DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

Air Quality Control Commission

REGULATION NUMBER 10

Criteria for Analysis of Transportation Conformity

5 CCR 1001-12

[Editor's Notes follow the text of the rules at the end of this CCR Document.]

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

I. Requirement to Comply with the Federal Rule

The purpose of Regulation Number 10 is to fulfill the requirement in 40 CFR 51.390(b) to establish a SIP revision that addresses the provisions of Sections 40 CFR 93.105(a) through (e), 40 CFR 93.122(a)(4)(ii), and 40 CFR 93.125(c) of the federal transportation conformity rule (see 40 CFR Part 93, Subpart A). Any person making a transportation conformity determination or adopting or approving a regionally significant project shall comply with the provisions of 40 CFR, Part 93, Subpart A., except as follows:

I.A. The interagency consultation procedures established in Section III. of this document specify Colorado procedures and shall apply in addition to the consultation procedures established in 40 CFR Section 93.105 (a) through (e).

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

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

II. Definitions

CDOT means the Colorado Department of Transportation.

Commission means the Air Quality Control Commission as defined in Section 25-7-103(7), C.R.S.

Division means The Air Pollution Control Division, pursuant to Section 25-7-111, C.R.S.

Hot Spot Analysis is an estimation of likely future localized criteria pollutant (or their precursor) concentrations and a comparison of those concentrations to the national ambient air quality standards. Federally required hot spot analyses assess impacts of pollutants on a scale smaller

than the entire nonattainment or maintenance area, including for example, congested roadway intersections, highway portions, or transit terminals, using air quality dispersion modeling.

Lead Planning Agency (LPA) is an agency designated by Colorado's Governor that is charged, together with the Division, with the duty of developing the State Implementation Plan (SIP) for any nonattainment or maintenance area.

Metropolitan planning organization (MPO) is that organization designated as being responsible, together with the State, for conducting the continuing, cooperative, and comprehensive planning process under 23 U.S.C. 134 and 49 U.S.C. 1607. It is the lead agency for preparing transportation plans, TIPs and transportation conformity documents, and it provides a forum for cooperative transportation decision-making.

Project-level Conformity See: *Hot Spot Analysis*

Regional Transportation Conformity refers to the status of a transportation planning region's conformance to relevant State Implementation Plans (SIPs). A conforming region's transportation plans and TIPs have passed emissions tests that must indicate they are unlikely to cause, contribute to, or increase the severity and frequency of future violations of national ambient air quality standards. Regional Conformity is demonstrated using transportation network models and air quality models and comparing projected transportation-related pollutant emissions to motor vehicle emissions budgets, or where budgets are not established, other emission limits for the region. To make a positive Conformity finding for a region, future emissions must not exceed certain limits, e.g., emission budgets, and transportation projects, plans and TIPs must not interfere with any transportation control measures required by SIPs.

Review Team is that group of interagency representatives who consult regarding Transportation Conformity assessment and findings, e.g., the Interagency Consultation Group (ICG) developed by the Denver Regional Council of Governments. The review team's responsibilities are defined in Section III. of this rule.

Regionally Significant Project means a transportation project (other than an exempt project*) for a facility that serves regional transportation needs, such as access to and from the area outside the region, major activity centers in the region, major planned developments such as new retail malls, sports complexes, etc., or transportation terminals as well as most terminals themselves) and would be included in the modeling of a metropolitan area's transportation network, including at a minimum all principal arterial highways and all fixed guideway transit facilities that offer and alternative to regional highway travel. For the purposes of this rule, regionally significant projects include only those located in nonattainment or maintenance areas. **Exempt projects are listed in the Federal Regulation at 40 CFR Part 93.126 and Part 93.127 and include safety improvements.*

Routine Conformity Determination is one that is made for transportation plans and TIPs and/or their amendments involving: (1) Plans or TIPs that the APCD determines to have minor amendments only, and /or (2) Projects with revisions to staging years only, and/or (3) Minor transit station plan revisions. Conformity Determinations for areas with Limited Maintenance Plans, which do not have emissions budgets, would also generally be considered "routine." Notwithstanding this general definition, the APCD or the Commission at its discretion may request that any Conformity Determination be reviewed by the Commission.

Transportation Control Measure (TCM) is any measure that is specifically identified and committed to in the applicable implementation plan (air quality SIP) through the process

established in CAA Section 176 (c) (8), that is either one of the types listed in CAA Section 108, or any other measure designed to reduce emissions or concentrations of air pollutants from transportation sources by reducing vehicle use or changing traffic flow or congestion conditions. Vehicle technology-based, fuel-based and maintenance-based measures, e.g., inspection and maintenance programs, are not TCM's.

Transportation Improvement Program (TIP) A prioritized program of transportation projects funded with federal transportation funds, developed under 23.U.S.C. 134(j) and 23 CFR Parts 450.324 through 450.330. The TIP must be fiscally constrained, and, in air quality nonattainment and maintenance areas, the MPO, as well as FHWA and FTA must determine that the TIP achieves Conformity

Transportation Plan in the context of this regulation means a fiscally constrained plan prepared by a Metropolitan Planning Organization or CDOT and a local government or governments and/or regional planning commission pursuant to 23 U.S.C. 134 and as amplified by 23 CFR Part 450.322 (also referred to as a metropolitan transportation plan, regional transportation plan, or long-range transportation plan) for which a regional conformity determination is required. Outside of MPO's, the Colorado Department of Transportation, along with local governments, develops regional transportation plans. The overall State Transportation Plan incorporates all of the regional plans.

Transportation Planning Region (TPR) is a geographic area for which the transportation planning process required by 23 USC 134 and 135 and Section 8 of the Federal Transit Act must be carried out. Per Colorado regulations (CCR 43-1-1102), a TPR is a geographically designated area of the state for which a regional transportation plan may be developed pursuant to the provisions of 43-1-1102 and 1103, CRS.

III. Interagency Consultation

III.A. Roles and Responsibilities for Transportation Conformity Determinations and Related SIP Development.

III.A.1. This rule sets out the minimum requirements for interagency consultation (Federal, State, regional and local) and resolution of conflicts. Representatives of the MPOs, local transit agency, the Division, the LPA and CDOT shall undertake an interagency consultation process in accordance with this section with each other and with local or regional offices of EPA, FHWA, and FTA on the development of the implementation plan, the list of TCMs in the applicable implementation plan, the transportation plan, the TIP, and all conformity determinations required by this rule. The MPO shall provide notice of revisions to Conformity documents through the normal planning process. The interagency consultation process shall be used in developing or noticing revisions to any documents that could affect Transportation Conformity.

III.A.2. It shall be the role and responsibility of each agency identified as a lead agency to prepare the final document and to ensure the adequacy of the interagency consultation process. Designation as a lead agency for any decision item shall mean that such agency shall be responsible for making the final decision on such decision item, except that any such decision shall be subject to the dispute resolution process set out in \ Section III.H.

III.A.3. In each nonattainment area, CDOT, the LPA, the Division, the MPO, local transit agency, and other agencies, as appropriate, may develop a written agreement pursuant to Section III.G. that outlines the specific roles and responsibilities of various participants in the interagency consultation process for the preparation of SIPs, transportation plans, TIPs and conformity determinations. In the absence of such a written agreement, in addition to the other duties specified in this rule, the specific roles and responsibilities of the various participants in the interagency consultation process shall be as follows:

III.A.3.a. The Division shall be responsible for: (A) emissions inventories; (B) air quality modeling and/or quality-assuring air quality modeling that is performed by the MPOs or CDOT; (C) performing attainment demonstrations; (D) assisting the LPA in the development of pollutant specific implementation plan revisions; (E) providing technical and policy input regarding emission factors and emissions budgets; and (F) updating motor vehicle emissions factors.

III.A.3.b. The LPA, or the Division if there is no LPA, shall: (A) develop pollutant-specific state implementation plans for submittal to the Commission; and (B) prepare emissions budgets.

III.A.3.c. The MPO shall: (A) develop transportation plans and TIPs, and shall make conformity determinations on transportation plans and TIPs within the applicable area, and shall be the lead agency for the development of such plans and TIPs, and for such conformity determinations; (B) develop transportation and socioeconomic data and planning assumptions and provide such data and planning assumptions to the Division for use in air quality analysis; (C) perform transportation modeling and documentation of timely implementation of TCMs needed for conformity assessments and SIP development; and (D) monitor regionally significant projects, and ensure that all disclosed, or otherwise known, regionally significant projects are included in the regional emissions analysis. The MPO may: (E) provide technical and policy input on emissions budgets; (F) perform air quality modeling for transportation conformity purposes; and (G) evaluate TCM impacts on transportation as needed.

III.A.3.d. CDOT shall: (A) provide technical input on proposed revisions to motor vehicle emissions factors, (B) convene air quality technical review meetings on specific projects when requested by other agencies or as needed, and (C) comment on transportation control measures and other aspects of the SIP that may affect the operation, construction or maintenance of the transportation system.

III.A.3.e. In addition to the duties and responsibilities identified in paragraph d. above, for FHWA/FTA projects located outside of metropolitan planning areas, CDOT shall convene the appropriate parties to outline roles and responsibilities and coordinate efforts needed to: (A) perform the required conformity evaluation for such projects, and identify the lead agency for such evaluations; (B) provide technical and policy input on emissions budgets; (C) develop socioeconomic data and planning assumptions for use in air quality analysis to determine

conformity of projects in consultation with the affected municipal and county governments and state agencies; and (D) perform transportation modeling, regional emissions analyses and documentation of timely implementation of TCMs needed for conformity assessments. CDOT may also conduct air quality modeling pursuant to a conformity determination..

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

III.B. Establishing a Forum for Regional Conformity Consultation

III.B.1. Minimum Consultation Requirements.

III.B.1.a. The MPO shall establish and maintain a forum, herein referred to as the review team, for regular consultation. The MPO may establish a committee, or use existing committees, to perform the tasks assigned to the review team, provided the agencies identified in SubparagraphIII.B.1.b., below, have an opportunity to participate. Conference calls or written correspondence may be used to hold the meetings required by this rule upon the concurrence of the Division and any affected LPA. The review team shall comply with the minimum requirements set out in paragraph c. below, except that, outside of metro planning areas, CDOT shall perform the functions assigned to the MPO.

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

III.B.1.c. The review team established pursuant to paragraphs a. and b. shall comply with the following minimum requirements:

III.B.1.c.(1) The MPO consultation process shall begin early enough for the review team to adequately review and provide meaningful input on draft transportation plans, TIPs and conformity determinations, including supporting documents.

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

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

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

III.B.1.c.(5) The MPO shall respond in written form to written comments received from any of the members of the review team copying all review team members.

III.C. Topics for Consultation

III.C.1. The review team shall address the following topics in the manner provided.

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

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

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

III.C.1.b.(1) The review team shall review the transportation network and identify minor arterials that serve regional transportation needs.

III.C.1.b.(2) Review the transportation projects disclosed to the MPO pursuant to Section III.E., and all transportation projects otherwise known to the members that may be regionally significant projects, and identify as regionally significant those projects that are on a facility which serves regional transportation needs and that would normally be included in the modeling of the metropolitan area's transportation network.

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

III.C.1.c. Evaluating whether projects otherwise exempted from meeting the requirements of this subpart (see 40 CFR Sections 93.126 and 93.127) should be treated as non-exempt in cases where potential emissions impacts may exist for any reason.

III.C.1.c.(1) At the request of any participant in the consultation process, the review team shall determine whether projects otherwise exempt from meeting the requirements of this subpart should be treated as non-exempt in cases where potential emissions impacts may exist for any reason.

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

III.C.1.d. Making a determination, as required by 40 CFR Section 93.113(c)(1), whether past obstacles to TCM implementation have been identified and are being overcome, and whether State and local agencies with influence over approvals or funding for TCMs are giving maximum priority to approval or funding for TCMs.

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

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

III.C.1.d.(3) The MPO shall report any situation in which it determines that obstacles to implementing a TCM are not being overcome, or that State and local agencies with influence over approvals or funding are not giving maximum priority to approval or funding for TCMs. The report shall be provided to the agency sponsoring the TCM, the Division, the Commission and the Governor. The Commission may schedule the matter for a hearing regarding enforcement, and/or replacement of TCMs.

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

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

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

The MPO shall make available final TIPs and transportation plans to participants in the consultation process.

III.C.1.g. Choosing conformity tests and methodologies for isolated rural nonattainment areas, as required by 40 CFR Section 93.109(g).

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

III.C.2. The review team shall address the following topics in the manner provided. Outside of the metropolitan planning areas, CDOT shall perform the tasks assigned to the MPO, excepting conformity determination tasks that it contracts out to other entities.

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

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

III.C.2.a.(2) The MPO will consult with the review team to evaluate whether events that may trigger a new conformity determination pursuant to 40 CFR Section 93.104 or a pollutant specific SIP have occurred.

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

In the event that contiguous MPOs are created within the state, the affected MPOs shall, in consultation with the participants in the consultation process,

establish a consultation procedure for consulting on emissions analyses for transportation activities that cross the borders of MPOs or nonattainment areas or air basins.

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

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

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

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

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

III.C.3.a. Determine which types of projects should be evaluated for localized hot spots. CDOT, subject to concurrence by the Division, shall identify the projects or categories of projects that shall be evaluated for potential hot spots.

III.C.3.b. Evaluate and choose a model (or models) and associated methods and assumptions to be used in hot-spot analyses. CDOT shall be responsible for selecting the hot spot model to be used for conformity determinations.

III.D. Process for assuming the location and design concept and scope of projects disclosed to the MPO as required by paragraph (E) of this section in cases where sponsors have not yet decided these features in sufficient detail to perform the regional emissions analysis according to the requirements of 40 CFR Section 93.122.

III.D.1. The MPO shall contact the sponsor of any project disclosed to the MPO pursuant to Section III.E., but whose sponsors have not yet decided these features in sufficient detail to perform the regional emissions analysis according to the requirements of 40 CFR Section 93.122, and shall request that such

sponsor develop the location and design concept and scope of the project for the purpose of including the project in the regional emissions analysis.

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

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

III.E.1. Prior to conducting a conformity analysis, the MPO shall ensure that CDOT and each municipality, county and public transit agency within the metropolitan planning area, and each agency with approval authority for transportation projects , is notified of the requirement to include regionally-significant projects, and changes to plans for such projects, in the regional emissions analysis.

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

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

In each nonattainment or maintenance area, the LPA or the Division shall establish and maintain a review team for regular consultation to ensure that the transportation community is involved in the development of the implementation plans. Such review team shall also be established to develop and review any SIP revision that includes a new or revised mobile source emissions budget, or that requires a new or revised attainment or maintenance demonstration. The review team may be part of a larger consultation procedure established by the LPA or Division to include all sectors of the community (in addition to the transportation community). The consultation procedure shall comply with the minimum requirements listed below. If the review team is established by the Division, the Division shall perform the tasks assigned to the LPA.

III.F.1.a. The review team shall consist of representatives of the MPO, the Division, CDOT, the EPA, FHWA, FTA, and the public transit agency.

III.F.1.b. The LPA shall begin consultation meetings early enough in the process for review team members to adequately review the modeling used to support the SIP, and to review the proposed control measures. The LPA must provide an opportunity to review copies of the draft implementation plan, including supporting documents, to the other

members of the review team, and shall provide at least thirty days for the submission of comments on the draft SIP prior to adoption by the LPA.

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

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

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

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

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

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

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

III.G. Agreements further describing consultation procedures.

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

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

III.H. Review of Conformity Determinations by the public, the Air Quality Control Commission, and resolution of conflicts.

III.H.1. Per, 40 CFR Section 93.105(e), agencies making conformity determinations—i.e., MPO's or CDOT--must provide for public review and comment prior to adopting new or amended transportation plans-and programs.

III.H.1.a. Agencies making conformity determinations must provide reasonable public access to relevant documents, consistent with 23 CFR Section 450.316(a). Any charges imposed for public inspection or copying of documents would be consistent with USDOT regulations at 49 CFR Section 7.43.

III.H.1.b. Agencies making conformity determinations must specifically address in writing any public comments asserting that a regionally significant project is not reflected in the emissions analysis supporting a positive conformity finding.

III.H.1.c. Agencies making conformity determinations shall provide opportunity for public involvement in conformity determinations for projects where otherwise required by law.

III.H.2. The Division shall make a finding regarding which Conformity Determinations are routine, per the definition set forth in this regulation. Routine Conformity Determinations regarding a TIP or Plan shall be reviewed by the Division. For instances in which the Division agrees that a positive Conformity Determination has been made, it shall provide notice of concurrence with those determinations.. The Division shall make the determination regarding whether a Conformity Determination is routine. If a Conformity Determination is non-routine, it shall be brought before the Commission for its review and possible concurrence. The Commission intends to conduct public meetings to review non-routine conformity determinations in accordance with the applicable provisions of the Air Quality Control Commission Procedural Rules, and reserves the right to schedule such meetings as permitted by the Commission's schedule and as necessary to comply with such procedural rules. However, this paragraph shall not be construed to incorporate such procedural rules into the SIP. No violation of such procedural rules shall be construed as a violation of the SIP, except where such procedural rules otherwise has been incorporated into the SIP.

III.H.3. Upon request of any member of the review team, a conformity determination on an FHWA project located outside of a metropolitan planning area shall be presented to the Commission prior to submittal to FHWA if there is a conflict that cannot be resolved by the review team. The request for such review must be filed as soon as practicable and shall not be filed any later than the first regularly scheduled Commission meeting following the final conformity determination.

III.H.4. In accordance with 40 CFR Section 93.105(d), conflicts among State agencies or between State agencies and an MPO may be escalated to the Governor. Such conflicts would render a Conformity Determination non-routine and subject to review by the AQCC. The fourteen calendar-days in which to appeal a conflict to the Governor shall commence upon review of a conformity determination by the

Commission pursuant to this Subsection H., except as provided below at Sections (a) and (b). If the State appeals to the Governor, the final conformity determination must have the concurrence of the Governor. If the Commission does not appeal to the Governor within 14 days, or as provided below at Sections (a) and (b), the MPO or CDOT may proceed with the final conformity determination.

III.H.4.a. The Commission may extend the beginning of the time to escalate a conflict to the next regularly scheduled Commission meeting if the entity making the conformity determination amends such determination during the fourteen-day period preceding the Commission meeting.

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

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

IV. Emission reduction credit for certain control measures.

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

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

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

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

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

VI.A. Amendments Adopted October 15, 1998

The change to Regulation Number 10, “Criteria for Analysis of Conformity,” Part B, “Transportation Conformity” will establish criteria and procedures for making conformity determinations on transportation plans, transportation improvement programs (TIPs), FHWA/FTA projects, and consultation procedures for major revisions to the State Implementation Plan (SIP).

<u>Federal Requirements</u>

Pursuant to 40 CFR Section 51.390, Colorado must submit to the EPA and the U.S. Department of Transportation (DOT), a revision to the SIP to establish criteria and procedures for DOT, metropolitan planning organizations (MPOs), and state and local transportation and air quality agencies to assess the conformity of transportation plans, programs, and projects, consistent with the requirements of 40 CFR, Part 93, Subpart A.

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

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

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

Contested Issues

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

Statutory Authority

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

Findings pursuant to Section 25-7-110.8

The portion of the rule incorporating the federal criteria for making conformity determinations is exempt from the requirements of Section 25-7-110.8, C.R.S. (1997). The consultation requirements are administrative in nature, and are exempt from the requirements of Section 25-7-

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

VI.B. Amendments Adopted November 20, 2008

Transportation Conformity Update

Background

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

Basis and Purpose

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

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

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

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

Federal Requirements

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

The federal rule also requires the states to develop procedures for interagency consultation on transportation conformity determinations, and for SIP revisions. The federal rule establishes

minimum requirements for such consultation procedures, and requires States to establish these consultation procedures, including consultation with the public and conflict resolution at 40 CFR, Sections 93.105 (c) and (d). Pursuant to 40 CFR Sections 51.390 and 93.105, the states must develop and adopt such procedures, and submit the procedures to EPA for inclusion in the SIP. Pursuant to 40 CFR Sections 93.122(a)(4)(ii) and 93.125(c), States must also address the obtainment and enforceability of written commitments to SIP control measures not included in transportation plan as well as transportation project mitigation measures.

Statutory Authority

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

Findings pursuant to Section 25-7-110.8

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

VI.C. Amendments Adopted December 15, 2011

Basis and Purpose

The purpose of these amendments is to streamline the transportation conformity process by allowing the Colorado Air Pollution Control Division to provide concurrence with routine transportation conformity determinations without the need for a public hearing before the Colorado Air Quality Control Commission. This change to the conformity process is allowed for under federal law and will reduce the burden on the AQCC, the Division and transportation planning organizations, while ensuring that air quality requirements are met. In addition, the amendments include a number of clarifying provisions that will help facilitate the implementation of the regulation. In addition to streamlining the transportation conformity process, these amendments include a number of housekeeping changes made at the request of EPA, including removing incorporations by reference to federal general conformity regulations. Inclusion of these requirements in Regulation Number 10, and the State Implementation Plan is not required and is unnecessary to the general conformity process.

Specific Statutory Authority

The Commission promulgates these regulatory changes pursuant to its authority under Section 25-7-105(1)(a)(I), C.R.S. to adopt a comprehensive state implementation plan that meets the requirements of the federal Clean Air Act.

Findings Pursuant to Section 25-7-110.8

The revisions to Regulation Number 10 are administrative in nature and are not intended to reduce air pollution. Rather, the revisions are intended to streamline the transportation conformity process and clarify existing requirements, while maintaining the air quality benefits of the existing rule. Accordingly, the requirements of Section 25-7-110.8, C.R.S. do not apply to this rulemaking.

VI.D. Adopted: February 18, 2016

This Statement of Basis, Specific Statutory Authority and Purpose complies with the requirements of the Colorado Administrative Procedure Act Sections 24-4-103, C.R.S. and the Colorado Air Pollution Prevention and Control Act Sections 25-7-110 and 25-7-110.5, C.R.S. ("the Act"), and the Air Quality Control Commission's ("Commission") Procedural Rules.

Basis

The Commission revised the definition of "routine conformity determination" to grant the Colorado Air Pollution Control Division ("Division") the authority to provide concurrence with a wider range of transportation conformity determinations thus streamlining the conformity process.

Specific Statutory Authority

The purpose of Regulation Number 10 is to fulfill the requirement in 40 CFR 51.390(b) to establish a SIP revision that addresses the provisions of Sections 40 CFR 93.105(a) through (e), 40 CFR 93.122(a)(4)(ii), and 40 CFR 93.125(c) of the federal transportation conformity rule (see 40 CFR Part 93, Subpart A). The Colorado Air Pollution and Control Act, Section 25-7-105(1)(a)(I), authorizes the Commission to adopt a comprehensive state implementation plan that meets the requirements of the federal Clean Air Act and Section 25-7-106(3) authorizes the Commission to adopt regulations governing procedures before the Commission.

Purpose

The purpose of this amendment is to streamline the transportation conformity process by allowing the Division to provide concurrence with a wider range of routine transportation conformity determinations without the need for a public hearing before the Commission. This change to the routine conformity determination definition will reduce the burden on the Commission, the Division and transportation planning organizations, while ensuring that air quality requirements are met.

Findings of Fact

The revisions to Regulation Number 10 are administrative in nature and are not intended to reduce air pollution. Rather, the revisions are intended to streamline the transportation conformity process while maintaining the air quality benefits of the existing rule. Accordingly, the requirements of § 25-7-110.8, C.R.S. do not apply to this rulemaking.

Further, the Commission corrected any typographical, grammatical and formatting errors found within the regulation.

Editor's Notes

History