because the validity of the regional emissions analysis depends on transportation modeling assumptions which need periodic updates, the MPO, with the assistance of TxDOT and local publicly owned transit agencies, will conduct meetings with the agencies specified in paragraph (1)(A) of this subsection to cooperatively establish research and data collection efforts and regional model development (e.g., household/transportation surveys).

(C) For the purposes of evaluating and choosing a model (or models) and associated methods and assumptions to be used in Hot-Spot and Regional Emissions Analyses, agencies specified in paragraph (1)(A) of this subsection shall participate in a working group identified as the Technical Working Group for Mobile Source Emissions (TWG). The frequency of meetings and agendas for them will be cooperatively determined by the agencies specified in paragraph (1)(A) of this subsection. The function of this working group may be delegated to an existing group with similar composition and purpose.

(D) The commission, affected MPOs, affected local air quality agencies, and TxDOT shall cooperatively evaluate events which will trigger the need for new conformity determinations. New conformity determinations may be triggered by events established in 40 CFR, §93.104 as well as other events, including emergency relief projects that require substantial functional, locational, and capacity changes, or in the event of any other unforeseeable circumstances.

(E) The MPO and its governing body, or TxDOT if applicable, shall make conformity determinations for all MTPs, TIPs, regionally significant projects, and all other events as required by 40 CFR, Part 93, Subpart A and this section. Upon completion of the transportation conformity determination review process, (including consultation, public participation, and all other requirements of this section), FHWA and FTA will issue a joint conformity finding, indicating the

transportation conformity status of the document(s) under review. The effective date of the conformity determination for an area is the date of the joint conformity finding made by FHWA-FTA.

(4) Conflict resolution.

(A) The commission and the MPO (or TxDOT where appropriate) shall make a good-faith effort to address the major concerns of the other party in the event they are unable to reach agreement on the conformity determination of a proposed MTP or TIP. The efforts shall include meetings of the agency executive directors, if necessary.

(B) In the event that the MPO or TxDOT determines that every effort has been made to address the commission's concerns, and that no further progress is possible, the MPO or TxDOT shall notify the commission executive director in writing to this effect. This subparagraph shall be cited by the MPO or TxDOT in any notification of a conflict which may require action by the Governor, or his or her delegate under subparagraph (C) of this paragraph.

(C) The commission has 14 calendar days from date of receipt of notification, as required in subparagraph (B) of this paragraph, to appeal to the Governor. If the commission appeals to the Governor, the final conformity determination must then have the concurrence of the Governor. The Governor may delegate his or her role in this process, but not to the commission or commission staff, a local air quality agency, the Texas Transportation Commission or TxDOT staff, or an MPO. This subparagraph shall be cited by the commission in any notification of a conflict which may require action by the Governor or his or her delegate. If the commission does not appeal to the Governor within 14 calendar days from receipt of written notification, the MPO or TxDOT may proceed with the final conformity determination.

(5) Public comment on conformity determinations. Consistent with the requirements of 23 CFR, Part 450, concerning public involvement, the agencies making conformity determinations on transportation plans, programs, and projects shall establish a proactive public involvement process which provides opportunity for public review and comment. This process shall, at a minimum, provide reasonable public access to technical and policy information considered by the agency at the beginning of the public comment period and before taking formal action on conformity determinations for all MTPs and TIPs, as required by 23 CFR §450.316 (b) and this section. Any charges imposed for public inspection and copying should be consistent with the fee schedule contained in 49 CFR §7.95. In addition, these agencies shall address in writing any public comment claiming that a non-FHWA/FTA funded, regionally significant project has not been properly represented in the conformity determination for an MTP or TIP. Finally, these agencies shall provide opportunity for public involvement in conformity determinations for projects where otherwise required by law.

(6) In formulating an enforcement policy regarding a violation of a rule of this subsection (relating to the consultation process) the commission may consider any good faith effort made by the consulting agencies to comply.

(e) Effective date. The revisions to this section adopted by the commission on November 18, 1998, and filed with the Secretary of State on November 23, 1998, shall be in effect on the date of EPA approval of the transportation conformity SIP associated with this rule.

Adopted November 18, 1998

Effective December 13, 1998