RULES
OF
TENNESSEE DEPARTMENT OF ENVIRONMENT AND CONSERVATION
BUREAU OF ENVIRONMENT
DIVISION OF AIR POLLUTION CONTROL

CHAPTER 1200-03-34
CONFORMITY

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1200-03-34-.01 TRANSPORTATION CONFORMITY INTERAGENCY CONSULTATIONAND GENERAL PROVISIONS.

(1) Interagency Consultation Procedures

(a) General.

1. Pursuant to 40 CFR §51.390, this document provides for interagency consultation (federal, state, and local), resolution of conflicts, public consultation procedures (per 40 CFR §93.105) and written commitments to control measures (40 CFR §93.122(a)(4)(ii)) and mitigation measures (40 CFR §93.125(c)). Such consultation procedures shall be undertaken by Metropolitan Planning Organizations (MPOs), the State department of transportation, and the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA) with State and local air quality agencies and the Environmental Protection Agency (EPA) prior to making conformity determinations, and by State and local air agencies and EPA with MPOs, the State department of transportation, and FHWA and FTA in developing applicable implementation plans.

2. The provisions of this rule shall apply in all nonattainment and maintenance areas for transportation related criteria pollutants or precursor pollutants for which the area is designated nonattainment or has a maintenance plan, and with respect to all actions outside any nonattainment area that in the judgment of the Tennessee Air Pollution Control Division (TAPCD) may cause or contribute to a new violation or increase the frequency or severity of any existing violation of any standard in any nonattainment area, or delay the timely attainment of any standard or any required interim emissions reduction or other milestone in any nonattainment area. Exhibit A illustrates stakeholders currently subject to this rule. Exhibit A is for illustrative purposes only; stakeholders need not be listed to be subject to this rule.

3. Definitions:

Terms used but not defined in this rule shall have the meaning given them by the Clean Air Act, titles 23 and 49 U.S.C., other Environmental Protection Agency (EPA) regulations, or other United States Department of Transportation (DOT) regulations, in that order of priority.

(i) Local air agencies are those agencies which are charged under law with the control of air pollution existing within the geographic boundaries of the political subdivisions, as defined by the Tennessee Air Quality Act, T.C.A. §§ 68-201-101, *et seq.*, organized and existing under the laws of the State of Tennessee.

(ii) Local transportation agencies are publicly owned transportation agencies which provide mass transportation by bus or rail which provides general service to the public on a fixed route on a regular and continuing basis. It does not include school buses or charter or sightseeing services, van pools, or small trolley fleets.

(iii) Project means a highway project or transit project.

(iv) TAPCD means the Tennessee Air Pollution Control Division.

(v) TDOT means the Tennessee Department of Transportation.

(b) Interagency consultation procedures: General factors.

1. Representatives of the MPOs, State and local air quality planning agencies, State department of transportation, and local publicly-owned transportation agencies not represented by an MPO, shall undertake an interagency consultation process in accordance with this rule with each other and with the EPA, FHWA, and FTA on the development of the implementation plan, the transportation plan (Plan), the Transportation Improvement Program (TIP), any revisions to the preceding documents, and all conformity determinations required by this rule.

2. The TAPCD, also referred to as the State air agency, shall be the lead agency responsible for preparing the final document or decision and for assuring the adequacy of the interagency consultation process with respect to the development of applicable transportation related implementation plans and control strategy implementation plan revisions.

3. MPOs subject to conformity shall be the lead agencies responsible for preparing the final document or decision and for assuring the adequacy of the interagency consultation process with respect to the development of the long range transportation plan, the Transportation Improvement Program (TIP), and any amendments or revisions thereto, and for providing assistance for technical analyses by employing travel-demand modeling techniques and acquiring all necessary data in the metropolitan area(s) under their jurisdiction. In the case of non-metropolitan areas, the TDOT shall be the lead agency responsible for preparing the final document or decision and for assuring the adequacy of the interagency consultation process with respect to the development of the Statewide long range transportation plan, the Statewide Transportation Improvement Program (STIP), and any amendments or revisions thereto and for providing assistance for technical analyses by employing travel-demand modeling techniques and acquiring all necessary data in non-metropolitan areas.

4. In addition to the lead agencies identified in parts 2 and 3 of this subparagraph, other agencies entitled to actively participate in the interagency consultation process under this rule include: the FHWA, the FTA, EPA, and local air agencies.

5. It shall be the role and responsibility of each lead agency in an interagency consultation process, as specified in parts 2 and 3 of this subparagraph, to confer with all other agencies identified in parts 1 through 4 of this subparagraph, provide all appropriate information to those agencies needed for meaningful input, solicit early and continuing input from those agencies, conduct the consultation process described in 40 CFR §93.105, assure policy-level contact with those agencies, consider the views of each agency and respond to those

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views in a period not to exceed thirty (30) days from the date received, prior to any final decision on such document, and assure that such views and written response are made part of the record of any decision or action. Each lead agency shall provide all necessary documentation for review at the initiation, or prior to, the review and comment period. Information for scheduled meetings will be distributed to participants at least seven (7) days before the scheduled meeting. It shall be the role and responsibility of each agency specified in parts 1 through 4 of this subparagraph, when not fulfilling the role and responsibilities of a lead agency, to confer with the lead agency and other participants in the consultation process, review and comment as appropriate (including comments in writing) on all proposed documents and decisions in a period not to exceed thirty (30) days, attend consultation and decision meetings, assure policy-level contact with other participants, provide input on any area of substantive expertise or responsibility, and provide technical assistance to the lead agency or consultation process in accordance with 40 CFR §93.105 when requested.

6. It shall be the responsibility of the MPOs, the State and local air agencies, and the State and local transportation agencies identified in parts 1 through 4 of this subparagraph to schedule and convene meetings for their own agencies, and to notify all other agencies involved in the conformity process of these scheduled meetings at least fourteen (14) days in advance, unless such meetings are of an internal nature and not immediately related to the conformity process. However, the participants may waive the fourteen (14) day advance notice requirement if all participants agree that an earlier scheduled meeting is in the best interest of the parties. Scheduling changes shall be coordinated in a timely manner. The lead agency will develop draft documents, record notes and distribute agendas prior to meetings (in person or by conference calls or other practical electronic means). The lead agency shall provide all appropriate information to those agencies needed for meaningful input and provide all draft and supportive documentation (hard copy or electronic format) in a timely manner to participating agencies. The lead agency responsible for preparing the final document subject to interagency consultation shall assure that all relevant documents and information are supplied to all participants in the consultation process prior to the release for public review.

7. Consultation on specific issues, other than the continual process of keeping all the agencies informed on all conformity and State Implementation Plan (SIP) actions, may be initiated at any time during the document development process by any of the agencies specified in parts 1 through 4 of this subparagraph. It shall be the responsibility of the initiator to ensure that all other agencies identified in parts 1 through 4 of this subparagraph are notified of any such action. All agencies so notified must respond to the issue(s) raised within fourteen (14) days, unless an alternate schedule is agreed upon by all participants.

8. It shall be the responsibility of the MPOs subject to this rule, and TDOT, to provide the State and local air agencies specified in this rule with the latest version of the TIP or STIP and the transportation plan.

9. It shall be the responsibility of the State and local air agencies to provide the MPOs, TDOT, FHWA, FTA and EPA with the latest version of the SIP as it applies to transportation conformity, in particular, attainment and maintenance plans.

10. It shall also be the responsibility of each of the agencies specified in parts 1 through 4 of this subparagraph to keep their own superiors and constituents

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properly informed of conformity determinations, as well as making this information available for the general public.

11. The agencies specified in parts 1 through 4 of this subparagraph may employ consultation services at their own discretion.

(c) Specific roles and responsibilities of various participants in the interagency consultation process shall be as follows:

1. TAPCD and the local air agencies shall be responsible for, in relation to SIP development, the following:

(i) Developing emissions inventories;

(ii) Developing emissions budgets;

(iii) Conducting air quality modeling;

(iv) Developing attainment and maintenance demonstrations;

(v) Revising control strategy implementation plans;

(vi) Regulatory Transportation Control Measures (TCMs) intended to provide enforceable emission reductions;

(vii) Compiling motor vehicle emissions factors;

(viii) Meeting all EPA reporting requirements related to air quality; and

(ix) Responding to all comments concerning the SIP.

The local air agencies shall be responsible for their areas of jurisdiction, with the State air agency being responsible for all remaining counties, as well as being responsible for ensuring that the local air agencies fulfill these tasks. Local air agencies may request assistance from the State air agency in any of the responsibilities listed here.

2. The MPOs subject to the conformity rule shall be responsible for, in their area(s) of jurisdiction, the following:

(i) Developing and monitoring transportation plans and TIPs;

(ii) Evaluating the transportation impacts and feasibility of TCMs;

(iii) Developing transportation and socioeconomic data and latest planning assumptions and providing such data and planning assumptions to TAPCD for use in air quality analysis;

(iv) Developing system- or facility-based or other programmatic (non-regulatory) TCMs;

(v) Providing technical and policy input on emissions budgets;

(vi) Performing transportation modeling, including:

(I) Selecting and evaluating such models;

(II) Documenting their use in conformity determinations; and

(III) Alerting, for comment, the agencies identified in parts (b)1 through 4 of this paragraph when any new model is being tested or employed, and;

(vii) Developing draft and final conformity determination documents for all transportation plans, TIPs and projects;

(viii) Monitoring and coding regionally significant projects into the transportation networks;

(ix) Developing statistical information such as vehicle miles travelled (VMT), vehicle mix and vehicle speeds for use in on-road mobile emissions analysis;

(x) Making elections regarding the timeframe of the conformity determination under 40 CFR §93.106(d); and

(xi) Identifying planning assumptions and evaluating those assumptions for consistency with SIP assumptions.

3. The Tennessee Department of Transportation shall be responsible for:

(i) Developing the Statewide transportation plan and STIP;

(ii) Providing technical input on new and proposed revisions to motor vehicle emission budgets;

(iii) Distributing draft and final environmental documents to other agencies;

(iv) Providing the transportation related information needed for mobile emissions analysis;

(v) Developing the statistical information, such as VMT, vehicle mix, and vehicle speeds, for use in on-road mobile emission analysis for areas outside the MPO boundary;

(vi) Developing the draft document(s) related to the NEPA process, providing it for review, responding to comments and preparing the final document(s);

(vii) Performing transportation modeling, including:

(I) Selecting and evaluating such models;

(II) Documenting their use in conformity determinations; and

(III) Alerting, for comment, the agencies identified in parts (b)1 through 4 of this paragraph when any new model is being tested or employed, and;

(viii) Making conformity determinations for areas outside of the MPO boundary;

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(ix) Convening consultation to cooperatively choose the appropriate conformity test(s) and methodologies for use in isolated rural nonattainment and maintenance areas, as required by 40 CFR §93.109(l)(2)(iii); and

(x) Convening air quality technical review meetings on specific projects when requested by other agencies or as needed.

4. FHWA and FTA shall be responsible for:

(i) Ensuring timely action on final determinations of conformity within thirty (30) days of receiving a formal conformity determination, after consultation with other agencies as provided in this rule and 40 CFR §93.105;

(ii) Providing guidance on conformity and the transportation planning process to participating agencies in interagency consultation; and

(iii) Reviewing and commenting on conformity determinations.

5. EPA shall be responsible for:

(i) Reviewing motor vehicle emissions budgets in submitted SIPs and finding them adequate or inadequate based on adequacy criteria and procedures;

(ii) Providing guidance on conformity criteria and procedures to agencies in interagency consultation;

(iii) Approving or disapproving submitted SIP revisions (including TCMs);

(iv) Providing modeling and emissions inventory development assistance to TAPCD, TDOT and MPOs; and

(v) Providing comments on the regional emissions analyses and conformity determination of transportation plans, TIPs and projects.

(d) Conformity determinations:

1. All conformity determinations shall be initiated by the sponsor of the transportation plan, program or project subject to the conformity rule:

(i) MPOs shall be responsible for initiating conformity determinations for plans, programs or projects within the specific MPO boundary;

(ii) TDOT shall be responsible for initiating conformity determination for plans, programs or projects external to an MPO boundary, including isolated rural nonattainment and maintenance areas as required by §93.109(l)(2)(iii); and

(iii) MPOs and TDOT shall employ interagency consultation procedures to ensure compatibility of conformity determinations for the same or overlapping nonattainment or maintenance area(s).

2. It shall be the responsibility of the MPOs subject to conformity and TDOT to submit any conformity determinations to the FHWA, FTA, EPA, TACPD, local air agencies, TDOT, if not the sponsor, and local publicly-owned transportation agencies not represented by an MPO for review and approval before the plan, program or project subject to the conformity rule may be found to conform, or found to be exempt.

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3. All conformity determinations with all supporting documentation and data shall be made available for review and comment to the TAPCD, local air agencies, FHWA, FTA and the EPA no less than thirty (30) days prior to presentation to a policy making body (electronic copy acceptable). Shorter review periods may be allowed occasionally in emergency situations with participant concurrence.

4. All conformity determinations shall also be made available to the general public, as defined in subparagraph (h) of this paragraph.

5. Conformity determinations, at a minimum, should include written documentation of the following:

   (i) All the input run streams for the latest mobile emissions model and latest planning assumptions on the date that the conformity analysis began (with the beginning date and the criteria used to identify this date specified), and attestation that the latest mobile emissions model is being used;

   (ii) Transportation related information and assumptions used for input into the mobile model, such as, vehicle miles traveled, vehicle speeds, and vehicle mix, along with a brief description of the source of this information, including documentation of any transportation related models used;

   (iii) A description of the project, plan or program that is the subject of the conformity or exemption status determination(s); and

   (iv) TAPCD may request further documentation; however, the agency making the conformity demonstration may appeal to the Technical Secretary if the request seems unreasonable.

6. TAPCD (and/or local air agencies, where applicable) shall review and provide written comment on final conformity determinations within fourteen (14) days of the date received. This process shall consist of:

   (i) Review of mobile emissions model inputs and outputs;

   (ii) Verification that the latest mobile emissions model and planning assumptions are being used;

   (iii) Review of the reasonableness of transportation related data; and

   (iv) Ensuring consistency with the emissions budget and/or the interim emission tests, as applicable.

7. It shall be the responsibility of the MPO (or the TDOT, where applicable) making a conformity determination, to provide TAPCD and the applicable local air agencies, FTA, FHWA and the EPA with documentation of the conformity determination.

8. It shall be the responsibility of TAPCD to provide affected MPOs, FHWA, FTA, EPA, local air agencies and TDOT with appropriate information regarding any SIP changes that could impact the conformity process.

9. It shall be the responsibility of the EPA to provide TAPCD and local air agencies and FTA, FHWA, TDOT, and the affected MPOs information regarding changes to the Conformity Rule that could impact conformity determinations.

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10. Emissions reduction credit from 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 written commitments to implementation are obtained by the MPO (or TDOT, where applicable) prior to the conformity determination and such commitments must be fulfilled by the implementing entities. This rule satisfies the requirement of 40 CFR §93.122(a)(4)(ii).

11. Written commitments to mitigation measures for project-level mitigation and control measures must be obtained by FHWA (or FTA for transit related projects), from project sponsors, prior to a positive project-level conformity determination, and that project sponsors must comply with such commitments. This rule satisfies the requirement of 40 CFR §93.125(c).

12. In order to assure the most recent planning assumptions are in place at the time the conformity analysis begins, the "time the conformity analysis begins" is to be determined by interagency consultation. This point in time should occur at the point at which the MPO (or TDOT, when applicable) or other designated agency begins to model the impact of the transportation plan or TIP on travel and/or emissions. New data that becomes available after an analysis begins is required to be used in the conformity determination only if a significant delay in the analysis has occurred, as determined through interagency consultation.

13. Consultation shall be undertaken, and conducted in accordance with this rule, to evaluate events which will trigger new conformity determinations in addition to those triggering events established in 40 CFR §93.104, including any changes in planning assumptions, that may trigger a new conformity determination. The consultation process pursuant to this rule shall be initiated by FHWA, EPA, TAPCD, TDOT, or the MPO where one exists.

(e) Implementation Plans:

1. Any proposed revisions to the SIP, which may have a direct or indirect effect upon the motor vehicle emissions budget for an area subject to conformity, shall be made available to the MPOs specified in this rule, as well as TDOT, FHWA, FTA, and EPA in written or electronic form for their review and comment at least thirty (30) days before presentation to the Tennessee Air Pollution Control Board. Shorter review periods may be allowed occasionally in emergency situations with participant concurrence.

2. TAPCD shall also provide the public a period from the date of announcement to comment on any proposed SIP revisions which may have a direct or indirect effect upon the motor vehicle emissions budget for an area subject to conformity, as defined in subparagraph (h) of this paragraph.

3. Any proposed revisions to the SIP shall include documentation on methods of analysis, models employed and purpose of the revision.

(f) Other processes:

1. TAPCD shall be responsible for the process whereby MPOs, local air agencies, TDOT, FHWA, FTA and EPA shall study and develop supplementary consultation procedures to identify, evaluate and address, as needed, the following issues. In the absence of supplementary consultation procedures,

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TAPCD will include the following items for discussion during interagency consultation meetings in advance of a conformity determination:

(i) Hot spot analysis methods, models and assumptions;

(ii) Determination of regionally significant projects and projects considered to have a significant change in design concept and scope;

(iii) Evaluating when exempt projects should be treated as non-exempt;

(iv) Timely implementation of TCMs and processing of TCM substitutions;

(v) Identifying conformity determination triggers other than those established in 40 CFR §93.104; and

(vi) Methods, models and assumptions for regional emissions analysis.

2. These supplementary procedures (in part 1 of this subparagraph) may be specific for each metropolitan area or each nonattainment or maintenance area subject to the conformity rule.

3. TAPCD shall conduct meetings to discuss any supplementary consultation procedures as needed.

4. Final document distribution for conformity determinations associated with Plans, TIPs and STIPs (occasionally, alternate schedules may be used with concurrence by participants):

(i) The final air quality conformity determination, necessary supporting documentation and the Plan and TIP will be submitted to the FHWA Division Office, the FTA Regional Office, the EPA Regional Office, TDOT, TAPCD and any applicable local air agencies. EPA will respond in writing, to the FTA Regional Office and FHWA Division Office, as soon as possible but not later than thirty (30) days from the date received;

(ii) Comments will be resolved by FHWA and FTA, in concert with EPA, with the MPO or TDOT, in their respective areas, as necessary;

(iii) FHWA and FTA will jointly prepare correspondence to make the conformity finding. Joint conformity findings will be addressed to the MPO (or TDOT where no MPO exists), with a copy to TDOT, EPA, TAPCD and any applicable local air agencies. The findings of FTA and FHWA together constitute the DOT conformity findings;

(iv) In the event that the MPO or TDOT in their respective areas, wishes to amend the TIP to add projects that are exempt from the conformity analysis requirement, FHWA or FTA or both, if necessary, will concur in the amendment and re-affirm the original DOT conformity finding by letter. This re-affirmation letter will reference the date(s) of the original FHWA and FTA findings. In cases where the amendment involves projects that are not exempt, a new conformity analysis and determination will be required, and will, in turn, require a new DOT conformity finding.

Within fifteen (15) days subsequent to approval and adoption of final documents, including transportation plans, TIPs, conformity determinations, applicable implementation plans and implementation plan revisions, the lead agency shall

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provide copies (electronic copies acceptable) of such documents and supporting information to all affected agencies.

5. Generalized hot-spot determination process:

Interagency consultation shall be undertaken to evaluate and choose a model(s), associated methods and planning assumptions to be used in hot-spot analyses.

Generalized hot-spot determination process (occasionally, alternate schedules may be used with concurrence by participants):

(i) The project sponsor (or TDOT or the MPO), will seek consensus if the project is believed to be exempt from hot-spot analysis. This can be accomplished through electronic transmittal, providing for a minimum of fourteen (14) days for review. If requested, an additional fourteen (14) days will be provided for review, as well as any additional information needed to make the determination;

(ii) If the project is not exempt, the project sponsor (or TDOT or the MPO) will collect and organize and distribute specific data needed to determine whether nonexempt projects are or are not of air quality concern. This can be accomplished through electronic transmittal, providing for a minimum of fourteen (14) days for review. If requested, an additional fourteen (14) days will be provided for review, as well as any additional information needed to make the determination;

(iii) If it is determined the project is a project of air quality concern, the project sponsor (or TDOT or the MPO) will then engage and begin a consultation process to evaluate and choose a model (or models) and associated methods and assumptions to be used in hot-spot analysis. The project sponsor (or TDOT or the MPO) will make a PM2.5 hot-spot determination (i.e., project-level conformity determination) and request that other stakeholder agencies comment on the conclusions through formal interagency consultation as provided in this rule.

6. Regionally significant projects:

For purposes of regional emissions analysis, the MPO (TDOT where no MPO exists) shall actively consult with the affected agencies to determine which minor arterials and other transportation projects should be considered "regionally significant" projects (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. Prior to initiating any final action on these issues, the MPO (or TDOT, if applicable) shall consider the views of each agency that comments and respond in writing.

7. Transportation Control Measures (TCMs):

(i) For each Plan or TIP update, the agencies specified in this rule to participate in consultation shall review whether past obstacles to implementation of Transportation Control Measures (TCMs) which are behind the schedule established in the applicable implementation plan are being overcome, and whether State and local agencies with influence over approval or funding for TCMs are giving maximum priority to approval or

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funding for TCMs. If necessary, consideration will be given as to whether delays in TCM implementation necessitate revisions to the applicable implementation plan to remove TCMs or substitute TCMs or other emission reduction measures.

(ii) Where TCMs are to be included in an applicable implementation plan, a list of TCMs shall be developed by TDEC (and local air agencies, if applicable) in cooperation with the MPO, TDOT, or both.

8. Exempt projects which may be non-exempt:

The MPO (or TDOT where applicable) shall commence consultation regarding potentially exempt projects to (occasionally, alternate schedules may be used with concurrence by participants):

(i) Identify exempt project as defined by 40 CFR §93.126 Table 2, and 40 CFR §93.127 Table 3;

(ii) Identify exempt projects and categories of exempt projects which should be treated as non-exempt because they may have adverse air quality impacts and determine appropriate air quality analysis methodologies for analyzing such projects; and

(iii) Identify transportation Plan and TIP/STIP revisions which add or delete exempt projects, as defined in 40 CFR §93.126 Table 2 and 40 CFR §93.127 Table 3.

The MPO (or TDOT where applicable), will seek consensus from the consultation participants if the project is believed to be exempt. This can be accomplished through electronic transmittal, providing for a minimum of fourteen (14) days for review. If requested, an additional fourteen (14) days will be provided for review, as well as any additional information needed to make the determination.

9. Multi-jurisdictional consultation:

Agencies specified in this rule will consult on emissions analysis for transportation activities which cross the borders of MPOs or nonattainment areas or air basins. Where the nonattainment area crosses the boundaries of multiple MPOs, the MPOs shall share cooperatively the responsibilities of conducting conformity determinations on transportation activities. The MPOs will enter into a memorandum of agreement which will define the effective boundaries and the respective responsibilities for each MPO for regional emissions analysis. Adjacent MPOs of nonattainment or maintenance areas shall share information concerning air quality modeling assumptions and emissions rates that affect both areas. This provision also applies to MPOs and TDOT where the nonattainment area extends beyond the MPO's boundary. TAPCD and/or local air agencies (where applicable) will initiate consultation with other states when nonattainment areas extend beyond Tennessee's borders.

10. Project disclosure:

(i) The sponsor of any potentially regionally significant project, and any agency that is responsible for taking action(s) on any such project, shall disclose such project to TDOT or the MPO (whichever is appropriate) in a timely manner. Such disclosure shall be made not later than the first occasion on which any of the following actions is sought: any policy board

action necessary for the project to proceed, the issuance of administrative permits for the facility or for construction of the facility, the execution of a contract to design or construct the facility, the execution of any indebtedness for the facility, any final action of a board, commission or administrator authorizing or directing employees to proceed with design, permitting or construction of the project, or the execution of any contract to design or construct or any approval needed for any facility that is dependent on the completion of the regionally significant project. To help assure timely disclosure, the sponsor of any potential regionally significant project shall disclose to TDOT or the MPO (whichever is appropriate) on a schedule prescribed by TDOT or the MPO (whichever is appropriate), but no less than annually, each project for which alternatives have been identified through the NEPA process, and any preferred alternative that may be a regionally significant project. The consultation process shall include assuming the location, design concept and scope of the project, where the sponsor has not yet decided these features, in sufficient detail to allow the MPO (or TDOT) to perform a regional emissions analysis. This consultation process pursuant to this rule shall be initiated by TDOT, or the MPO, where one exists;

(ii) In the case of any such regionally significant project that has not been disclosed to the MPO and other interested agencies participating in the consultation process in a timely manner, such regionally significant project shall not be considered to be included in the regional emissions analysis supporting the current conformity determination and not to be consistent with the motor vehicle emissions budget in the applicable implementation plan or interim budget.

11. Transportation model development:

An interagency consultation process in accordance with the interagency consultation procedures outlined in this rule shall be undertaken for the design, schedule, and funding of research and data collection efforts related to regional transportation model development (such as household/ travel transportation surveys), to be initiated by MPOs (or TDOT, if applicable).

12. Responding to significant comments:

If the written response to a significant comment does not adequately address the commenting agency's concerns, further consultation is to be conducted. If a regularly scheduled meeting is to be held within a reasonable time frame of the receipt of the significant comment, it should be made a part of that meeting's agenda and information on the issue will be forwarded to all involved agencies. If necessary, discussion and resolution of the significant comment will be considered a reason to convene a special meeting with the commenting agency as the requester and the agenda consisting of the significant comment.

(g) Resolving conflicts:

Any conflict among State agencies or between State agencies and the MPO shall be escalated to the Governor if the conflict cannot be resolved by the heads of the involved agencies. All agencies involved shall make every effort to resolve any differences, including personal meetings between the heads of such agencies or their policy-level representatives, to the extent possible. The appeal process described herein shall apply only to MPO (or TDOT) approved conformity determinations on the transportation plan, TIP, or projects (including project-level determinations), including

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any documents directly related to determinations of conformity and conflicts between state agencies or between one or more state agency(ies) and the MPO. Conflicts regarding SIPs should be appealed to the State or Local Air Pollution Control Board as appropriate.

1. In the event that the MPO or TDOT determines that every effort has been made to address TAPCD concerns and no further progress is possible, the MPO or TDOT shall notify the Director of TAPCD in writing to this effect. The memorandum shall delineate each unresolved issue to be appealed, and shall include, at a minimum:

   (i) The legal basis of the issue/conflict and steps taken to resolve the conflict;

   (ii) Relevant reference material needed to facilitate review and mediation of the conflict, including all relevant portions of state and federal law and regulations, conformity requirements, and any other relevant documents;

   (iii) A description of all reasonable alternatives and supporting data and justification for each alternative. This includes quantifying and documenting the need for the recommended alternative consistent with the Clean Air Act of 1990 and the applicable state and federal laws and regulations; and

   (iv) An explanation of the consequences of not reaching a resolution.

2. If conflicts concerning conformity determinations cannot be resolved by the interagency consultation procedures, then the State air agency shall notify the agency or agencies involved in the conflict of its intent to escalate the conflict resolution to the Office of the Governor.

3. The fourteen (14) calendar day window shall commence:

   (i) On the date that the Technical Secretary of TAPCD and head of the agency or agencies involved in the conflict officially agree that the conflict cannot be resolved; or

   (ii) When one or more agencies other than TAPCD request the start of the fourteen (14) day clock on a specified date, after notifying all other agencies involved of their intent, and TAPCD agrees.

4. If TAPCD does not contact the Office of the Governor within the fourteen (14) calendar day window, then the issue in conflict is considered to be resolved in favor of the agency in conflict with TAPCD.

5. The Governor may delegate his or her role, but not to the head or staff of TAPCD, TDOT, a state transportation commission or board, or an MPO.

6. TAPCD shall notify involved parties of the final decision by the Office of the Governor.

7. In the case of interstate nonattainment areas, if the conflict involves agencies outside of Tennessee, and the conflict cannot be resolved by the affected agency heads, the conflicts may be resolved in a manner mutually agreed to by the parties involved.

(h) Public participation:

(Rule 1200-03-34-.01, continued)

1. Each agency subject to conformity shall provide the general public a window of opportunity no less than thirty (30) days to review and comment on new conformity determinations before formal action (approval or endorsement by an executive committee of the MPO, or where no MPO exists, TDOT management, for submission to FTA/FHWA for their finding) is taken on all transportation plans, TIPs and STIPs, consistent with these requirements and those of 23 CFR §450.316(a). A comment period of no less than fourteen (14) days will be made available to the public on amendments to conformity determinations and associated documents. TAPCD and local air agencies shall offer the public the same opportunity to comment before final action on SIPs which may have a direct or indirect effect upon the motor vehicle emissions budget for an area subject to conformity. The notification process shall include, at a minimum, public notices and submittals to public depositories. In addition, all public comments that specifically address known plans for a regionally significant project, which is not receiving FHWA or FTA funding or approval, and have not been properly reflected in the emissions analysis supporting a proposed conformity determination for a transportation plan or TIP, must be responded to, in writing, within thirty (30) days of the end of the comment period.

2. The public participation procedure defined in part 1 of this subparagraph shall not be construed as superseding public involvement procedures already in effect for agencies subject to the conformity consultation process, such as the MPOs' citizen involvement process, the Uniform Administrative Procedures Act (T.C.A. §§ 4-5-101 *et seq*.), the Tennessee Sunshine Law (T.C.A. §§ 8-44-101 *et seq*.), or any other established process which already meets or exceeds these standards. In addition, this subparagraph does not apply to project-level conformity determinations subject to NEPA where a NEPA public participation process exists.

3. The public or any interested party may also inspect any of the documents related to the conformity process upon request; any charges imposed on the public for inspection or copying documents related to the conformity process shall be consistent with (or no greater than) the fee schedule contained in 49 CFR §7.43.

Exhibit A: Illustrative list of stakeholders subject to consultation as per this rule:

Federal Agencies:

United State Environmental Protection Agency (EPA)
Federal Transit Administration (FTA)
Federal Highway Administration (FHWA)

State Agencies:

Tennessee Air Pollution Control Division (TAPCD)
Tennessee Department of Transportation (TDOT)

Local Air Agencies:

Air Pollution Control Program, Memphis/Shelby County Health Department
Division of Pollution Control, Metropolitan Health Department for Davidson County
Department of Air Quality Management, Knox County Health Department
Air Pollution Control Bureau, Chattanooga/Hamilton County

(Rule 1200-03-34-.01, continued)

Metropolitan Planning Organizations:

Chattanooga-Hamilton County Regional Planning Agency
Clarksville-Montgomery County Regional Planning Commission
Knoxville Regional Transportation Planning Organization
Memphis-Shelby County Department of Regional Services
Nashville Metropolitan Planning Organization

Authority: *T.C.A. §§ 68-201-105.* ***Administrative History:*** *Original rule filed March 29, 1995; effective June 14, 1995. Amendment filed August 31, 2001; effective November 14, 2001. Repeal and new rule filed January 18, 2012; effective April 17, 2012.*

1200-03-34-.02 CONFORMITY OF GENERAL FEDERAL ACTIONS.

(1) Adopted herein by reference are the federal regulations in Paragraph (2) of this rule as published in the Code of Federal Regulations (CFR) as Subpart W of 40 CFR § 51.850 et seq., Federal Register November 30, 1993

(2) SUBPART W -- DETERMINING CONFORMITY OF GENERAL FEDERAL ACTIONS TO STATE OR FEDERAL IMPLEMENTATION PLANS

§51.850 Prohibition.

(a) No department, agency or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve any activity which does not conform to an applicable implementation plan.

(b) A Federal agency must make a determination that a Federal action conforms to the applicable implementation plan in accordance with the requirements of this rule before the action is taken.

(c) The preceding sentence does not include Federal actions where either:

(1) A National Environmental Policy Act (NEPA) analysis was completed as evidenced by a final environmental assessment (EA), environmental impact statement (EIS), or finding of no significant impact (FONSI) that was prepared prior to January 31, 1994, or

(2) (i) Prior to January 31, 1994, an EA was commenced or a contract was awarded to develop the specific environmental analysis;

(ii) Sufficient environmental analysis is completed by March 15,1994 so that the Federal agency may determine that the Federal action is in conformity with the specific requirements and the purposes of the applicable SIP pursuant to the agency's affirmative obligation under section 176(c) of the Clean Air Act (Act); and

(iii) A written determination of conformity under section 176(c) of the Act has been made by the Federal agency responsible for the Federal action by March 15, 1994.

(d) Notwithstanding any provision of this subpart, a determination that an action is in conformance with the applicable implementation plan does not exempt the action from any other requirements of the applicable implementation plan, the NEPA, or the Act.

§51.851 State implementation plan (SIP) revision.

(Rule 1200-03-34-.02, continued)

(a) Each State must submit to the Environmental Protection Agency (EPA) a revision to its applicable implementation plan which contains criteria and procedures for assessing the conformity of Federal actions to the applicable implementation plan, consistent with this subpart. The State must submit the conformity provisions within 12 months after November 30, 1993, or within 12 months of an area's designation to nonattainment, whichever date is later.

(b) The Federal conformity rules under this subpart and 40 CFR part 93, in addition to any existing applicable State requirements, establish the conformity criteria and procedures necessary to meet the Act requirements until such time as the required conformity SIP revision is approved by EPA. A State's conformity provisions must contain criteria and procedures that are no less stringent than the requirements described in this subpart. A State may establish more stringent conformity criteria and procedures only if they apply equally to non-Federal as well as Federal entities. Following EPA approval of the State conformity provisions (or a portion thereof) in a revision to the applicable SIP, the approved (or approved portion of the) State criteria and procedures would govern conformity determinations and the Federal conformity regulations contained in 40 CFR part 93 would apply only for the portion, if any, of the State's conformity provisions that is not approved by EPA. In addition, any previously applicable SIP requirements relating to conformity remain enforceable until the State revises its SIP to specifically remove them from the SIP and that revision is approved by EPA.

§51.852 Definitions.

Terms used but not defined in this part shall have the meaning given them by the Act and EPA's regulations (40 CFR chapter 1), in that order of priority.

Affected Federal land manager means the Federal agency or the Federal official charged with direct responsibility for management of an area designated as Class I under 42 U.S.C. 7472 of the Act that is located within 100 km of the proposed Federal action.

Applicable implementation plan or applicable SIP means the portion (or portions) of the SIP or most recent revision thereof, which has been approved under section 110 of the Act, or promulgated under section 110(c) of the Act (Federal implementation plan), or promulgated or approved pursuant to regulations promulgated under section 301(d) of the Act and which implements the relevant requirements of the Act.

Areawide air quality modeling analysis means an assessment on a scale that includes the entire nonattainment or maintenance area which uses an air quality dispersion model to determine the effects of emissions on air quality.

Cause or contribute to a new violation means a Federal action that:

(1) Causes a new violation of a national ambient air quality standard (NAAQS) at a location in a nonattainment or maintenance area which would otherwise not be in violation of the standard during the future period in question if the Federal action were not taken, or

(2) Contributes, in conjunction with other reasonably foreseeable actions, to a new violation of a NAAQS at a location in a nonattainment or maintenance area in a manner that would increase the frequency or severity of the new violation.

Caused by, as used in the terms "direct emissions" and "indirect emissions," means emissions that would not otherwise occur in the absence of the Federal action.

Criteria pollutant or standard means any pollutant for which there is established a NAAQS at 40 CFR part 50.

(Rule 1200-03-34-.02, continued)

Direct emissions means those emissions of a criteria pollutant or its precursors that are caused or initiated by the Federal action and occur at the same time and place as the action.

Emergency means a situation where extremely quick action on the part of the Federal agencies involved is needed and where the timing of such Federal activities makes it impractical to meet the requirements of this rule, such as natural disasters like hurricanes or earthquakes, civil disturbances such as terrorist acts, and military mobilizations.

Emissions budgets are those portions of the applicable SIP's projected emissions inventories that describe the levels of emissions (mobile, stationary, area, etc.) that provide for meeting reasonable further progress milestones, attainment, and/or maintenance for any criteria pollutant or its precursors.

Emission offsets, for purposes of section 51.858, are emissions reductions which are quantifiable, consistent with the applicable SIP attainment and reasonable further progress demonstrations, surplus to reductions required by, and credited to, other applicable SIP provisions, enforceable at both the State and Federal levels, and permanent within the time frame specified by the program.

Emissions that a Federal agency has a continuing program responsibility for means emissions that are specifically caused by an agency carrying out its authorities, and does not include emissions that occur due to subsequent activities, unless such activities are required by the Federal agency. Where an agency, in performing its normal program responsibilities, takes actions itself or imposes conditions that result in air pollutant emissions by a non-Federal entity taking subsequent actions, such emissions are covered by the meaning of a continuing program responsibility.

EPA means the Environmental Protection Agency.

Federal action means any activity engaged in by a department, agency, or instrumentality of the Federal government, or any activity that a department, agency or instrumentality of the Federal government supports in any way, provides financial assistance for, licenses, permits, or approves, other than activities related to transportation plans, programs, and projects developed, funded, or approved under title 23 U.S.C. or the Federal Transit Act (49 U.S.C. 1601 et seq.). Where the Federal action is a permit, license, or other approval for some aspect of a non-Federal undertaking, the relevant activity is the part, portion, or phase or the non-Federal undertaking that requires the Federal permit, license, or approval.

Federal agency means, for purposes of this rule, a Federal department, agency, or instrumentality of the Federal government.

Increase the frequency or severity of any existing violation of any standard in any area means to cause a nonattainment area to exceed a standard more often or to cause a violation at a greater concentration than previously existed and/or would otherwise exist during the future period in question, if the project were not implemented.

Indirect emissions means those emissions of a criteria pollutant or its precursors that:

(1) Are caused by the Federal action, but may occur later in time and/or may be farther removed in distance from the action itself but are still reasonably foreseeable; and

(2) The Federal agency can practicably control and will maintain control over due to a continuing program responsibility of the Federal agency.

Local air quality modeling analysis means an assessment of localized impacts on a scale smaller than the entire nonattainment or maintenance area, including, for example, congested roadway intersections and highways or transit terminals, which uses an air quality dispersion model to determine the effects of emissions on air quality.

(Rule 1200-03-34-.02, continued)

Maintenance area means an area with a maintenance plan approved under section 175A of the Act.

Maintenance plan means a revision to the applicable SIP, meeting the requirements of section 175A of the Act.

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.

Milestone has the meaning given in section**s** 182(g)(1) and 189(c)(1) of the Act.

National ambient air quality standards (NAAQS) are those standards established pursuant to section 109 of the Act and include standards for carbon monoxide (CO), lead (Pb), nitrogen dioxide (NO_2), ozone, particulate matter (PM-10), and sulfur dioxide (SO_2).

NEPA is the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.).

Nonattainment Area (NAA) means an area designated as nonattainment under section 107 of the Act and described in 40 CFR part 81.

Precursors of a criteria pollutant are:

(1) For ozone, nitrogen oxides (NOx), unless an area is exempted from NOx requirements under section 182(f) of the Act, and volatile organic compounds (VOC); and

(2) For PM-10, those pollutants described in the PM-10 nonattainment area applicable SIP as significant contributors to the PM-10 levels.

Reasonably foreseeable emissions are projected future indirect emissions that are identified at the time the conformity determination is made; the location of such emissions is known and the emissions are quantifiable, as described and documented by the Federal agency based on its own information and after reviewing any information presented to the Federal agency.

Regional water and/or wastewater projects include construction, operation, and maintenance of water or wastewater conveyances, water or wastewater treatment facilities, and water storage reservoirs which affect a large portion of a nonattainment or maintenance area.

Regionally significant action means a Federal action for which the direct and indirect emissions of any pollutant represent 10 percent or more of a nonattainment or maintenance area's emissions inventory for that pollutant.

Total of direct and indirect emissions means the sum of direct and indirect emissions increases and decreases caused by the Federal action; i.e., the "net" emissions considering all direct and indirect emissions. The portion of emissions which are exempt or presumed to conform under section 51.853, paragraphs (c), (d), (e), or (f) are not included in the "total of direct and indirect emissions." The "total of direct and indirect emissions" includes emissions of criteria pollutants and emissions of precursors of criteria pollutants.

§51.853 Applicability.

(a) Conformity determinations for Federal actions related to transportation plans, programs, and projects developed, funded, or approved under title 23 U.S.C. or the Federal Transit Act (49 U.S.C. 1601 et seq.) must meet the procedures and criteria of 40 CFR part 51, subpart T, in lieu of the procedures set forth in this subpart.

(Rule 1200-03-34-.02, continued)

(b) For Federal actions not covered by paragraph (a) of this section, a conformity determination is required for each pollutant where the total of direct and indirect emissions in a nonattainment or maintenance area caused by a Federal action would equal or exceed any of the rates in paragraphs (b)(1) or (2) of this section.

(1) For purposes of paragraph (b) of this section, the following rates apply in nonattainment areas (NAAs):

	Tons/Year
Ozone (VOC's or NOx)	
Serious NAA's	50
Severe NAA's	25
Extreme NAA's	10
Other ozone NAA's outside an ozone transport region	100
Marginal and moderate NAA's inside an ozone transport region	
VOC	50
NOx	100
Carbon monoxide	
All NAA's	100
SO_2 or NO_2	
All NAA's	100
PM-10	
Moderate NAA's	100
Serious NAA's	70
Pb	
All NAA's	25

(2) For purposes of paragraph (b) of this section, the following rates apply in maintenance areas:

	Tons/Year
Ozone (NOx), SO_2 or NO_2	
All Maintenance Areas	100
Ozone (VOC's)	
Maintenance areas inside an ozone transport region	50
Maintenance areas outside an ozone transport region	100
Carbon monoxide	
All maintenance areas	100
PM-10	
All maintenance areas	100
Pb	
All maintenance areas	25

(c) The requirements of this subpart shall not apply to:

(1) Actions where the total of direct and indirect emissions are below the emissions levels specified in paragraph (b) of this section.

(2) The following actions which would result in no emissions increase or an increase in emissions that is clearly de minimus:

(Rule 1200-03-34-.02, continued)

(i) Judicial and legislative proceedings.

(ii) Continuing and recurring activities such as permit renewals where activities conducted will be similar in scope and operation to activities currently being conducted.

(iii) Rulemaking and policy development and issuance.

(iv) Routine maintenance and repair activities, including repair and maintenance of administrative sites, roads, trails, and facilities.

(v) Civil and criminal enforcement activities, such as investigations, audits, inspections, examinations, prosecutions, and the training of law enforcement personnel.

(vi) Administrative actions such as personnel actions, organizational changes, debt management or collection, cash management, internal agency audits, program budget proposals, and matters relating to the administration and collection of taxes, duties and fees.

(vii) The routine, recurring transportation of material and personnel.

(viii) Routine movement of mobile assets, such as ships and aircraft, in home port reassignments and stations (when no new support facilities or personnel are required) to perform as operational groups and/or for repair or overhaul.

(ix) Maintenance dredging and debris disposal where no new depths are required, applicable permits are secured, and disposal will be at an approved disposal site.

(x) Actions, such as the following, with respect to existing structures, properties, facilities and lands where future activities conducted will be similar in scope and operation to activities currently being conducted at the existing structures, properties, facilities, and lands; for example, relocation of personnel, disposition of federally-owned existing structures, properties, facilities, and lands, rent subsidies, operation and maintenance cost subsidies, the exercise of receivership or conservatorship authority, assistance in purchasing structures, and the production of coins and currency.

(xi) The granting of leases, licenses such as for exports and trade, permits, and easements where activities conducted will be similar in scope and operation to activities currently being conducted.

(xii) Planning, studies, and provision of technical assistance.

(xiii) Routine operation of facilities, mobile assets and equipment.

(xiv) Transfers of ownership, interests, and titles in land, facilities, and real and personal properties, regardless of the form or method of the transfer.

(xv) The designation of empowerment zones, enterprise communities, or viticultural areas.

(Rule 1200-03-34-.02, continued)

(xvi) Actions by any of the Federal banking agencies or the Federal Reserve Banks, including actions regarding charters, applications, notices, licenses, the supervision or examination of depository institutions or depository institution holding companies, access to the discount window, or the provision of financial services to banking organizations or to any department, agency or instrumentality of the United States.

(xvii) Actions by the Board of Governors of the Federal Reserve System or any Federal Reserve Bank to effect monetary or exchange rate policy.

(xviii) Actions that implement a foreign affairs function of the United States.

(xix) Actions (or portions thereof) associated with transfers of land, facilities, title, and real properties through an enforceable contract or lease agreement where the delivery of the deed is required to occur promptly after a specific, reasonable condition is met, such as promptly after the land is certified as meeting the requirements of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and where the Federal agency does not retain continuing authority to control emissions associated with the lands, facilities, title, or real properties.

(xx) Transfers of real property, including land, facilities, and related personal property from a Federal entity to another Federal entity and assignments of real property, including land, facilities, and related personal property from a Federal entity to another Federal entity for subsequent deeding to eligible applicants.

(xxi) Actions by the Department of the Treasury to effect fiscal policy and to exercise the borrowing authority of the United States.

(3) The following actions where the emissions are not reasonably foreseeable:

(i) Initial Outer Continental Shelf lease sales which are made on a broad scale and are followed by exploration and development plans on a project level.

(ii) Electric power marketing activities that involve the acquisition, sale and transmission of electric energy.

(4) Actions which implement a decision to conduct or carry out a conforming program such as prescribed burning actions which are consistent with a conforming land management plan.

(d) Notwithstanding the other requirements of this subpart, a conformity determination is not required for the following Federal actions (or portion thereof):

(1) The portion of an action that includes major new or modified stationary sources that require a permit under the new source review (NSR) program (section 173 of the Act) or the prevention of significant deterioration (PSD) program (title I, part C of the Act).

(2) Actions in response to emergencies or natural disasters such as hurricanes, earthquakes, etc., which are commenced on the order of hours or days after the emergency or disaster and, if applicable, which meet the requirements of paragraph (e) of this section;

(Rule 1200-03-34-.02, continued)

(3) Research, investigations, studies, demonstrations, or training [other than those exempted under section 51.853(c)(2)], where no environmental detriment is incurred and/or, the particular action furthers air quality research, as determined by the State agency primarily responsible for the applicable SIP;

(4) Alteration and additions of existing structures as specifically required by new or existing applicable environmental legislation or environmental regulations (e.g., hush houses for aircraft engines and scrubbers for air emissions).

(5) Direct emissions from remedial and removal actions carried out under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and associated regulations to the extent such emissions either comply with the substantive requirements of the PSD/NSR permitting program or are exempted from other environmental regulation under the provisions of CERCLA and applicable regulations issued under CERCLA.

(e) Federal actions which are part of a continuing response to an emergency or disaster under section 51.853(d)(2) and which are to be taken more than 6 months after the commencement of the response to the emergency or disaster under section 51.853(d)(2) are exempt from the requirements of this subpart only if:

(1) The Federal agency taking the actions makes a written determination that, for a specified period not to exceed an additional 6 months, it is impractical to prepare the conformity analyses which would otherwise be required and the actions cannot be delayed due to overriding concerns for public health and welfare, national security interests and foreign policy commitments; or

(2) For actions which are to be taken after those actions covered by paragraph (e)(1) of this section, the Federal agency makes a new determination as provided in paragraph (e)(1) of this section.

(f) Notwithstanding other requirements of this subpart, actions specified by individual Federal agencies that have met the criteria set forth in either paragraph (g)(1) or (g)(2) and the procedures set forth in paragraph (h) of this section are presumed to conform, except as provided in paragraph (j) of this section.

(g) The Federal agency must meet the criteria for establishing activities that are presumed to conform by fulfilling the requirements set forth in either paragraph (g)(1) or (g)(2) of this section:

(1) The Federal agency must clearly demonstrate using methods consistent with this rule that the total of direct and indirect emissions from the type of activities which would be presumed to conform would not:

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

(ii) Interfere with provisions in the applicable SIP for maintenance of any standard;

(iii) Increase the frequency or severity of any existing violation of any standard in any area; or

(iv) Delay timely attainment of any standard or any required interim emission reductions or other milestones in any area including, where applicable, emission levels specified in the applicable SIP for purposes of:

(Rule 1200-03-34-.02, continued)

(A) A demonstration of reasonable further progress;

(B) A demonstration of attainment; or

(C) A maintenance plan; or

(2) The Federal agency must provide documentation that the total of direct and indirect emissions from such future actions would be below the emission rates for a conformity determination that are established in paragraph (b) of this section, based, for example, on similar actions taken over recent years.

(h) In addition to meeting the criteria for establishing exemptions set forth in paragraphs (g)(1) or (g)(2) of this section, the following procedures must also be complied with to presume that activities will conform:

(1) The Federal agency must identify through publication in the Federal Register its list of proposed activities that are presumed to conform and the basis for the presumptions;

(2) The Federal agency must notify the appropriate EPA Regional Office(s), State and local air quality agencies and, where applicable, the agency designated under section 174 of the Act and the MPO and provide at least 30 days for the public to comment on the list of proposed activities presumed to conform;

(3) The Federal agency must document its response to all the comments received and make the comments, response, and final list of activities available to the public upon request; and

(4) The Federal agency must publish the final list of such activities in the Federal Register.

(i) Notwithstanding the other requirements of this subpart, when the total of direct and indirect emissions of any pollutant from a Federal action does not equal or exceed the rates specified in paragraph (b) of this section, but represents 10 percent or more of a nonattainment or maintenance area's total emissions of that pollutant, the action is defined as a regionally significant action and the requirements of section 51.850 and sections 51.855-860 shall apply for the Federal action.

(j) Where an action otherwise presumed to conform under paragraph (f) of this section is a regionally significant action or does not in fact meet one of the criteria in paragraph (g)(1) of this section, that action shall not be presumed to conform and the requirements of section 51.850 and sections 51.855-860 shall apply for the Federal action.

(k) The provisions of this subpart shall apply in all nonattainment and maintenance areas.

§51.854 Conformity analysis.

Any Federal department, agency, or instrumentality of the Federal government taking an action subject to this subpart must make its own conformity determination consistent with the requirements of this subpart. In making its conformity determination, a Federal agency must consider comments from any interested parties. Where multiple Federal agencies have jurisdiction for various aspects of a project, a Federal agency may choose to adopt the analysis of another Federal agency or develop its own analysis in order to make its conformity determination.

§51.855 Reporting requirements.

(Rule 1200-03-34-.02, continued)

(a) A Federal agency making a conformity determination under section 51.858 must provide to the appropriate EPA Regional Office(s), State and local air quality agencies and, where applicable, affected Federal land managers, the agency designated under section 174 of the Act and the MPO a 30 day notice which describes the proposed action and the Federal agency's draft conformity determination on the action.

(b) A Federal agency must notify the appropriate EPA Regional Office(s), State and local air quality agencies and, where applicable, affected Federal land managers, the agency designated under section 174 of the Clean Air Act and the MPO within 30 days after making a final conformity determination under section 51.858.

§51.856 Public participation.

(a) Upon request by any person regarding a specific Federal action, a Federal agency must make available for review its draft conformity determination under section 51.858 with supporting materials which describe the analytical methods and conclusions relied upon in making the applicability analysis and draft conformity determination.

(b) A Federal agency must make public its draft conformity determination under section 51.858 by placing a notice by prominent advertisement in a daily newspaper of general circulation in the area affected by the action and by providing 30 days for written public comment prior to taking any formal action on the draft determination. This comment period may be concurrent with any other public involvement, such as occurs in the NEPA process.

(c) A Federal agency must document its response to all the comments received on its draft conformity determination under section 51.858 and make the comments and responses available, upon request by any person regarding a specific Federal action, within 30 days of the final conformity determination.

(d) A Federal agency must make public its final conformity determination under section 51.858 for a Federal action by placing a notice by prominent advertisement in a daily newspaper of general circulation in the area affected by the action within 30 days of the final conformity determination.

§51.857 Frequency of conformity determinations.

(a) The conformity status of a Federal action automatically lapses 5 years from the date a final conformity determination is reported under section 51.855, unless the Federal action has been completed or a continuous program has been commenced to implement that Federal action within a reasonable time.

(b) Ongoing Federal activities at a given site showing continuous progress are not new actions and do not require periodic redeterminations so long as such activities are within the scope of the final conformity determination reported under section 51.855.

(c) If, after the conformity determination is made, the Federal action is changed so that there is an increase in the total of direct and indirect emissions above the levels in section 51.853(b), a new conformity determination is required.

§51.858 Criteria for determining conformity of general Federal actions.

(a) An action required under section 51.853 to have a conformity determination for a specific pollutant, will be determined to conform to the applicable SIP if, for each pollutant that exceeds the rates in section 51.853, paragraph (b), or otherwise requires

(Rule 1200-03-34-.02, continued)

a conformity determination due to the total of direct and indirect emissions from the action, the action meets the requirements of paragraph (c) of this section, and meets any of the following requirements:

(1) For any criteria pollutant, the total of direct and indirect emissions from the action are specifically identified and accounted for in the applicable SIP's attainment or maintenance demonstration;

(2) For ozone or nitrogen dioxide, the total of direct and indirect emissions from the action are fully offset within the same nonattainment or maintenance area through a revision to the applicable SIP or a similarly enforceable measure that effects emission reductions so that there is no net increase in emissions of that pollutant;

(3) For any criteria pollutant, except ozone and nitrogen dioxide, the total of direct and indirect emissions from the action meet the requirements:

(i) Specified in paragraph (b) of this section, based on areawide air quality modeling analysis and local air quality modeling analysis; or

(ii) Meet the requirements of paragraph (a)(5) and, for local air quality modeling analysis, the requirement of paragraph (b) of this section;

(4) For CO or PM-10,

(i) Where the State agency primarily responsible for the applicable SIP determines that an areawide air quality modeling analysis is not needed, the total of direct and indirect emissions from the action meet the requirements specified in paragraph (b) of this section, based on local air quality modeling analysis; or

(ii) Where the State agency primarily responsible for the applicable SIP determines that an areawide air quality modeling analysis is appropriate and that a local air quality modeling analysis is not needed, the total of direct and indirect emissions from the action meet the requirements specified in paragraph (b) of this section, based on areawide modeling, or meet the requirements of paragraph (a)(5) of this section; or

(5) For ozone or nitrogen dioxide, and for purposes of paragraphs (a)(3)(ii) and (a)(4)(ii) of this section, each portion of the action or the action as a whole meets any of the following requirements:

(i) Where EPA has approved a revision to an area's attainment or maintenance demonstration after 1990 and the State makes a determination as provided in paragraph (2)(5)(i)(A) of this section; or where the State makes a commitment as provided in paragraph (2)(5)(i)(B) of this section;

(A) The total of direct and indirect emissions from the action (or portion thereof) is determined and documented by the State agency primarily responsible for the applicable SIP to result in a level of emissions which, together with all other emissions in the nonattainment (or maintenance) area, would not exceed the emissions budgets specified in the applicable SIP;

(Rule 1200-03-34-.02, continued)

(B) The total of direct and indirect emissions from the action (or portion thereof) is determined by the State agency responsible for the applicable SIP to result in a level of emissions which, together with all other emissions in the nonattainment (or maintenance) area, would exceed an emissions budget specified in the applicable SIP and the State Governor or the Governor's designee for SIP actions makes a written commitment to EPA which includes the following:

(1) A specific schedule for adoption and submittal of a revision to the SIP which would achieve the needed emission reductions prior to the time emissions from the Federal action would occur;

(2) Identification of specific measures for incorporation into the SIP which would result in a level of emissions which, together with all other emissions in the nonattainment or maintenance area, would not exceed any emissions budget specified in the applicable SIP;

(3) A demonstration that all existing applicable SIP requirements are being implemented in the area for the pollutants affected by the Federal action, and that local authority to implement additional requirements has been fully pursued;

(4) A determination that the responsible Federal agencies have required all reasonable mitigation measures associated with their action; and

(5) Written documentation including all air quality analyses supporting the conformity determination.

(C) Where a Federal agency made a conformity determination based on a State commitment under paragraph (a)(5)(i)(B) of this section, such a State commitment is automatically deemed a call for a SIP revision by EPA under section 110(k)(5) of the Act, effective on the date of the Federal conformity determination and requiring response within 18 months or any shorter time within which the State commits to revise the applicable SIP;

(ii) The action (or portion thereof), as determined by the MPO, is specifically included in a current transportation plan and transportation improvement program which have been found to conform to the applicable SIP under 40 CFR part 51, subpart T, or 40 CFR part 93, subpart A;

(iii) The action (or portion thereof) fully offsets its emissions within the same nonattainment or maintenance area through a revision to the applicable SIP or an equally enforceable measure that effects emission reductions equal to or greater than the total of direct and indirect emissions from the action so that there is no net increase in emissions of that pollutant;

(iv) Where EPA has not approved a revision to the relevant SIP attainment or maintenance demonstration since 1990, the total of direct and indirect emissions from the action for the future years [described in paragraph (d) of section 51.859] do not increase emissions with respect to the baseline emissions;

(Rule 1200-03-34-.02, continued)

(A) The baseline emissions reflect the historical activity levels that occurred in the geographic area affected by the proposed Federal action during:

(1) Calendar year 1990;

(2) The calendar year that is the basis for the classification (or, where the classification is based on multiple years, the most representative year), if a classification is promulgated in 40 CFR part 81; or

(3) The year of the baseline inventory in the PM-10 applicable SIP;

(B) The baseline emissions are the total of direct and indirect emissions calculated for the future years [described in paragraph (d) of section 51.859] using the historic activity levels [described in paragraph (a)(5)(iv)(A) of this section] and appropriate emission factors for the future years; or

(v) Where the action involves regional water and/or wastewater projects, such projects are sized to meet only the needs of population projections that are in the applicable SIP.

(b) The areawide and/or local air quality modeling analyses must:

(1) Meet the requirements in section 51.859; and

(2) Show that the action does not:

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

(ii) Increase the frequency or severity of any existing violation of any standard in any area.

(c) Notwithstanding any other requirements of this section, an action subject to this subpart may not be determined to conform to the applicable SIP unless the total of direct and indirect emissions from the action is in compliance or consistent with all relevant requirements and milestones contained in the applicable SIP, such as elements identified as part of the reasonable further progress schedules, assumptions specified in the attainment or maintenance demonstration, prohibitions, numerical emission limits, and work practice requirements.

(d) Any analyses required under this section must be completed, and any mitigation requirements necessary for a finding of conformity must be identified before the determination of conformity is made.

§51.859 Procedures for conformity determinations of general Federal actions.

(a) The analyses required under this subpart must be based on the latest planning assumptions.

(1) All planning assumptions must be derived from the estimates of population, employment, travel, and congestion most recently approved by the MPO, or other agency authorized to make such estimates, where available.

(Rule 1200-03-34-.02, continued)

(2) Any revisions to these estimates used as part of the conformity determination, including projected shifts in geographic location or level of population, employment, travel, and congestion, must be approved by the MPO or other agency authorized to make such estimates for the urban area.

(b) The analyses required under this subpart must be based on the latest and most accurate emission estimation techniques available as described below, unless such techniques are inappropriate. If such techniques are inappropriate and written approval of the EPA Regional Administrator is obtained for any modification or substitution, they may be modified or another technique substituted on a case-by-case basis or, where appropriate, on a generic basis for a specific Federal agency program.

(1) For motor vehicle emissions, the most current version of the motor vehicle emissions model specified by EPA and available for use in the preparation or revision of SIPs in that State must be used for the conformity analysis as specified below:

(i) The EPA must publish in the Federal Register a notice of availability of any new motor vehicle emissions model; and

(ii) A grace period of three months shall apply during which the motor vehicle emissions model previously specified by EPA as the most current version may be used. Conformity analyses for which the analysis was begun during the grace period or no more than 3 years before the Federal Register notice of availability of the latest emission model may continue to use the previous version of the model specified by EPA.

(2) For non-motor vehicle sources, including stationary and area source emissions, the latest emission factors specified by EPA in the "Compilation of Air Pollutant Emission Factors (AP-42)" must be used for the conformity analysis unless more accurate emission data are available, such as actual stack test data from stationary sources which are part of the conformity analysis.

(c) The air quality modeling analyses required under this subpart must be based on the applicable air quality models, data bases, and other requirements specified in the most recent version of the "Guideline on Air Quality Models (Revised)" (1986), including supplements (EPA publication no. 450/2-78-027R), unless:

(1) The guideline techniques are inappropriate, in which case the model may be modified or another model substituted on a case-by-case basis or, where appropriate, on a generic basis for a specific Federal agency program; and

(2) Written approval of the EPA Regional Administrator is obtained for any modification or substitution.

(d) The analyses required under this subpart, except section 51.858(a)(1), must be based on the total of direct and indirect emissions from the action and must reflect emission scenarios that are expected to occur under each of the following cases:

(1) The Act mandated attainment year or, if applicable, the farthest year for which emissions are projected in the maintenance plan;

(2) The year during which the total of direct and indirect emissions from the action is expected to be the greatest on an annual basis; and

(3) Any year for which the applicable SIP specifies an emissions budget.

(Rule 1200-03-34-.02, continued)

§51.860 Mitigation of air quality impacts.

(a) Any measures that are intended to mitigate air quality impacts must be identified and the process for implementation and enforcement of such measures must be described, including an implementation schedule containing explicit timelines for implementation.

(b) Prior to determining that a Federal action is in conformity, the Federal agency making the conformity determination must obtain written commitments from the appropriate persons or agencies to implement any mitigation measures which are identified as conditions for making conformity determinations.

(c) Persons or agencies voluntarily committing to mitigation measures to facilitate positive conformity determinations must comply with the obligations of such commitments.

(d) In instances where the Federal agency is licensing, permitting or otherwise approving the action of another governmental or private entity, approval by the Federal agency must be conditioned on the other entity meeting the mitigation measures set forth in the conformity determination.

(e) When necessary because of changed circumstances, mitigation measures may be modified so long as the new mitigation measures continue to support the conformity determination. Any proposed change in the mitigation measures is subject to the reporting requirements of section 51.856 and the public participation requirements of section 51.857.

(f) The implementation plan revision required in section 51.851 of this subpart shall provide that written commitments to mitigation measures must be obtained prior to a positive conformity determination and that such commitments must be fulfilled.

(g) After a State revises its SIP to adopt its general conformity rules and EPA approves that SIP revision, any agreements, including mitigation measures, necessary for a conformity determination will be both State and federally enforceable. Enforceability through the applicable SIP will apply to all persons who agree to mitigate direct and indirect emissions associated with a Federal action for a conformity determination.

Authority: *T.C.A. §§ 4-5-201 et. seq. and 68-201-105.* ***Administrative History:*** *Original rule filed March 29, 1995; effective June 14, 1995.*