

TITLE 20 ENVIRONMENTAL PROTECTION
CHAPTER 2 AIR QUALITY (STATEWIDE)
PART 99 CONFORMITY TO THE STATE IMPLEMENTATION PLAN OF TRANSPORTATION
PLANS, PROGRAMS AND PROJECTS

20.2.99.1 ISSUING AGENCY: New Mexico Environmental Improvement Board.
[20.2.99.1 NMAC - Rp, 20.2.99.1 NMAC, 09/15/14]

20.2.99.2 SCOPE: Agencies affected by this part are: federal transportation agencies (the federal highway administration (FHWA) and the federal transit administration (FTA) of the United States department of transportation (US DOT)), and state and local agencies responsible for transportation planning and air quality management that are within the geographic jurisdiction of the environmental improvement board (see also 20.2.99.6 NMAC).

A. The provisions of this part shall apply in all nonattainment areas and maintenance areas for transportation-related criteria pollutants for which the area is designated as a nonattainment area or has a maintenance plan.

B. The provisions of this part apply with respect to emissions of the following criteria pollutants: ozone, carbon monoxide, nitrogen dioxide, and particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM₁₀) and particles with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers (PM_{2.5}).

C. The provisions of this part apply with respect to emissions of the following precursor pollutants in nonattainment areas or maintenance areas:

- (1) volatile organic compounds (VOCs) and nitrogen oxides in ozone areas;
- (2) nitrogen oxides in nitrogen dioxide areas;
- (3) volatile organic compounds or nitrogen oxides in PM₁₀ areas if:

(a) the US EPA region 6 administrator or the department has made a finding (including a finding as part of the New Mexico state implementation plan (SIP) or a submitted implementation plan revision) that transportation-related emissions of one or both of these precursor emissions within the nonattainment area are a significant contributor to the PM₁₀ nonattainment problem and has so notified the metropolitan planning organization (MPO) (or the New Mexico department of transportation (NMDOT) in the absence of an MPO) and US DOT; or

(b) the applicable SIP (or implementation plan submission) establishes an approved (or adequate) motor vehicle emissions budget for such emissions as part of the reasonable further progress, attainment or maintenance strategy;

(4) nitrogen oxides in PM_{2.5} areas, unless both the US EPA regional administrator and the department have made a finding that transportation-related emissions of nitrogen oxides within the nonattainment area are not a significant contributor to the PM_{2.5} nonattainment problem and has notified the MPO (or the NMDOT in the absence of an MPO) and US DOT, or the applicable implementation plan (or implementation plan submission) does not establish an approved (or adequate) motor vehicle emissions budget for such emissions as part of the reasonable further progress, attainment or maintenance strategy; and

(5) VOCs, sulfur dioxide (SO₂) or ammonia (NH₃) in PM_{2.5} areas either if the US EPA regional administrator or the department has made a finding that transportation-related emissions of any of these precursors within the nonattainment area are a significant contributor to the PM_{2.5} nonattainment problem and has so notified the MPO (or the NMDOT in the absence of an MPO) and US DOT, or if the applicable implementation plan (or implementation plan submission) establishes an approved (or adequate) motor vehicle emissions budget for such emissions as part of the reasonable further progress, attainment or maintenance strategy.

D. The provisions of this part apply to PM_{2.5} nonattainment areas and maintenance areas with respect to PM_{2.5} from re-entrained road dust if the US EPA regional administrator or the department has made a finding that re-entrained road dust emissions within the area are a significant contributor to the PM_{2.5} nonattainment problem and has so notified the MPO (or the NMDOT in the absence of an MPO) and US DOT, or if the applicable SIP (or implementation plan submission) includes re-entrained road dust in the approved (or adequate) motor vehicle emissions budget as part of the reasonable further progress, attainment or maintenance strategy.

E. The provisions of this part apply to maintenance areas through the last year of a maintenance area's approved CAA Section 175A(b) maintenance plan, unless the applicable implementation plan specifies that the provisions of this part (20.2.99 NMAC) shall apply for more than 20 years.

[20.2.99.2 NMAC - Rp, 20.2.99.2 NMAC, 09/15/14]

20.2.99.3 STATUTORY AUTHORITY: Environmental Improvement Act, Paragraph (4) and (7) of Subsection A of Section 74-1-8 NMSA 1978 and Air Quality Control Act, Sections 74-2-1 NMSA 1978 *et seq.*, including specifically, Subsections (A), (B) and (C) of Section 74-2-5 NMSA 1978. Subsection (B) of Section 74-2-5 NMSA 1978 provides that the environmental improvement board shall adopt regulations "to attain and maintain national ambient air quality standards and prevent or abate air pollution."
[20.2.99.3 NMAC - Rp, 20.2.99.3 NMAC, 09/15/14]

20.2.99.4 DURATION: Permanent.
[20.2.99.4 NMAC - Rp, 20.2.99.4 NMAC, 09/15/14]

20.2.99.5 EFFECTIVE DATE: September 15, 2014, except where a later date is cited at the end of a section.
[20.2.99.5 NMAC - Rp, 20.2.99.5 NMAC, 09/15/14]
[The latest effective date of any section in this part is 09/15/14.]

20.2.99.6 OBJECTIVE: The purpose of this part is to implement Section 176(c) of the Clean Air Act (CAA), as amended (42 U.S.C. 7401 *et seq.*), the related requirements of 23 U.S.C. 109(j), and regulations under 40 CFR Part 93 Subpart A, with respect to the conformity of transportation plans, programs and projects which are developed, funded or approved by the US DOT, the NMDOT, MPOs or other recipients of funds under Title 23 U.S.C. or the Federal Transit Laws (49 U.S.C. Chapter 53) to the SIP, as developed pursuant to Section 110 and Part D of the CAA. This part sets forth policy and procedures for consultations demonstrating and assuring conformity of such activities to the SIP and for resolving interagency conflicts.
[20.2.99.6 NMAC - Rp, 20.2.99.6 NMAC, 09/15/14]

20.2.99.7 DEFINITIONS: Terms used but not defined in this part shall have the meaning given them by the CAA Titles 23 and 49 U.S.C., US EPA regulations, US DOT regulations, and 20.2.2 NMAC (Definitions), in that order of priority.

A. "Applicable implementation plan" is defined in Section 302(q) of the CAA and means the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under Section 110 (of the CAA), promulgated under Section 110(c), or promulgated or approved pursuant to regulations promulgated under Section 301(d) and which implements the relevant requirements of the CAA.

B. "CAA" means the Clean Air Act, as amended, 42 U.S.C. 7401, *et seq.*

C. "Cause or contribute to a new violation" for a project means:

(1) to cause or contribute to a new violation of a standard in the area substantially affected by the project or over a region which would otherwise not be in violation of the standard during the future period in question, if the project were not implemented; or

(2) to contribute to a new violation in a manner that would increase the frequency or severity of a new violation of a standard in such area.

D. "CFR" means the code of federal regulations.

E. "Conformity determination" means the demonstration of consistency with motor vehicle emissions budgets for each pollutant and precursor identified in the applicable SIP. The conformity determination is the affirmative written documentation declaring conformity with the applicable SIP which is submitted to FHWA and FTA for approval with US EPA consultation. An affirmative conformity determination means conformity to the plan's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards; and that such activities will not:

(1) cause or contribute to a new violation of any standard in any area;

(2) increase the frequency or severity of any existing violation of any standard in any area; or

(3) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.

F. "Consultation" means that one party confers with another identified party, provides or makes available all relevant information to that party, and, prior to taking any action, considers the views of that party and (except with respect to those actions for which only notification is required) responds to written comments in a timely, substantive written manner prior to any final decision on such action. Such views and written response shall be made part of the record of any decision or action. Specific procedures and processes are described in 20.2.99.102 through 20.2.99.110 NMAC.

G. "Control strategy implementation plan revision" is the implementation plan which contains specific strategies for controlling the emissions of and reducing ambient levels of pollutants in order to satisfy CAA requirements for demonstrations of reasonable further progress and attainment (including implementation plan revisions submitted to satisfy CAA Sections 172(c), 182(b)(1), 182(c)(2)(A), 182(c)(2)(B), 187(a)(7), 189(a)(1)(B), 189(b)(1)(A) and 189(d); and Sections 192(a) and 192(b), for nitrogen dioxide; and any other applicable CAA provisions requiring a demonstration of reasonable further progress or attainment).

H. "Criteria pollutants" are the six principal pollutants for which national ambient air quality standards exist.

I. "Department" means the New Mexico environment department.

J. "Design concept" means the type of facility identified by the project, e.g., freeway, expressway, arterial highway, grade separated highway, reserved right-of-way rail transit, mixed traffic rail transit, exclusive busway, etc.

K. "Design scope" means the design aspects of a facility which will affect the proposed facility's impact on regional emissions, usually as they relate to vehicle or person-carrying capacity and control, e.g., number of lanes or tracks to be constructed or added, length of project, signalization, access control including approximate number and location of interchanges, preferential treatment for high-occupancy vehicles, etc.

L. "Donut areas" are geographic areas outside a metropolitan planning area boundary, but inside the boundary of a nonattainment area or maintenance area that contains any part of a metropolitan area(s). These areas are not isolated rural nonattainment area and maintenance areas.

M. "FHWA" means the federal highway administration of US DOT.

N. "FHWA/FTA project" means, for the purpose of this part, any highway or transit project which is proposed to receive funding assistance and approval through the federal-aid highway program or the federal mass transit program, or requires federal highway administration (FHWA) or federal transit administration (FTA) approval for some aspect of the project, such as connection to an interstate highway or deviation from applicable design standards on the interstate system.

O. "FTA" means the federal transit administration of US DOT.

P. "Highway project" is an undertaking to implement or modify a highway facility or highway-related program. Such an undertaking consists of all required phases necessary for implementation. For analytical purposes, it shall be defined sufficiently to:

- (1) connect logical termini and be of sufficient length to address environmental matters on a broad scope;
- (2) have independent utility or significance, i.e., be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and
- (3) not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

Q. "Hot-spot analysis" is an estimation of likely future localized CO, PM₁₀ or PM_{2.5} pollutant concentrations and a comparison of those concentrations to the national ambient air quality standards. Hot-spot analysis assesses impacts on a scale smaller than the entire nonattainment area or maintenance area, including, for example, congested roadway intersections and highways or transit terminals, and uses an air quality dispersion model to determine the effects of emissions on air quality.

R. "Increase the frequency or severity" means to cause a location or region to exceed a standard more often or to cause a violation at a greater concentration than previously existed or would otherwise exist during the future period in question, if the project were not implemented.

S. "Isolated rural nonattainment and maintenance areas" are areas that do not contain or are not part of any metropolitan planning area as designated under the transportation planning regulations. Isolated rural areas that do not have federally required metropolitan transportation plans or transportation improvement programs (TIPs) and do not have projects that are part of the emissions in such areas are instead included in statewide TIPs. These are not donut areas.

T. "Limited maintenance plan" means a maintenance plan that US EPA has determined meets US EPA's limited maintenance plan policy criteria for a given national ambient air quality standard (NAAQS) and pollutant. To qualify for a limited maintenance plan, for example, an area must have a design value that is significantly below a given NAAQS, and it must be reasonable to expect that a NAAQS violation will not result from any level of future motor vehicle emissions growth.

U. "Maintenance area" means any geographic region of the United States previously designated nonattainment pursuant to the CAA amendments of 1990 and subsequently redesignated to attainment subject to the requirement to develop a maintenance plan under Section 175A of the CAA, as amended.

- V.** **"Maintenance plan"** means an implementation plan under Section 175A of the CAA, as amended.
- W.** **"Memorandum of agreement" or "MOA"** means a document agreed upon by cooperating parties.
- X.** **"Metropolitan planning organization" or "MPO"** means the policy board of an organization created as a result of the designation process in 23 U.S.C.134(d).
- Y.** **"Milestone"** has the meaning given in CAA Sections 182(g)(1) and 189(c) for serious and above ozone nonattainment areas and PM₁₀ nonattainment areas, respectively. For all other nonattainment areas, a milestone consists of an emissions level and the date on which that level is to be achieved as required by the applicable CAA provision for reasonable further progress towards attainment.
- Z.** **"Motor vehicle emissions budget"** is that portion of the total allowable emissions, defined in the submitted or approved control strategy implementation plan revision or maintenance plan for a certain date for the purpose of meeting reasonable further progress milestones or demonstrating attainment or maintenance of the national ambient air quality standards, for any criteria pollutant or its precursors, allocated by the state implementation plan to highway and transit vehicle use and emissions.
- AA.** **"National ambient air quality standards" or "NAAQS"** are those standards established pursuant to Section 109 of the CAA.
- AB.** **"NEPA"** means the National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4321, *et seq.*
- AC.** **"NEPA process completion"** means, for the purposes of this part, with respect to FHWA or FTA, the point at which there is a specific action to make a determination that a project is categorically excluded, to make a finding of no significant impact, or to issue a record of decision on a final environmental impact statement under NEPA.
- AD.** **"NMDOT"** means the New Mexico department of transportation or its successor agency or authority, as represented by the department secretary or his or her designee.
- AE.** **"Nonattainment area"** means any geographic region of the United States which has been designated as nonattainment under Section 107 of the CAA for any pollutant for which a national ambient air quality standard exists.
- AF.** **"Project"** means a highway project or transit project.
- AG.** **"Recipient of funds designated under Title 23 U.S.C. or the federal transit laws"** means any agency at any level of state, county, city, or regional government that routinely receives Title 23 U.S.C. or federal transit law funds to construct FHWA/FTA projects, operate FHWA/FTA projects or equipment, purchase equipment, or undertake other services or operations via contracts or agreements. This definition does not include private landowners or developers, or contractors or entities that are only paid for services or products created by their own employees.
- AH.** **"Re-entrained road dust"** means emissions which are produced by travel on paved and unpaved roads, including emissions from anti-skid and de-icing material(s).
- AI.** **"Regionally significant project"** means a transportation project (other than an exempt project) that is on a facility which serves regional transportation needs (such as access to and from the area outside of the region, major activity centers in the region, major planned developments such as new retail malls, sports complexes, etc., or transportation terminals, as well as most terminals themselves) and would normally be included in the modeling of a metropolitan area's transportation network, including at a minimum:
- (1) all principal arterial highways; and
 - (2) all fixed guideway transit facilities that offer an alternative to regional highway travel.
- AJ.** **"Standard"** means a national ambient air quality standard.
- AK.** **"State implementation plan" or "SIP"** means an applicable implementation plan and the applicable portion (or portions) of the New Mexico state implementation plan, or most recent revision thereof, which has been approved under Section 110, or promulgated under Section 110(c), or promulgated or approved pursuant to regulations promulgated under Section 301(d) of the CAA and which implements the relevant requirements of the CAA (see the definition for "applicable implementation plan").
- AL.** **"Title 23 U.S.C."** means Title 23 of the United States Code.
- AM.** **"Transit"** means mass transportation by bus, rail, or other conveyance which provides general or special service to the public on a regular and continuing basis. It does not include school buses or charter or sightseeing services.
- AN.** **"Transit project"** means an undertaking to: implement or modify a transit facility or transit-related program; purchase transit vehicles or equipment; or provide financial assistance for transit operations. It

does not include actions that are solely within the jurisdiction of local transit agencies, such as changes in routes, schedules or fares. It may consist of several phases. For analytical purposes, it shall be defined inclusively enough to:

- (1) connect logical termini and be of sufficient length to address environmental matters on a broad scope;
- (2) have independent utility or independent significance, i.e., be a reasonable expenditure even if no additional transportation improvements in the area are made; and
- (3) not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

AO. "Transportation control measure" or "TCM" means any measure that is specifically identified and committed to in the applicable implementation plan, including a substitute or additional TCM that is incorporated into the applicable SIP through the process established in CAA Section 176(c)(8), that is either one of the types listed in Section 108 of the CAA, or 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. Notwithstanding the above, vehicle technology-based, fuel-based and maintenance-based measures which control the emissions from vehicles under fixed traffic conditions are not TCMs for the purposes of this part.

AP. "Transportation improvement program" or "TIP" means a transportation improvement program developed by a metropolitan planning organization under Title 23 U.S.C. 134(j).

AQ. "Transportation plan" means the official intermodal metropolitan transportation plan that is developed through the metropolitan planning process for the metropolitan planning area, developed pursuant to 23 CFR part 450.

AR. "Transportation project" is a highway project or a transit project.

AS. "US EPA" means the United States environmental protection agency.

AT. "US DOT" means the United States department of transportation.

AU. "Written commitment" means, for the purposes of this part, a written commitment that includes a description of the action to be taken; a schedule for the completion of the action; a demonstration that funding necessary to implement the action has been authorized by the appropriating or authorizing body; and an acknowledgment that the commitment is an enforceable obligation under the applicable implementation plan. [20.2.99.7 NMAC - Rp, 20.2.99.7 NMAC, 09/15/14]

20.2.99.8 DOCUMENTS: Documents incorporated and cited in this part may be viewed at the New Mexico environment department, air quality bureau, Santa Fe, NM. [20.2.99.8 NMAC - Rp, 20.2.99.8 NMAC, 09/15/14]

20.2.99.9 - 20.2.99.100 [RESERVED]

20.2.99.101 APPLICABILITY:

A. Action applicability.

(1) Conformity determinations are required for:

(a) the adoption, acceptance, approval or support of transportation plans and transportation plan amendments developed pursuant to 23 CFR part 450 or 49 CFR part 613 by an MPO (or NMDOT in the absence of an MPO) or US DOT;

(b) the adoption, acceptance, approval or support of TIPs and TIP amendments developed pursuant to 23 CFR part 450 or 49 CFR part 613 by an MPO (or NMDOT in the absence of an MPO) or US DOT; and

(c) the approval, funding, or implementation of FHWA/FTA projects.

(2) Conformity determinations are not required under this part for individual projects which are not FHWA/FTA projects.

B. Geographic and pollutant applicability are set out in 20.2.99.2 NMAC (Scope).

C. Limitations. In order to receive any FHWA/FTA approval or funding actions, including NEPA approvals, for a project phase subject to this subpart, a currently conforming transportation plan and TIP must be in place at the time of project approval.

D. Grace period for new nonattainment areas. For areas or portions of areas which have been continuously designated attainment or not designated for any standard for ozone, CO, PM₁₀, PM_{2.5} or NO₂ since 1990 and are subsequently redesignated to nonattainment or designated nonattainment for any standard for any of

these pollutants, the provisions of this subpart shall not apply with respect to that standard for 10 months following the effective date of final designation to nonattainment for each standard for such pollutant.
[20.2.99.101 NMAC - Rp, 20.2.99.109 NMAC, 09/15/14]

20.2.99.102 CONSULTATION:

A. 20.2.99.102 through 20.2.99.110 NMAC provide procedures for the interagency (federal, state, and local) consultation process, resolution of conflicts, and public consultation. Public consultation procedures will be developed in accordance with the requirements for public involvement in 23 CFR part 450. The affected agencies listed in Subsection C of 20.2.99.102 NMAC shall undertake a consultation process with each other prior to the development of: 1) conformity determinations; 2) major activities listed in 20.2.99.103 NMAC below; 3) specific major activities listed in 20.2.99.106 NMAC below; and 4) specific routine activities listed in 20.2.99.107 NMAC below. This consultation process shall follow the consultation procedures described in 20.2.99.105 NMAC below.

B. Prior to US EPA's approval of this part, any MPO (or NMDOT in the absence of an MPO) and NMDOT, before making any conformity determinations, shall provide reasonable opportunity for consultation with the department, the local transportation agency in the county where the nonattainment area or maintenance area is located, the local air quality agency in the county in which the nonattainment area or maintenance area is located, New Mexico FHWA division offices, FTA region 6 offices, and US EPA region 6, including consultation on the issues described in 20.2.99.103 NMAC. This opportunity for consultation shall be provided prior to the determination of conformity.

C. Affected agencies.

(1) Agencies which are affected by this part and which are required to participate in the consultation process are:

- (a) the designated MPO for the nonattainment area or maintenance area;
- (b) the department;
- (c) NMDOT;
- (d) the local transportation agency for the county or city in which the nonattainment area or maintenance area is located;
- (e) the local transit agency for the city or county in which the nonattainment area or maintenance area is located;
- (f) US EPA region 6;
- (g) New Mexico FHWA division offices;
- (h) FTA region 6;
- (i) local air quality agencies; and
- (j) any other organization or resource agency within the state responsible under state law for developing, submitting or implementing transportation-related provisions of an implementation plan.

(2) Agencies which may be affected by this part and which are entitled to participate in the interagency consultation process include:

- (a) NMDOT district office for the county in which the nonattainment area or maintenance area is located; and
- (b) the city or county government in the city or county where the nonattainment area or maintenance area is located.

D. Policy level points of contact and policy level meetings.

(1) The policy level points of contact for participating organizations are as follows:

- (a) MPO: executive director or designee;
- (b) department: secretary or designee;
- (c) NMDOT: secretary or designee;
- (d) NMDOT district office: district engineer;
- (e) local government: chief administrative officer or designee;
- (f) US EPA region 6: regional administrator or designee;
- (g) FHWA NM division office: division administrator or designee;
- (h) FTA region 6: regional administrator or designee; and
- (i) other organizations: as directed in writing.

(2) Policy level meetings shall be those meetings to which the following individuals have been given ample notice thereof:

(a) policy level points of contact for all agencies which are required to participate in the conformity process; and

(b) the policy level points of contact for all agencies and organizations which are entitled to participate and have submitted a written request to participate in the conformity process.

[20.2.99.102 NMAC - Rp, 20.2.99.116 NMAC, 09/15/14]

20.2.99.103 AGENCY ROLES IN CONSULTATION: Specific roles of the agencies participating in the interagency consultation process are listed below. Specific responsibilities of the agencies participating in the interagency consultation process are listed in 20.2.99.104 NMAC. For the purposes of this part, the lead agency for all conformity processes and procedures is that agency which is responsible for initiating the consultation process, preparing the initial and final drafts of the document or decision, and for assuring the adequacy of the interagency consultation process.

A. The department shall be the lead agency for the development of:

- (1) applicable control strategy implementation plan revisions for the nonattainment area or maintenance area;
- (2) the list of transportation control measures (TCMs) to be submitted as part of the SIP; and
- (3) any amendments or revisions thereto.

B. In the case of areas in which an MPO has been established, the designated MPO for the nonattainment area or maintenance area shall be the lead agency for:

- (1) development of the unified planning work program under 23 CFR 450.314;
- (2) development of the transportation plan for the nonattainment area or maintenance area;
- (3) development of the transportation improvement program (TIP) for the nonattainment area or maintenance area;
- (4) any amendments or revisions thereto;
- (5) any determinations of conformity under this part for which that MPO is responsible;
- (6) choosing conformity tests and methodologies for isolated rural nonattainment and maintenance areas; and
- (7) development of TCMs, in cooperation with the department.

C. In the case of areas in which an MPO has not been established, NMDOT shall be the lead agency for:

- (1) development of the transportation plan for the nonattainment area or maintenance area;
- (2) development of the TIP for the nonattainment area or maintenance area;
- (3) any amendments or revisions thereto;
- (4) any determinations of conformity under this part for which an MPO would otherwise be responsible;
- (5) choosing conformity tests and methodologies for isolated rural nonattainment and maintenance areas; and
- (6) development of TCMs, in cooperation with the department.

[20.2.99.103 NMAC - Rp, 20.2.99.117 NMAC, 09/15/14]

20.2.99.104 AGENCY RESPONSIBILITIES IN CONSULTATION:

A. The department shall be responsible for developing or providing:

- (1) emissions inventories;
- (2) motor vehicle emissions budgets;
- (3) air quality modeling;
- (4) attainment demonstrations;
- (5) control strategy implementation plan revisions;
- (6) regulatory TCMs; and
- (7) updated motor vehicle emissions factors.

B. The designated MPO (or, in nonattainment areas or maintenance areas where an MPO has not been established, NMDOT) shall be responsible for:

- (1) developing transportation plans and TIPs;
- (2) developing and evaluating TCM transportation impacts;
- (3) developing transportation and socioeconomic data and planning assumptions and providing such data and planning assumptions for use in air quality analysis to determine conformity of transportation plans, TIPs, and projects;

- (4) monitoring regionally significant projects;
 - (5) developing system or facility-based or other programmatic (non-regulatory) TCMs;
 - (6) providing technical input on motor vehicle emissions budgets; and
 - (7) performing transportation modeling, regional emissions analyses and documentation of timely implementation of TCMs needed for conformity assessments.
- C.** NMDOT shall be responsible for:
- (1) providing technical input on proposed revisions to motor vehicle emissions factors;
 - (2) distributing draft and final highway or transit project environmental documents to other agencies;
- and
- (3) convening air quality technical review meetings on specific highway or transit plans, programs and projects when requested by other agencies or as needed.
- D.** FHWA New Mexico offices and FTA region 6 shall be responsible for:
- (1) assuring timely action on final findings of conformity, after consultation with other agencies as provided in 20.2.99.102 through 20.2.99.110 NMAC; and
 - (2) providing guidance on conformity and the transportation planning process to agencies participating in the interagency consultation process.
- E.** US EPA region 6 shall be responsible for providing guidance on conformity criteria and procedures to agencies participating in the interagency consultation process.
[20.2.99.104 NMAC - Rp, 20.2.99.118 NMAC, 09/15/14]

20.2.99.105 GENERAL CONSULTATION PROCEDURES: The following are the responsibilities of lead and participating agencies at each stage of the consultation process.

- A.** It shall be the affirmative responsibility of the lead agency to initiate the consultation process by:
- (1) notifying other participants of the plan, program or project which must undergo the interagency consultation process;
 - (2) preparing an initial draft of the document being developed, together with necessary supporting information;
 - (3) convening consultation meetings and agendas when the initial draft of the document being developed is complete; and
 - (4) appointing the conveners of technical meetings.
- B.** It shall be the responsibility of the lead agency to facilitate the interagency consultation process by:
- (1) conferring with all other agencies identified under Subsection C of 20.2.99.102 NMAC who are participating in the particular consultation process;
 - (2) providing all appropriate information needed for meaningful input to the participating agencies, including timely notification of all policy level and relevant technical meetings;
 - (3) soliciting early and continuing input from participating agencies;
 - (4) scheduling consultation meetings as specified in this part;
 - (5) conducting the consultation process as described in this section (20.2.99.105 NMAC);
 - (6) assuring that all relevant documents and information, including drafts of the document being developed and necessary background documents, are supplied to all participants in the consultation process in a timely manner;
 - (7) assuring, where required, policy-level contact with those agencies;
 - (8) considering the views of each participating agency and (except with respect to those actions for which only notification is required) responding to written comments in a timely, substantive written manner prior to making any final decision on the document that is the subject of the consultation process; and
 - (9) assuring that such views and written responses are made part of the record of any decision or action.
- C.** Regular consultation on major activities, as defined in 20.2.99.106 NMAC, shall include policy level meetings beginning no later than nine months prior to the date a final document is required (or the date on which such agency begins its own work on such document, if later) and continuing at regular, scheduled intervals no less frequently than quarterly. In addition, technical meetings shall be convened as necessary. Not later than 30 days prior to the adoption or approval of the final document or decision, the lead agency shall supply the final draft document, including all relevant information and documents, as appropriate, to the participating agencies.

D. Regular consultation on routine activities, as defined in 20.2.99.107 NMAC, shall include meetings at regular, scheduled intervals no less frequently than semiannually, and shall be on the agenda of at least one policy level meeting. In addition, technical meetings shall be convened as necessary.

E. The lead agency shall provide each final document for which a consultation process was required to be undertaken (including, but not limited to, the relevant portions of SIPs or implementation plan revisions, transportation plans, and TIPs, and determinations of conformity), together with all supporting information, as appropriate, to each participating agency within 14 calendar days after adopting or approving such document or making such determination. The lead agency may supply a checklist of available supporting information, which the participating agencies may use to request all or part of such supporting information, in lieu of generally distributing all supporting information.

F. It shall be the responsibility of each participating agency (those listed in Paragraph (1) of Subsection C of 20.2.99.102 NMAC) during the consultation process to:

(1) confer with the lead and other participating agencies (those listed in Paragraph (1) of Subsection C of 20.2.99.102 NMAC) in the consultation process;

(2) review and comment as appropriate (including comments in writing) on all proposed and final draft documents and decisions within 30 days of receipt;

(3) attend consultation and decision meetings;

(4) assure policy-level contact with other participants;

(5) provide input on any area of substantive expertise or responsibility (including, but not limited to planning assumptions, modeling, information on status of TCM implementation, and interpretation of regulatory or other requirements); and

(6) provide technical assistance to the lead agency or consultation process in accordance with this section when requested.

G. A meeting that is scheduled or required for another purpose may be used for the purposes of consultation if the conformity consultation purpose is specifically identified in the announcement for the meeting and all participating agencies are notified of such meeting.

[20.2.99.105 NMAC - Rp, 20.2.99.119 NMAC, 09/15/14]

20.2.99.106 CONSULTATION PROCEDURES FOR SPECIFIC MAJOR ACTIVITIES: An interagency consultation process among the members of the lead and participating agencies shall be undertaken for the following specific major activities in accordance with all the procedures specified in 20.2.99.105 NMAC above. The lead agency for each activity shall be as specified, and the participating agencies shall be the agencies specified in Subsection C of 20.2.99.102 NMAC above.

A. Evaluation and choice of each model (or models) and associated methods and assumptions to be used in hot-spot analyses and regional emissions analyses, including vehicle miles traveled (VMT) forecasting. The lead agency shall be the MPO (or NMDOT in the absence of an MPO).

B. Determination of 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 design scope from the transportation plan or TIP. The lead agency shall be the MPO (or NMDOT in the absence of an MPO).

C. Evaluation of whether projects otherwise exempted from meeting the requirements of this part should be treated as non-exempt in cases where potential adverse emissions impacts may exist for any reason. The lead agency shall be the MPO (or NMDOT in the absence of an MPO).

D. Determination of whether past obstacles to implementation of TCMs which are behind the schedule established in the SIP 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. Consultation shall also include consideration of whether delays in TCM implementation necessitate revisions to the SIP to remove TCMs or substitute TCMs or other emission reduction measures. The lead agency shall be the MPO (or NMDOT in the absence of an MPO).

E. Determination of whether:

(1) the project is included in the regional emissions analysis supporting the currently conforming TIP's conformity determination, even if the project is not strictly "included" in the TIP for the purposes of MPO project selection or endorsement; and

(2) the project's design concept and design scope have changed significantly from those which were included in the regional emissions analysis, or in a manner which would significantly impact use of the facility; the lead agency shall be the MPO (or NMDOT in the absence of an MPO).

F. Determination of what forecast of VMT to use in establishing or tracking motor vehicle emissions budgets, developing transportation plans, TIPs, or making conformity determinations. The lead agency shall be the MPO (or NMDOT in the absence of an MPO).

G. Verification of what forecast of VMT to use in developing SIPs. The lead agency shall be the air quality bureau of the department.

H. Consultation, within the context of a memorandum of agreement (MOA), on emissions analysis for transportation activities which cross the borders of MPOs or nonattainment areas or air basins. The lead agency shall be NMDOT.

I. Evaluation of events which will trigger new conformity determinations. The lead agency shall be the MPO (or NMDOT in the absence of an MPO).

J. In the event that the metropolitan planning area does not include the entire nonattainment area or maintenance area, an interagency consultation process involving the designated MPO for the nonattainment area or maintenance area, NMDOT, local transportation agencies, and the department, shall be undertaken, in the context of an MOA, for cooperative planning and analysis for purposes of determining conformity of all projects outside the metropolitan area and within the nonattainment area or maintenance area. The lead agency shall be NMDOT.

K. In nonattainment areas or maintenance areas where more than one MPO is involved, such MPOs must develop an MOA or memorandum of understanding reflecting their consultation.

L. In nonattainment areas or maintenance areas where the MPO's jurisdiction does not cover the entire nonattainment area or maintenance area, the MPO and NMDOT must develop an MOA or a memorandum of understanding reflecting their consultation.

M. In choosing conformity tests and methodologies for isolated rural nonattainment and maintenance areas, the lead agency shall be the MPO (or NMDOT in the absence of an MPO).

[20.2.99.106 NMAC - Rp, 20.2.99.120 NMAC, 09/15/14]

20.2.99.107 CONSULTATION PROCEDURES FOR SPECIFIC ROUTINE ACTIVITIES: An interagency consultation process among the lead and participating agencies shall be undertaken for the following routine activities in accordance with all the procedures specified in 20.2.99.105 NMAC. The lead agency for each activity shall be as specified, and the participating agencies shall be the agencies specified in Subsection C of 20.2.99.102 NMAC above or as specified for the specific activity. Not later than 30 days prior to the preparation of the final document or decision, the lead agency shall supply all relevant information and documents, as appropriate, to the participating agencies.

A. Identification of projects located at sites in PM₁₀ nonattainment areas which have vehicle and roadway emission and dispersion characteristics which are essentially identical to those at sites which have violations verified by monitoring, and therefore require quantitative PM₁₀ hot-spot analysis. The lead agency shall be either the MPO or NMDOT, in cooperation with the department.

B. Assumption of the location and design concept and design scope of projects which are disclosed to the MPO, as required by Subsection D of 20.2.99.107 NMAC, but whose sponsors have not yet decided these features in sufficient detail to perform the regional emissions analysis. The lead agency shall be either the MPO or NMDOT. Participating agencies shall include recipients of funds designated under Title 23 U.S.C. or the federal transit laws.

C. The design, schedule, and funding of research and data collection efforts and regional transportation model development by the MPO (e.g., household/travel transportation surveys). The lead agency shall be either NMDOT or the MPO, as applicable. Participating agencies shall be the MPO, the department, and NMDOT.

D. Regionally significant non-FHWA/FTA projects.

(1) Assurance that plans for construction of regionally significant projects which are not FHWA/FTA projects (including projects for which alternative locations, design concept and design scope, or the no-build option are still being considered), including all those sponsored by recipients of funds designated under Title 23 U.S.C. or the federal transit laws, are disclosed to the MPO on a regular basis, and assurance that any changes to those plans are immediately disclosed. The lead agency for this process shall be the agency which is implementing the project. Participating agencies shall be the MPO, the department, NMDOT, local transportation and transit agencies for the city or county in which the nonattainment area or maintenance area is located, and recipients of funds designated under Title 23 U.S.C. or the federal transit laws.

(2) The sponsor of any such regionally significant project, and any agency that becomes aware of any such project through applications for approval, permitting, funding or otherwise, shall disclose such project to the designated MPO for the nonattainment area or maintenance area and NMDOT in a timely manner. Such disclosure shall be made not later than the first occasion on which any of the following actions is sought:

- (a) any policy board action necessary for the project to proceed;
- (b) the issuance of administrative permits for the facility or for construction of the facility;
- (c) the execution of a contract to design or construct the facility;
- (d) the execution of any indebtedness for the facility;
- (e) any final action of a board, commission or administrator authorizing or directing employees to proceed with design, permitting or construction of the project; or
- (f) the execution of any contract to design or construct or any approval needed for any facility that is dependent on the completion of a regionally significant project.

(3) In the case of any such regionally significant project that has not been disclosed in a timely manner to the designated MPO for the nonattainment area or maintenance area, NMDOT, and other interested agencies participating in the consultation process, such regionally significant project and all other regionally significant projects of that sponsor shall be deemed to be not included in the regional emissions analysis supporting the currently conforming TIP's conformity determination and to be not consistent with the motor vehicle emissions budget in the SIP. In the case of repeated failures to disclose regionally significant projects by an agency that becomes aware of any such project through applications for approval, permitting or funding, all other regionally significant projects within the jurisdiction of such agency shall be deemed to be not included in the regional emissions analysis supporting the currently conforming TIP's conformity determination and to be not consistent with the motor vehicle emissions budget in the SIP.

(4) For the purposes of this section (20.2.99.107 NMAC), the phrase "adopt or approve of a regionally significant project" means the first time any action necessary to authorizing a project occurs, such as 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 construct the facility, any final action of a board, commission or administrator authorizing or directing employees to proceed with construction of the project, or any written decision or authorization from the MPO that the project may be adopted or approved.
[20.2.99.107 NMAC - Rp, 20.2.99.121 NMAC, 09/15/14]

20.2.99.108 NOTIFICATION PROCEDURES FOR ROUTINE ACTIVITIES: Notification of affected agencies (including those listed in Paragraph (1) of Subsection C of 20.2.99.102 NMAC) of transportation plan or TIP amendments which merely add or delete exempt projects shall be the affirmative responsibility of NMDOT or the MPO. Such notification shall be provided not later than 30 days prior to the preparation of the final draft of the document or decision. This process shall include:

- A.** notification of the affected agencies (including those listed in Paragraph (1) of Subsection C of 20.2.99.102 NMAC) early in the process of decision on the final document; and
- B.** supplying all relevant documents and information to the affected agencies (including those listed in Paragraph (1) of Subsection C of 20.2.99.102 NMAC).

[20.2.99.108 NMAC - Rp, 20.2.99.122 NMAC, 09/15/14]

20.2.99.109 CONFLICT RESOLUTION AND APPEALS TO THE GOVERNOR:

A. Any conflict among state agencies or between state agencies and an MPO shall be escalated to the governor if the conflict cannot be resolved by the heads of the involved agencies. Prior to such escalation, such agencies 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.

B. The department has 14 calendar days to appeal a determination of conformity (or other policy decision under this part) to the governor after NMDOT or the MPO has notified the department of the resolution of all comments on such determination of conformity or policy decision. Such 14-day period shall commence when the MPO or NMDOT has confirmed receipt by the secretary of the department of the resolution of the comments of the department. If the department appeals to the governor, the final conformity determination must have the concurrence of the governor. The department must provide notice of any appeal under this subsection to the MPO and NMDOT. If the department does not appeal to the governor within 14 days, the MPO or NMDOT may proceed with the final conformity determination.

C. In the case of any comments with regard to findings of fiscal constraint or air quality effects of any determination of conformity, NMDOT has 14 calendar days to appeal a determination of conformity (or other policy

decision under this part) to the governor after the MPO has notified the department or NMDOT of the resolution of all comments on such determination of conformity or policy decision. Such 14-day period shall commence when the MPO has confirmed receipt by the secretary of the department or NMDOT of the resolution of the comments of NMDOT. If NMDOT appeals to the governor, the final conformity determination must have the concurrence of the governor. NMDOT must provide notice of any appeal under this subsection to the MPO and the department. If NMDOT does not appeal to the governor within 14 days, the MPO may proceed with the final conformity determination.

D. The governor may delegate the role of hearing any such appeal under this subsection and of deciding whether to concur in the conformity determination to another official or agency within the state, but not to the head or staff of the department or any local air quality agency, NMDOT, a state transportation commission or board, any agency that has responsibility for one of these functions or an MPO.
[20.2.99.109 NMAC - Rp, 20.2.99.123 NMAC, 09/15/14]

20.2.99.110 PUBLIC CONSULTATION PROCEDURES:

A. Affected agencies making conformity determinations on transportation plans, programs and projects shall establish a proactive public involvement process which provides opportunity for public review and comment by, at a minimum, providing reasonable public access to technical and policy information considered by the agency at the beginning of the public comment period and prior to taking formal action on a conformity determination for all transportation plans, TIPs, and projects, consistent with the requirements of 23 CFR part 450, including Sections 450.316 (a), 450.322(c), and 450.324(c) as in effect on the date of adoption of this part. Any charges imposed for public inspection and copying should be consistent with the fee schedule contained in 49 CFR 7.43. In addition, any such agency must specifically address in writing all public comments which allege that known plans for a regionally significant project which is not receiving FHWA or FTA funding or approval have not been properly reflected in the emissions analysis supporting a proposed conformity finding for a transportation plan or TIP. Any such agency shall also provide opportunity for public involvement in conformity determinations for projects to the extent otherwise required by law (e.g. NEPA).

B. The opportunity for public involvement provided under this section (20.2.99.110 NMAC) shall include access to information, emissions data, analyses, models and modeling assumptions used to perform a conformity determination, and the obligation of any such agency to consider and respond in writing to significant comments.

C. No transportation plan, TIP or project may be found to conform unless the determination of conformity has been subject to a public involvement process in accordance with this section, without regard to whether the US DOT has certified any process under 23 CFR part 450.
[20.2.99.110 NMAC - Rp, 20.2.99.124 NMAC, 09/15/14]

20.2.99.111 ENFORCEABILITY OF DESIGN CONCEPT AND DESIGN SCOPE AND PROJECT-LEVEL MITIGATION AND CONTROL MEASURES:

A. Prior to determining that a transportation project is in conformity, the MPO, other recipient of funds designated under Title 23 U.S.C. or the federal transit laws, FHWA or FTA must obtain from the project sponsor or operator written commitments to implement in the construction of the project and operation of the resulting facility or service any project-level mitigation or control measures which are identified as conditions for NEPA process completion with respect to local CO, PM₁₀, or PM_{2.5} impacts. Before a conformity determination is made, written contractual commitments must also be obtained for project-level mitigation or control measures which are conditions for making conformity determinations for a transportation plan or TIP and included in the project design concept and design scope which is used in the regional emissions analysis or used in the project-level hot-spot analysis.

B. Project sponsors voluntarily committing to mitigation measures to facilitate positive conformity determinations shall provide written contractual commitments and must comply with the obligations of such commitments.

C. Written contractual commitments to mitigation or control measures shall be obtained prior to a positive conformity determination, and project sponsors must comply with such commitments.

D. If the MPO or project sponsor believes the mitigation or control measure is no longer necessary for conformity, the project sponsor or operator may be relieved of its obligation to implement the mitigation or control measure if it can demonstrate that the applicable hot-spot requirements, motor vehicle emissions budget requirements and interim emissions requirements are satisfied without the mitigation or control measure, and so notifies the agencies involved in the interagency consultation process required under 20.2.99.102 through

20.2.99.110 NMAC. The MPO (or NMDOT in the absence of an MPO) and US DOT must find that the transportation plan and TIP still satisfy the applicable requirements for motor vehicle emissions budgets and interim motor vehicle emissions budgets, and that the project still satisfies the requirements for hot spots, and therefore that the conformity determinations for the transportation plan, TIP and project are still valid. This finding is subject to the applicable public consultation requirements in 20.2.99.110 NMAC for conformity determinations for projects. [20.2.99.111 NMAC - Rp, 20.2.99.150 NMAC, 09/15/14]

20.2.99.112 SAVINGS PROVISION: The federal conformity rules under 40 CFR Part 93 Subpart A, in addition to any existing applicable state requirements, establish the conformity criteria and procedures necessary to meet the requirements of CAA Section 176(c) until such time as this conformity implementation plan revision is approved by US EPA. Following US EPA approval of this revision to the SIP (or a portion thereof), the approved (or approved portion of) the department's 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 department's conformity provisions that is not approved by US EPA. In addition, any previously applicable SIP requirements relating to conformity remain enforceable until the department revises its SIP to specifically remove them and that revision is approved by US EPA. [20.2.99.112 NMAC - Rp, 20.2.99.154 NMAC, 09/15/14]

HISTORY OF 20.2.99 NMAC:

Pre-NMAC History: None.

History of Repealed Material:

20.2.99 NMAC, Conformity to the State Implementation Plan of Transportation Plans, Programs, and Projects, filed 10/16/02 - Repealed effective 09/15/14.

Other History:

20 NMAC 2.99, Conformity To The State Implementation Plan Of Transportation Plans, Programs, And Projects, filed 11/14/94 was replaced by 20 NMAC 2.99, Conformity To The State Implementation Plan Of Transportation Plans, Programs, And Projects, filed 10/23/98, effective 11/23/98.

20 NMAC 2.99, Conformity To The State Implementation Plan Of Transportation Plans, Programs, And Projects, filed 10/23/98 was renumbered, reformatted and replaced by 20.2.99 NMAC, Conformity To The State Implementation Plan Of Transportation Plans, Programs, And Projects, filed 10/16/02, effective 11/15/02.

20.2.99 NMAC, Conformity to the State Implementation Plan of Transportation Plans, Programs, and Projects, filed 10/16/02 was replaced by 20.2.99 NMAC, Conformity to the State Implementation Plan of Transportation Plans, Programs and Projects, effective 09/15/14.