

## Chapter 26 Conformity

Authority: Environment Article, §§1-101, 1-404, 2-101—2-103, 2-301—2-303, 10-102, and 10-103, Annotated Code of Maryland

### **.01 Purpose and Scope.**

The purpose of this chapter is to implement §176(c) of the Clean Air Act (CAA), as amended (42 U.S.C. §7401 et seq.), and the related requirements of 23 U.S.C. §109(j), with respect to the conformity of transportation plans, programs, and projects which are developed, funded, or approved by the United States Department of Transportation (DOT), and by metropolitan planning organizations (MPOs) or other recipients of funds under Title 23 U.S.C. or the Federal Transit Laws (49 U.S.C. Chapter 53). This chapter sets forth policy, criteria, and procedures for demonstrating and assuring conformity of these activities to an applicable implementation plan developed pursuant to §110 and Part D of the CAA. The requirements in this chapter are applicable in areas of the State designated by the U.S. Environmental Protection Agency as nonattainment or maintenance areas for any relevant National Ambient Air Quality Standards (NAAQS).

### **.02 Definitions.**

A. In this chapter, all terms not defined in this regulation have the meanings stated in 40 CFR §§93.101 and 93.152, as amended, which is incorporated by reference.

B. Terms Defined.

(1) "Adopt or approve of" a regionally significant project means the first time any of the following actions are necessary to authorize a project to occur:

- (a) Any policy board action necessary for the project to proceed;
- (b) The issuance of administrative permits for the project;
- (c) The execution of a contract to construct the project;
- (d) Any final action of a board, commission, or administrator authorizing or directing employees to proceed with construction of the project; or
- (e) Any written decision or authorization from the metropolitan planning organization (MPO) that the project may be adopted or approved.

(2) "Applicable implementation plan", "applicable SIP", and "State implementation plan" mean the Maryland State Implementation Plan (SIP), including revisions approved by the United States Environmental Protection Agency (EPA) and any Federal Implementation Plan adopted by EPA that applies to Maryland.

(3) "Cooperation" means that the parties involved in carrying out the planning, programming, and management systems processes work together to achieve a common goal or objective.

(4) "Department" means the Department of the Environment.

(5) "Governor" means the Governor of Maryland.

(6) "MDOT" means the Maryland Department of Transportation.

## (7) Metropolitan Planning Organization (MPO).

(a) "Metropolitan planning organization (MPO)" means the:

(i) Organization 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. §5303; and

(ii) Forum for cooperative transportation decision making.

(b) "Metropolitan planning organization (MPO)" includes:

(i) The "Baltimore Regional Transportation Board (BRTB)," the MPO for the Baltimore region, which includes Anne Arundel, Baltimore, Carroll, Harford, and Howard counties and the cities of Baltimore and Annapolis;

(ii) The "Hagerstown/Eastern Panhandle (HEP)" MPO for the Hagerstown area, which includes Washington County, Maryland and the counties of Berkeley and Jefferson in West Virginia;

(iii) The "National Capital Transportation Planning Board (TPB) ", the MPO for the Washington region, which includes Frederick, Montgomery, and Prince George's counties in Maryland, the District of Columbia, and Northern Virginia; and

(iv) The "Wilmington Area Planning Council (WILMAPCO)", the MPO for New Castle County, Delaware and Cecil County, Maryland.

(8) Progress Report means the report prepared by the MPOs, MDOT and MDE tracking the progress of transportation and land use plans in achieving the long-term planning targets for greenhouse gas and nitrogen oxides emissions established in Regulation .09A of this chapter.

## (9) Regional Planning Organization (RPO).

(a) "Regional planning organization" means an organization certified by the Governor as being responsible for the preparation of air quality plans for a nonattainment area under §174 of the federal Clean Air Act.

(b) "Regional planning organization" may include elected officials of State and local governments in the affected nonattainment area, or representatives of the MDE, MDOT, and MPOs for the affected area.

(c) "Regional planning organization" is the forum for a cooperative decision-making process for air quality planning in the RPO's specific nonattainment area.

(10) "State" means the State of Maryland.

(11) "State air agency" means the Maryland Department of the Environment, Air and Radiation Management Administration.

(12) "Statewide transportation improvement program (STIP)" means a staged, multiyear, intermodal program of transportation projects covering the State, which is consistent with the Statewide transportation plan and metropolitan transportation plans, and developed under 23 CFR 450.

(13) "Statewide transportation plan" means the official intermodal Statewide transportation plan that is developed through the Statewide planning process for the State, under 23 CFR 450.

(14) Transportation Control Measure (TCM).

(a) "Transportation Control Measure" means:

(i) A measure that is specifically identified and committed to in the applicable implementation plan that is either one of the types listed in §108 of the Clean Air Act; or

(ii) Any other measure for the purpose of reducing emissions or concentrations of air pollutants from transportation sources by reducing vehicle use or changing traffic flow or congestion conditions.

(b) "Transportation control measure" does not include vehicle technology-based, fuel-based, and maintenance-based measures which control the emissions from vehicles under fixed traffic conditions.

### **.03 Transportation Conformity.**

A. Applicability to Transportation-Related Projects Subject to Federal Regulations. All transportation plans, programs, and projects developed, funded, or approved in Maryland, under Title 23 U.S.C. or the Federal Transit Act (49 U.S.C. §1601 et seq.) shall conform to the Maryland State Implementation Plan.

B. Requirement for Conformity. Each agency and organization charged with the responsibility to make transportation conformity determinations shall do so pursuant to this chapter and the provisions of 40 CFR Part 93, Subpart A, as amended, which is incorporated by reference.

### **.04 Transportation Conformity—Consultation in General.**

A. The MPOs, RPOs, the Department, and MDOT shall comply with the procedures in this chapter governing interagency consultation, conflict resolution, and public consultation with each other and with divisional or regional offices of the EPA, Federal Highway Administration (FHWA), and Federal Transit Administration (FTA) on the development of:

- (1) Control strategy implementation and maintenance plan revisions;
- (2) The list of TCMs in applicable implementation plans;
- (3) The Unified Planning Work Program (UPWP) under 23 CFR §450.314;
- (4) Transportation plans;
- (5) Transportation improvement programs (TIPs);
- (6) Associated conformity determinations required by this chapter; and

(7) Associated reports concerning long-term planning targets for nitrogen oxides and greenhouse gases required by this chapter.

B. An agency may not participate in the consultation process unless it is identified as a participating agency in this chapter.

### **.05 Transportation Conformity—Interagency Consultation Requirements.**

A. Consultation Process.

(1) Representatives of the MPOs, RPOs, the Department, and MDOT shall undertake an interagency consultation process with the FHWA, FTA, and EPA, in accordance with this regulation and Regulations .06—.08 of this chapter on the development of:

determinations; and

- (a) UPWP, transportation plans, TIPs, any revisions to them, associated conformity
- (b) The SIP and revisions to the SIP; and
- (c) The progress report on long-term planning targets.

(2) The MPOs are the lead agencies responsible for preparing an amendment or revision of the UPWP, the transportation plan, or the TIP, for making conformity determinations, and for preparing and distributing the progress report on long-term planning targets.

(3) In nonmetropolitan, or rural nonattainment and maintenance areas, the MDOT is the lead agency responsible for preparing amendments or revisions to the Statewide transportation plan, or the Statewide TIP, making conformity determinations, and for preparing and distributing the progress report on long-term planning targets.

(4) The Department is the lead agency responsible for preparing revisions to the SIP and incorporating TCMs recommended by the MPOs and MDOT and for the development of long-term planning targets.

(5) In the case of metropolitan nonattainment and maintenance areas that have a certified RPO, the RPO is the agency responsible for preparing an air quality plan and for assuring the adequacy of the interagency consultation process with respect to the development of the proposed air quality plan, and any amendments or revisions to the plan.

B. When serving as lead agency, the MPOs, RPOs, MDOT, and MDE have the following responsibilities:

(1) Initiating the applicable consultation process by notifying other participants, convening meetings, preparing summaries, assuring that all relevant documents and information are supplied to all participants in the consultation process in a timely manner, maintaining a written record of the consultation process, and providing final documents and supporting information to each participating agency after approval or adoption, and distribution of the final progress report;

(2) Enabling regular consultation on major activities (such as the development of a transportation plan, the development of a TIP, any determination of conformity on transportation plans or TIPs, the development of a SIP, or the preparation of the progress report) including meetings beginning on a date determined by the lead agency to be adequate to meet the date a final decision is required and continuing at a frequency mutually agreed upon by the affected agencies;

(3) Convening meetings of technical staff as necessary;

(4) Conferring with all other agencies identified in §A of this regulation with an interest in the planning process, providing all information to those agencies needed for meaningful input, soliciting early and continuing input from those agencies, before taking any action, considering the views of each agency and responding to those views in a timely, substantive written manner, and making the views and written response part of the record of any decision or action;

(5) When not fulfilling the responsibilities of a lead agency, reviewing and commenting as appropriate (including comments in writing) on all proposed decisions and actions in a timely manner, attending consultation and decision meetings, providing input on any area of substantive expertise or responsibility, and providing technical assistance to the lead agency or to the consultation process when requested.

C. In addition to serving as lead agency pursuant to §A(2) of this regulation, the MPOs are responsible for:

- (1) Developing or approving transportation and related socioeconomic data and local planning assumptions, or both, and providing data and assumptions for use in air quality analysis for SIP tracking and conformity of transportation plans, TIPs, and projects, **and preparation of the progress report**;
- (2) Providing transportation demand forecasting for development of on-road mobile source emissions inventories by the Department and MDOT;
- (3) In cooperation with MDOT, evaluating potential TCM projects and impacts;
- (4) In cooperation with MDOT, monitor regionally significant projects to determine a need for emissions modeling;
- (5) In cooperation with MDOT, providing technical and policy input into the development of emissions budgets **and long-term planning targets**;
- (6) In cooperation with MDOT, consulting with other MPOs on emissions analysis for transportation activities which cross the borders of the MPOs or nonattainment areas;
- (7) In cooperation with MDOT, determining which transportation projects should be considered "regionally significant" for the purpose of regional emission analysis **and the progress report** (in addition to those functionally classified as principal arterial roadway or higher classifications, 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;
- (8) In cooperation with MDOT, assuring that plans for construction of regionally significant projects which are not FHWA or FTA funded or approved projects (including projects for which alternative locations, design concept and scope, or the no-build options are still being considered), including all plans by recipients of funds designated under 23 U.S.C or the Federal Transit Act, are disclosed by the MPO members on a regular basis, and assuring that any changes to those plans are immediately disclosed and the interagency consultation process undertaken involving the MPO and MDOT and the recipients of funds designated under 23 U.S.C. or the Federal Transit Act;
- (9) In cooperation with MDOT, designing, scheduling, and funding research and data collection efforts and model developments in regional transportation, such as household or travel transportation surveys;
- (10) In cooperation with MDOT and the Department, evaluating and choosing each model or models and associated methods and assumptions to be used in regional transportation demand analysis, including vehicle miles traveled (VMT) forecasting;
- (11) In cooperation with the Department and MDOT, evaluating whether projects otherwise exempted from meeting the requirements of 40 CFR §93.127 should be treated as nonexempt in cases where potential adverse emissions impacts may exist for any reason;
- (12) In cooperation with MDOT and the Department, making a determination as required by 40 CFR §93.113, whether past obstacles to implementation of TCMs that are behind the schedule established in the applicable implementation plan have been identified and are being overcome, and whether State and local agencies with influence over approvals or funding for TCMs are giving maximum priority to approvals or funding for TCMs, and as part of this consultation, considering whether delays in TCM implementation necessitate revisions to the applicable implementation plan to remove TCM or substitute TCMs or other emission reduction measures;
- (13) In cooperation with MDOT and the Department, determining what forecast of vehicle miles traveled (VMT) to use in establishing or tracking emissions budgets, developing transportation plans, TIPs, or control strategy implementation plan revisions, making conformity determinations, **or preparing the progress report**;
- (14) In cooperation with MDOT and the Department, evaluating events which may trigger new conformity determinations **or progress reports** in addition to those triggering events established by 40 CFR §93.104;

(15) In cooperation with MDOT and the Department, developing assumptions regarding the location and design concept and scope of projects which are disclosed to the MPO as required by this regulation, but whose sponsors have not yet decided these features in sufficient detail to perform the regional emissions analysis according to the requirements of 40 CFR §93.122, as amended;

(16) In cooperation with MDOT and the Department, consulting with the FHWA and FTA on timely action on final findings of conformity;

(17) In cooperation with MDOT and the Department, obtaining guidance on conformity and the transportation planning process for agencies involved in the interagency consultation process; and

(18) In cooperation with MDOT and the Department, evaluating transportation plans and TIPs and their progress toward meeting the long-term planning targets.

D. In addition to serving as lead agency pursuant to §A(3) of this regulation, MDOT is responsible for:

(1) Circulating draft and final environmental impact or assessment documents to appropriate agencies;

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

(3) In rural nonattainment areas and areas not included in an MPO, assuring the proper completion of transportation modeling and regional emissions analyses and the documentation of timely implementation of TCMs needed for conformity assessments, and preparing and distributing the progress report; and

(4) Representing jurisdictions outside the metropolitan planning area within the nonattainment or maintenance area on the MPO when determining conformity on all projects in those areas.

E. In addition to serving as lead agency pursuant to §A(4) of this regulation, the Department is responsible for:

(1) Developing emissions inventories and budgets and long-term planning targets;

(2) Tracking attainment of air quality standards and emission factor model updates;

(3) Gaining final approval at the State level for control strategy implementation plan revisions and maintenance plans;

(4) In cooperation with MDOT, choosing conformity tests and methodologies for isolated rural nonattainment and maintenance areas;

(5) In cooperation with MDOT, evaluating and choosing each model or models and associated methods and assumptions to be used in hot-spot analysis;

(6) In cooperation with MDOT and MPOs, consulting with the EPA on review and approval of updated motor vehicle emissions factors, emission inventories, and budgets;

(7) In cooperation with MDOT and MPOs, obtaining guidance on conformity criteria and procedures for the agencies involved in the interagency consultation process; and

(8) In nonattainment areas where an RPO has been certified, cooperating with the RPO in the development of emissions inventories and budgets and long-term planning targets and in the development of regional air quality plans.

## **.06 Transportation Conformity-----Conflict Resolution Associated with Conformity Determinations.**

A. Unresolved conflicts among State agencies, or between State agencies and the MPOs, or among the MPO member jurisdictions, shall be identified by an MPO or agency in writing to the other MPO, the Department, or MDOT, with copies to the FHWA, FTA, and EPA. The MPOs or agency's written notice shall:

- (1) Explain the nature of the conflict;
- (2) Review options for resolving the conflict;
- (3) Describe the MPO's or agency's proposal to resolve the conflict;
- (4) Explain the consequences of not reaching a resolution; and
- (5) Request that comments on the matter be received within 2 weeks.

B. If the action in §A of this regulation does not result in a resolution of the conflict, one of the following applies:

- (1) If the conflict is between the MPOs or between the MPOs and MDOT then the parties shall follow the coordination procedures of 23 CFR §450.210;
- (2) If the conflict is between the MPOs or MDOT and the Department and the conflict cannot be resolved by the affected agency heads:
  - (a) The Secretary of the Environment may elevate the conflict to the Governor in accordance with the procedures of §C of this regulation, or
  - (b) If the MDE Secretary does not appeal to the Governor within 14 days as provided in §C of this regulation, the MPO or MDOT may proceed with its final conformity determination;
- (3) In the case of interstate nonattainment areas, if the conflict involves agencies outside of Maryland, and the conflict cannot be resolved by the affected agency heads, the conflict may be resolved in a manner mutually agreed to by the parties involved.

C. Appeals to the Governor by the Secretary of the Environment under the provisions of §B(2) of this regulation shall be in accordance with the following procedures:

- (1) The Secretary of the Environment has 14 calendar days to appeal to the Governor after the MPO or MDOT has notified the Secretary of the MPO's or MDOT's resolution of the Department's comments;
- (2) The notification to the Secretary shall be in writing and shall be hand-delivered;
- (3) The 14-day appeal commences when MDOT or MPO has confirmed receipt by the Secretary of the agency's or MPO's resolution of the Department's comments;
- (4) The appeal to the Governor shall contain:
  - (a) The conformity determination and any supporting documentation,
  - (b) The Department's comments on the determination, and
  - (c) Any response by the MPOs or MDOT to the MDE;

(5) The Department shall provide a complete appeal package to the MPO and MDOT within 24 hours following the date on which the appeal is filed with the Governor's Office;

(6) If the Governor does not concur with the conformity determination, the Governor may direct revision of the applicable implementation plan, revision of the planned program of projects, revision of the conformity analysis, or any combination of these;

(7) If the Governor concurs with the conformity determination made by the MPO and MDOT, the MPO and MDOT may proceed with the final conformity determination; and

(8) The Governor may delegate the Governor's role in this process, but not to the agency head or staff of the MDE or MDOT.

D. This regulation does not prevent the State agencies and MPOs from making efforts on their own initiative to obtain mutual conflict resolution through conferences or other appropriate means.

## **.07 Transportation Conformity—Public Consultation Procedures.**

A. In accordance with 40 CFR §93.105(e), the MPOs shall:

(1) Establish a proactive public involvement process which provides reasonable opportunity for review and comment before taking formal action on a conformity determination for all transportation plans and TIPs, consistent with the requirements of 23 CFR §450.316(b);

(2) Release information supporting conformity determinations at the beginning of the public comment period; and

(3) Assess and impose reasonable charges for public inspection and copying of such information, consistent with the fee schedule contained in 49 CFR §7.43.

B. If the public disagrees with the MPO's decision about whether a project is regionally significant and whether it was modeled properly in the emission analysis supporting a proposed conformity finding for a transportation plan or TIP, a written explanation shall be provided by the MPO upon request by the public.

C. The MPOs shall also provide an opportunity for public involvement in conformity determinations for projects when otherwise required by law.

## **.08 Transportation Conformity—Interagency Consultation Procedures.**

The MPOs, RPOs, MDOT, and the Department may enter into agreements to set forth specific consultation procedures in more detail that are not in conflict with this chapter.

## **.09 Additional Reporting Requirements**

A. The Department shall establish long-term planning targets for nitrogen oxides and greenhouse gases for the last and second to last horizon year of the conformity determination. For purposes of developing the long-term planning targets, the Department shall use the emissions analyses that form the basis for mobile source emissions budgets in the last ozone SIP submitted to EPA. The long-term planning targets shall be 10% lower than the emissions estimates for the last and second to last horizon years from the SIP analysis.

(1) The carbon dioxide budgets are:

(a) for the Baltimore Region Nonattainment Area

(i) 8.1 million metric tons per year in 2025



- (ii) 5.4 million metric tons per year in 2035
- (b) for the Washington DC Region Nonattainment Area
  - (i) 12.3 million metric tons per year in 2030
  - (ii) 7.3 million metric tons per year in 2040
- (1) The nitrogen oxides budgets are:
  - (a) for the Baltimore Region Nonattainment Area
    - (i) 18.3 tons per day in 2025
    - (ii) 16.1 tons per day in 2035
  - (b) for the Washington DC Region Nonattainment Area
    - (i) 28.71 tons per day in 2030
    - (ii) 29.19 tons per day in 2040

B. In conjunction with any conformity determinations on any transportation Plan or TIP in an area the United States Environmental Protection Agency designates as nonattainment for ozone during calendar year 2012, a Progress Report shall be compiled comparing the long-term planning targets to the emissions estimates for the for the last and second to last horizon years in the current analysis. The Progress Report shall be attached to the conformity analysis and undergo the same public involvement processes as the conformity analysis. Additionally, the Progress Report shall be distributed to the elected officials serving as members of the Metropolitan Planning Organization of the region so that each member receives a copy.

C. To the extent the emissions analysis of the conformity determination demonstrates that the long-term planning targets in Regulation .09B will not be met, the Progress Report must include a summary of planned activities that will be implemented over the next planning period and before the next conformity determination to allow the region to make better progress toward meeting the long-term planning targets.

## **.10 General Conformity.**

Each department, agency, and instrumentality of the federal government shall comply with the general conformity requirements of 40 CFR Part 93, Subpart B, as amended, which is incorporated by reference. This regulation addresses and replaces the requirements at 40 CFR §93.151 for a revision to the Maryland State Implementation Plan.

### Administrative History

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