COPY

STATE OF NEW MEXICO
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD

IN THE MATTER OF PROPOSED REVISIONS TO:
20.2.98 NMAC – *Conformity of General Federal Action to the State Implementation Plan*

No. EIB 13-07(R)

PETITION FOR REGULATORY CHANGE

The New Mexico Environment Department ("Department"), pursuant to 20.1.1 NMAC - Rulemaking Procedures, petitions the Environmental Improvement Board ("Board") to repeal 20.2.98 NMAC – *Conformity of General Federal Action to the State Implementation Plan* ("Part 98"). The statement of reasons is attached. The Board is authorized to repeal these regulations by the Air Quality Control Act, NMSA 1978 § 74-2-5.

The Department requests that the Board schedule the hearing in this matter for its regular meeting in October 2013. The Department anticipates that its testimony regarding the Part 98 revisions will require less than one hour.

Respectfully submitted,

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STATEMENT OF REASONS

The U.S. Environmental Protection Agency (EPA) amended the federal general conformity regulation, 40 CFR Part 93, Subpart B (Part 93, Subpart B) on March 24, 2010. *See* 75 Fed. Reg. 17,254 (April 5, 2010). Part 93, Subpart B implements Clean Air Act provisions prohibiting federal agencies from taking actions that may cause or contribute to violations of the national ambient air quality standards (NAAQS) for areas that are in nonattainment or noncompliance for one of the NAAQS. Examples of covered actions include airport construction or expansion, and dredging shipping channels.

A portion of the amendments to Part 93, Subpart B were in response to revisions made in August 2005, to the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) that removed the requirement for states to adopt and submit General Conformity State Implementation Plans (SIPs) under the Clean Air Act. Before this revision to SAFETEA-LU, states were required to adopt regulatory SIPs that corresponded to the federal general conformity regulation Part 93, Subpart B. In its March 2010 revisions to Part 93, EPA made the adoption and submittal of General Conformity SIPs optional rather than mandatory for states. *See* 75 Fed. Reg. at 17,258.

The proposed repeal of Part 98 will eliminate the need for the New Mexico Environment Department to continually update the State's general conformity regulation to incorporate any revisions to Part 93, Subpart B. Part 98 has also never been utilized in the State of New Mexico. The State currently has only one small nonattainment area located in the southern region of the state in Anthony, New Mexico, and this area does not include any federally funded facilities or lands. Moreover, even if New Mexico had potentially affected nonattainment areas, as a practical matter repeal of Part 98 would not affect any future general conformity determinations. As EPA stated in the preamble to the rule revisions, "[i]f a State does not have a conformity SIP, then federal agencies must conduct their evaluation under the requirements of 40 CFR 93.150 – 93.165. These requirements are essentially the same as the requirements contained in the conformity SIPs. Therefore, there would be little difference in the enforceability of the regulations." 75 Fed. Reg. at 17,258-259.

Due to limited usefulness of Part 98 and the potential resources needed to ensure that the regulation corresponds with the federal general conformity regulation, the New Mexico Environment Department believes it would be the most beneficial to the state to opt out of the general conformity SIP requirement, as allowed by the new EPA regulations, by repealing Part 98 of 20.2 NMAC.

[~~TITLE 20 ENVIRONMENTAL PROTECTION~~
~~CHAPTER 2 AIR QUALITY (STATEWIDE)~~
~~PART 98 CONFORMITY OF GENERAL FEDERAL ACTIONS TO THE STATE IMPLEMENTATION PLAN~~

~~20.2.98.1 ISSUING AGENCY: New Mexico Environmental Improvement Board.~~
~~[12/14/94; 08/02/96; 20.2.98.1 NMAC - Rn, 20 NMAC 2.98.100 10/31/02]~~

~~20.2.98.2 SCOPE: All departments, agencies and instrumentalities of the federal government.~~
~~A. The provisions of this Part shall apply in all nonattainment and maintenance areas for criteria pollutants for which the area is designated non-attainment or has a maintenance plan and for which the Department has jurisdiction.~~
~~B. Under section 176(c) of the Federal Act and 40 CFR part 51 subpart W, a Federal agency must make a determination that a Federal action conforms to the SIP in accordance with the requirements of this Part before the action is taken.~~
~~C. The preceding sentence does not include Federal actions where either:~~
~~(1) A National Environmental Policy Act (NEPA) analysis was completed as evidenced by a final environmental assessment (EA), environmental impact statement (EIS), or finding of no significant impact (FONSI) that was prepared prior to January 31, 1994, or~~
~~(2) Prior to January 31, 1994, an EA was commenced or a contract was awarded to develop the specific environmental analysis; sufficient environmental analysis was completed by March 15, 1994, so that the Federal agency may determine that the Federal action is in conformity with the specific requirements and the purposes of the SIP pursuant to the agency's affirmative obligation under section 176(c) of the Federal Act; and a written determination of conformity under section 176(c) of the Federal Act has been made by the Federal agency responsible for the Federal action by March 15, 1994.~~
~~D. Notwithstanding any provision of this Part, a determination that an action is in conformity with the SIP does not exempt the action from any other requirements of the SIP, the NEPA, or the Federal Act.~~
~~[12/14/94; 08/02/96; 20.2.98.2 NMAC - Rn, 20 NMAC 2.98.101 10/31/02]~~

~~20.2.98.3 STATUTORY AUTHORITY: NMSA 1978, section 72-4-5(B) provides that the Environmental Improvement Board shall adopt regulations "to attain and maintain national ambient air quality standards and prevent or abate air pollution...."~~
~~[12/14/94; 08/02/96; 20.2.98.3 NMAC - Rn, 20 NMAC 2.98.102 10/31/02]~~

~~20.2.98.4 DURATION: Permanent.~~
~~[12/14/94; 08/02/96; 20.2.98.4 NMAC - Rn, 20 NMAC 2.98.103 10/31/02]~~

~~20.2.98.5 EFFECTIVE DATE: December 10, 1994 except where a later date is cited at the end of a section or paragraph.~~
~~[12/14/94; 08/02/96; 20.2.98.5 NMAC - Rn, 20 NMAC 2.98.104 10/31/02]~~
~~[The latest effective date of any section in this Part is 10/31/02.]~~

~~20.2.98.6 OBJECTIVE: The purpose of this Part is to implement section 176(c) of the Federal Act, as amended (42 U.S.C. 7401 et seq.) and regulations under 40 CFR part 51 subpart W, with respect to the conformity of general Federal actions to the SIP. Under those authorities, no department, agency or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve any activity which does not conform to a SIP. This Part sets forth policy, criteria, and procedures for demonstrating and assuring conformity of such actions to the SIP.~~
~~[12/14/94; 08/02/96; 20.2.98.6 NMAC - Rn, 20 NMAC 2.98.105 10/31/02]~~

~~20.2.98.7 DEFINITIONS: Terms used but not defined in this Part shall have the meaning given them by the Federal Act and US EPA's regulations, in that order of priority.~~
~~A. "Affected Federal land manager" means the Federal agency or the Federal official charged with direct responsibility for management of an area designated as Class I under the Federal Act (42 U.S.C. 7472) that is located within one hundred kilometers (100 km) of the proposed Federal action.~~

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

~~C. "Cause or contribute to a new violation" means a Federal action that:~~

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

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

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

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

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

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

~~H. "Emissions budgets" are those portions of the total allowable emissions defined in a revision to the SIP for a certain date for the purpose of meeting reasonable further progress milestones or attainment or maintenance demonstrations, for any criteria pollutant or its precursors, allocated by the SIP to: (1) mobile sources, (2) any stationary source or class of stationary sources, (3) any class of area sources, or (4) any subcategory of the emissions inventory. The allocation system must be specific enough to assure meeting the criteria of section 176(c)(1)(B) of the Federal Act. An emissions budget may be expressed in terms of an annual period, a daily period, or other period established in the SIP.~~

~~I. "Emission offsets," for purposes of 20.2.98.113 NMAC are emissions reductions which are quantifiable, consistent with the SIP attainment and reasonable further progress demonstrations; surplus to reductions required by, and credited to, other SIP provisions; enforceable under both State and Federal law; and permanent within the time frame specified by the program.~~

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

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

~~L. "Federal agency" means, for purposes of this Part, a Federal department, agency, or instrumentality of the Federal government.~~

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

~~N. "Indirect emissions" means those emissions of a criteria pollutant or its precursors that:~~

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

~~(2) the Federal agency can practicably control and will maintain control over due to a continuing program responsibility of the Federal agency. These emissions may include, but are not limited to the following:~~

~~(a) traffic on or to, or stimulated or accommodated by, a proposed facility which is related to increases or other changes in the scale or timing of operations of such facility;~~
~~(b) emissions related to the activities of employees of contractors or Federal employees;~~
~~(c) emissions related to employee commuting and similar programs to increase average vehicle occupancy imposed on all employers of a certain size in the locality;~~
~~(d) emissions related to the use of Federal facilities under lease or temporary permit;~~
~~(e) emissions related to the activities of contractors or leaseholders that may be addressed by provisions that are usual and customary for contracts or leases or within the scope of contractual protection of the interests of the United States; and~~
~~(f) fugitive dust from dirt roads or disturbed soil.~~

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

~~P. "Maintenance area" means any geographic area of the United States previously designated nonattainment pursuant to the Federal Act Amendments of 1990 and subsequently redesignated to attainment subject to the requirement to develop a maintenance plan approved under section 175A of the Federal Act.~~

~~Q. "Maintenance plan" means a revision to the SIP, meeting the requirements of section 175A of the Federal Act.~~

~~R. "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.~~

~~S. "Milestone" has the meaning given in sections 182(g)(l) and 189(c)(1) of the Federal Act. A milestone consists of an emissions level and the date on which it is required to be achieved.~~

~~T. "National ambient air quality standards (NAAQS)" are those standards established pursuant to section 109 of the Federal Act and include standards for carbon monoxide (CO), lead (Pb), nitrogen dioxide (NO2), ozone, particulate matter (PM10), and sulfur dioxide (SO2).~~

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

~~V. "Nonattainment area (NAA)" means any geographic area of the United States which has been designated as nonattainment under section 107 of the Federal Act and described in 40 CFR part 81.~~

~~W. "Precursors of a criteria pollutant" are:~~
~~(1) For ozone, nitrogen oxides (NOx) (unless an area is exempted from NOx requirements under section 182(f) of the Federal Act), and volatile organic compounds (VOC); and~~
~~(2) For PM10, those pollutants described in the PM10 nonattainment area SIP as significant contributors to the PM10 levels.~~

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

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

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

~~AA. "State Implementation Plan (SIP)" means the applicable portion (or portions) of the New Mexico State Implementation Plan (SIP), or most recent revision thereof, which has been approved under section 110 of the Federal Act, or promulgated under section 110(c) (Federal Implementation Plan) of the Federal Act, or promulgated or approved pursuant to regulations promulgated under section 301(d) of the Federal Act and which implements the relevant requirements of the Federal Act.~~

~~AB. "Total of direct and indirect emissions" means the sum of direct and indirect emissions increases and decreases caused by the Federal action; i.e., the "net" emissions considering all direct and indirect emissions. Any emissions decreases used to reduce such total shall have already occurred or shall be enforceable under State and Federal law. The portion of emissions which are exempt or presumed to conform under subsections A, B, C, or D of 20.2.98.108 NMAC are not included in the "total of direct and indirect emissions", except as~~

provided in subsection H of 20.2.98.108 NMAC. The "total of direct and indirect emissions" includes emissions of criteria pollutants and emissions of precursors of criteria pollutants. The segmentation of projects for conformity analyses when emissions are reasonably foreseeable is not permitted by this Part.
[12/14/94; 08/02/96; 20.2.98.7 NMAC - Rn, 20 NMAC.2.98.106 10/31/02]

20.2.98.8 to 20.2.98.106 [RESERVED]

20.2.98.107 CONFORMITY DETERMINATIONS:

A. Conformity determinations for Federal actions related to transportation plans, programs, and projects developed, funded, or approved under title 23 U.S.C. or the Federal Transit Act (49 U.S.C. 1601 et seq.) must meet the procedures and criteria of 20.2.99 NMAC (Conformity to the State Implementation Plan of Transportation Plans, Programs, and Projects), in lieu of the procedures set forth in this Part.

B. For Federal actions not covered by subsection A of 20.2.98.107 NMAC, a conformity determination is required for each pollutant where the total of direct and indirect emissions in a nonattainment or maintenance area caused by a Federal action would equal or exceed any of the rates in subsections C or D of 20.2.98.107 NMAC.

C. For purposes of subsection B of 20.2.98.107 NMAC, the following rates apply in nonattainment areas (NAAs):

Pollutant	Tons/Year
Ozone (VOCs or NOx):	
Serious NAAs	50
Severe NAAs	25
Extreme NAAs	10
Other ozone NAAs outside an ozone transport region	100
Marginal and moderate NAAs inside an ozone transport region	
VOC	50
NOx	100
Carbon monoxide: All NAAs	100
SO2 or NO2: All NAAs	100
PM10:	
Moderate NAAs	100
Serious NAAs	70
Pb: All NAAs	25

D. For purposes of subsection B of 20.2.98.107 NMAC, the following rates apply in maintenance areas:

Pollutant	Tons/Year
Ozone (NOx), SO2 or NO2: All maintenance areas:	100
Ozone (VOCs):	
Maintenance areas inside an ozone transport region	50
Maintenance areas outside an ozone transport region	100
Carbon monoxide: All maintenance areas	100
PM10: All maintenance areas	100
Pb: All maintenance areas	25

[12/14/94; 08/02/96; 20.2.98.107 NMAC - Rn, 20 NMAC 2.98.107 10/31/02]

20.2.98.108 EXEMPTIONS:

A. The requirements of this Part shall not apply to:

(1) Actions where the total of direct and indirect emissions are below the emissions levels specified in subsection B of 20.2.98.107 NMAC;

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

~~(a) Judicial and legislative proceedings.~~
~~(b) Continuing and recurring activities such as permit renewals where activities conducted will be similar in scope and operation to activities currently being conducted.~~
~~(c) Rulemaking and policy development and issuance.~~
~~(d) Routine maintenance and repair activities, including repair and maintenance of administrative sites, roads, trails, and facilities.~~
~~(e) Civil and criminal enforcement activities, such as investigations, audits, inspections, examinations, prosecutions, and the training of law enforcement personnel.~~
~~(f) Administrative actions such as personnel actions, organizational changes, debt management or collection, cash management, internal agency audits, program budget proposals, and matters relating to the administration and collection of taxes, duties and fees.~~
~~(g) The routine, recurring transportation of material and personnel.~~
~~(h) Routine movement of mobile assets, such as ships and aircraft, in home port reassignments and stations (when no new support facilities or personnel are required) to perform as operational groups and/or for repair or overhaul.~~
~~(i) Maintenance dredging and debris disposal where no new depths are required, applicable permits are secured, and disposal will be at an approved disposal site.~~
~~(j) With respect to existing structures, properties, facilities and lands where future activities conducted will be similar in scope and operation to activities currently being conducted at the existing structures, properties facilities, and lands; for example, actions such as relocation of personnel; disposition of federally-owned existing structures, properties, facilities, and lands; rent subsidies; operation and maintenance cost subsidies; the exercise of receivership or conservatorship authority; assistance in purchasing structures; and the production of coins and currency.~~
~~(k) The granting of leases, licenses such as for exports and trade, permits, and easements where activities conducted will be similar in scope and operation to activities currently being conducted.~~
~~(l) Planning, studies, and provision of technical assistance.~~
~~(m) Routine operation of facilities, mobile assets and equipment.~~
~~(n) Transfers of ownership, interests, and titles in land, facilities, and real and personal properties, regardless of the form or method of the transfer.~~
~~(o) The designation of empowerment zones, enterprise communities, or viticultural areas.~~
~~(p) Actions by any of the Federal banking agencies or the Federal Reserve Banks, including actions regarding charters, applications, notices, licenses, the supervision or examination of depository institutions or depository institution holding companies, access to the discount window, or the provision of financial services to banking organizations or to any department, agency or instrumentality of the United States.~~
~~(q) Actions by the Board of Governors of the Federal Reserve System or any Federal Reserve Bank to affect monetary or exchange rate policy.~~
~~(r) Actions that implement a foreign affairs function of the United States.~~
~~(s) Actions (or portions thereof) associated with transfers of land, facilities, title, and real properties through an enforceable contract or lease agreement where the delivery of the deed is required to occur promptly after a specific, reasonable condition is met, such as promptly after the land is certified as meeting the requirements of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and where the Federal agency does not retain continuing authority to control emissions associated with the lands, facilities, title, or real properties.~~
~~(t) Transfers of real property, including land, facilities, and related personal property from a Federal entity to another Federal entity and assignments of real property, including land, facilities, and related personal property from a Federal entity to another Federal entity for subsequent deeding to eligible applicants.~~
~~(u) Actions by the Department of the Treasury to affect fiscal policy and to exercise the borrowing authority of the United States.~~
~~(3) Actions where the emissions are not reasonably foreseeable, such as the following:~~
~~(a) Initial Outer Continental Shelf lease sales which are made on a broad scale and are followed by exploration and development plans on a project level.~~
~~(b) Electric power marketing activities that involve the acquisition, sale and transmission of electric energy.~~
~~(4) Individual actions which implement a decision to conduct or carry out a program that has been found to conform to the SIP, such as prescribed burning actions which are consistent with a land management plan that has been found to conform to the SIP.~~

~~**B.** Notwithstanding the other requirements of this Part, a conformity determination is not required for the following Federal actions (or portion thereof):~~

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

~~(2) Actions in response to emergencies or natural disasters such as hurricanes, earthquakes, etc., which are commenced on the order of hours or days after the emergency or disaster and, if applicable, which meet the requirements of subsection C of 20.2.98.108 NMAC;~~

~~(3) Research, investigations, studies, demonstrations, or training (other than those exempted under paragraph (2) of subsection A of 20.2.98.108 NMAC) where no environmental detriment is incurred and/or the particular action furthers air quality research, as determined by the Department;~~

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

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

~~C. Federal actions which are part of a continuing response to an emergency or disaster under paragraph (2) of subsection B of 20.2.98.108 NMAC and which are to be taken more than six months after the commencement of the response to the emergency or disaster under paragraph (2) of subsection B of 20.2.98.108 NMAC are exempt from the requirements of this section (20.2.98.108 NMAC) only if:~~

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

~~(2) For actions which are to be taken after those actions covered by paragraph (1) of subsection C 20.2.98.108 NMAC, the Federal agency makes a new determination as provided in paragraph (1) of subsection C 20.2.98.108 NMAC.~~

~~D. Notwithstanding other requirements of this Part, individual actions or classes of actions specified by individual Federal agencies that have met the criteria set forth in either paragraph (1) or (2) of subsection E of 20.2.98.108 NMAC and the procedures set forth in subsection F of 20.2.98.108 NMAC are presumed to conform, except as provided in subsection H of 20.2.98.108 NMAC.~~

~~E. The Federal agency shall meet the criteria for establishing activities that are presumed to conform by fulfilling the requirements set forth in either paragraph (1) or (2) of subsection E of 20.2.98.108 NMAC:~~

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

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

~~(b) Interfere with provisions in the SIP for maintenance of any standard;~~

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

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

~~(i) A demonstration of reasonable further progress;~~

~~(ii) A demonstration of attainment; or~~

~~(iii) A maintenance plan; or~~

~~(2) The Federal agency shall provide documentation that the total of direct and indirect emissions from such future actions would be below the emission rates for a conformity determination that are established in subsection B of 20.2.98.107 NMAC based, for example, on similar actions taken over recent years.~~

~~F. In addition to meeting the criteria for establishing exemptions set forth in paragraphs (1) or (2) of subsection E of 20.2.98.108 NMAC, the following procedures must also be complied with to presume that activities will conform:~~

~~(1) The Federal agency shall identify through publication in the Federal Register its list of proposed activities that are presumed to conform and the analysis, assumptions, emissions factors, and criteria used as the basis for the presumptions;~~

~~(2) The Federal agency shall notify the US EPA Region 6 Office, the Department and, where applicable, the agency designated under section 174 of the Act, and the MPO;~~

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

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

~~G. Notwithstanding the other requirements of this Part, when the total of direct and indirect emissions of any pollutant from a Federal action does not equal or exceed the rates specified in subsection B of 20.2.98.107 NMAC, but represents ten percent or more of a nonattainment or maintenance area's total emissions of that pollutant, the action is defined as a regionally significant action and the requirements of 20.2.98.2 NMAC and 20.2.98.6 NMAC and 20.2.98.110 NMAC through 20.2.98.115 NMAC shall apply for the Federal action.~~

~~H. Where an action presumed to be de minimis under paragraphs (1) or (2) of subsection A of 20.2.98.108 NMAC or otherwise presumed to conform under subsection D of 20.2.98.108 NMAC is a regionally significant action or where an action otherwise presumed to conform under subsection D of 20.2.98.108 NMAC does not in fact meet one of the criteria in paragraph (1) of subsection E of 20.2.98.108 NMAC, that action shall not be considered to be de minimis or presumed to conform and the requirements of 20.2.98.2 NMAC and 20.2.98.6 NMAC and 20.2.98.110 NMAC through 20.2.98.115 NMAC shall apply for the Federal action.~~

~~I. Any measures used to affect or determine applicability of this Part, as determined under this section (20.2.98.108 NMAC), must result in projects that are in fact de minimis; must result in such de minimis levels prior to the time the applicability determination is made; and must be State or Federally enforceable. Any measures that are intended to reduce air quality impacts for this purpose shall be identified (including the identification and quantification of all emission reductions claimed) and the process for implementation (including any necessary funding of such measures and tracking of such emission reductions) and enforcement of such measures shall be described, including an implementation schedule containing explicit timelines for implementation. Prior to a determination of applicability, the Federal agency making the determination shall obtain written commitments from the appropriate persons or agencies to implement any measures which are identified as conditions for making such determinations. Such written commitment shall describe such mitigation measures and the nature of the commitment, in a manner consistent with the previous sentence. After this Part is approved by US EPA, enforceability through the SIP of any measures necessary for a determination of applicability will apply to all persons who agree to reduce direct and indirect emissions associated with a Federal action for a conformity applicability determination.~~

~~[12/14/94; 08/02/96; 20.2.98.108 NMAC - Rn, 20 NMAC 2.98.108 10/31/02]~~

~~**20.2.98.109 CONFORMITY ANALYSIS:** Any Federal department, agency, or instrumentality of the Federal government taking an action subject to 40 CFR part 51 subpart W and this Part must make its own conformity determination, consistent with the requirements of this Part. In making its conformity determination, a Federal agency shall consider comments from any interested parties. Where multiple Federal agencies have jurisdiction for various aspects of a project, a Federal agency may choose to adopt the analysis of another Federal agency (to the extent the proposed action and impacts analyzed are the same as the project for which a conformity determination is required) or develop its own analysis in order to make its conformity determination.~~

~~[12/14/94; 08/02/96; 20.2.98.109 NMAC - Rn, 20 NMAC 2.98.109 10/31/02]~~

~~**20.2.98.110 REPORTING REQUIREMENTS:**~~

~~A. Federal agency making a conformity determination under 20.2.98.113 NMAC shall provide to the US EPA Region 6 Office; the Department; and, where applicable, affected Federal land managers; the agency designated under section 174 of the Federal Act; and the MPO a thirty (30) day notice which describes the proposed action and the Federal agency's draft conformity determination on the action.~~

~~B. Federal agency shall notify the US EPA Region 6 Office; the Department; and, where applicable, affected Federal land managers; the agency designated under section 174 of the Federal Act; and the MPO; within thirty (30) days after making a final conformity determination under 20.2.98.113 NMAC.~~

~~[12/14/94; 08/02/96; 09/08/99; 20.2.98.110 NMAC - Rn, 20 NMAC 2.98.110 10/31/02]~~

~~**20.2.98.111 PUBLIC PARTICIPATION:**~~

~~A. Upon request by any person regarding a specific Federal action, a Federal agency shall make available for review its draft conformity determination under 20.2.98.113 NMAC with supporting materials which describe the analytical methods, assumptions, and conclusions relied upon in making the applicability analysis and draft conformity determination.~~

~~B. A Federal agency shall make public its draft conformity determination under 20.2.98.113 NMAC by placing a notice by prominent advertisement in a daily newspaper of general circulation in the areas affected by the action and by providing thirty (30) days for written public comment prior to taking any formal action on the draft~~

~~determination. This comment period may be concurrent with any other public involvement, such as occurs in the NEPA process.~~

~~C. A Federal agency shall document its response to all the comments received on its draft conformity determination under 20.2.98.113 NMAC and make the comments and responses available, upon request by any person, regarding a specific Federal action, within thirty (30) days of the final conformity determination.~~

~~D. A Federal agency shall make public its final conformity determination under 20.2.98.113 NMAC for a Federal action by placing a notice by prominent advertisement in a daily newspaper of general circulation in the areas affected by the action within thirty (30) days of the final conformity determination.~~

~~[12/14/94; 08/02/96; 20.2.98.111 NMAC - Rn, 20 NMAC 2.98.111 10/31/02]~~

~~**20.2.98.112 FREQUENCY OF CONFORMITY DETERMINATIONS:**~~

~~A. The conformity status of a Federal action automatically lapses five (5) years from the date a final conformity determination is reported under 20.2.98.110 NMAC unless the Federal action has been completed or a continuous program has been commenced to implement that Federal action within a reasonable time.~~

~~B. Ongoing Federal activities at a given site showing continuous progress are not new actions and do not require periodic redeterminations so long as the emissions associated with such activities are within the scope of the final conformity determination reported under 20.2.98.110 NMAC.~~

~~C. If, after the conformity determination is made, the Federal action is changed so that there is an increase in the total of direct and indirect emissions above the levels in subsection B of 20.2.98.107 NMAC, a new conformity determination is required.~~

~~[12/14/94; 08/02/96; 20.2.98.112 NMAC - Rn, 20 NMAC 2.98.112 10/31/02]~~

~~**20.2.98.113 CRITERIA FOR DETERMINING CONFORMITY OF GENERAL FEDERAL ACTIONS:**~~

~~A. An action required under 20.2.98.2 NMAC, 20.2.98.107 NMAC or 20.2.98.108 NMAC to have a conformity determination for a specific pollutant, will be determined to conform to the SIP if, for each pollutant that exceeds the rates in subsection B of 20.2.98.107 NMAC or otherwise requires a conformity determination due to the total of direct and indirect emissions from the action, the action meets the requirements of subsection C of 20.2.98.113 NMAC, and meets any of the following requirements:~~

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

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

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

~~(a) specified in subsection B of 20.2.98.113 NMAC, based on areawide air quality modeling analysis and local air quality modeling analysis, or~~

~~(b) specified in paragraph (5) of subsection A of 20.2.98.113 NMAC and, for local air quality modeling analysis, the requirement of subsection B of 20.2.98.113 NMAC;~~

~~(4) For CO or PM10,~~

~~(a) Where the Department determines that an areawide air quality modeling analysis is not needed, the total of direct and indirect emissions from the action meet the requirements specified in subsection B of 20.2.98.113 NMAC based on local air quality modeling analysis, or~~

~~(b) Where the Department determines that an areawide air quality modeling analysis is appropriate and that a local air quality modeling analysis is not needed, the total of direct and indirect emissions from the action meet the requirements specified in subsection B of 20.2.98.113 NMAC, based on areawide modeling, or meet the requirements of paragraph (5) of subsection A of 20.2.98.113 NMAC; or~~

~~(5) For ozone or nitrogen dioxide, and for purposes of subparagraph (b) of paragraph (3) and subparagraph (b) of paragraph (4) of subsection A of 20.2.98.113 NMAC, each portion of the action or the action as a whole meets any of the following requirements:~~

~~(a) Where US EPA has approved a revision to an area's attainment or maintenance demonstration after 1990 and the Department makes a determination as provided in item (i) below or where the Department makes a commitment as provided in item (ii) below.~~

~~(i) The total of direct and indirect emissions from the action (or portion thereof) is determined and documented by the Department to result in a level of emissions which, together with all other emissions in the nonattainment (or maintenance) area, would not exceed the emissions budgets specified in the SIP.~~

~~(ii) The total of direct and indirect emissions from the action (or portion thereof) is determined by the Department to result in a level of emissions which, together with all other emissions in the nonattainment (or maintenance) area, would exceed an emissions budget specified in the SIP and the Governor or, if appropriate, the Governor's designee for SIP actions under State law, makes a written commitment to US EPA which includes the following: a) a specific schedule for adoption and submittal of a revision to the SIP which would achieve the needed emission reductions prior to the time emissions from the Federal action would occur; b) identification of specific measures for incorporation into the SIP which would result in a level of emissions which, together with all other emissions in the nonattainment or maintenance area, would not exceed any emissions budget specified in the SIP; c) a demonstration that all existing SIP requirements are being implemented in the area for the pollutants affected by the Federal action, and that local authority to implement additional requirements has been fully pursued; d) a determination that the responsible Federal agencies have required all reasonable mitigation measures associated with their action (as a matter of Department policy, a commitment will be made only if the Department determines that the project sponsors and responsible Federal agencies have sought all available emissions offsets and made all reasonably available modifications of the action to reduce emissions); and e) written documentation including all air quality analyses supporting the conformity determination.~~

~~(iii) Where a Federal agency made a conformity determination based on a Department commitment under item (ii) above, such a Department commitment is automatically deemed to be a call for an implementation plan revision by US EPA under section 110(k)(5) of the Federal Act, effective on the date of the Federal conformity determination and requiring response within eighteen (18) months or any shorter time within which the Department commits to revise the SIP;~~

~~(b) The action (or portion thereof) as determined by the MPO is specifically included in a current transportation plan and transportation improvement program which have been found to conform to the SIP under 20.2.99 NMAC (Conformity to the State Implementation Plan of Transportation Plans, Programs, and Projects).~~

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

~~(d) Where US EPA has not approved a revision to the relevant implementation plan attainment or maintenance demonstration since 1990, the total of direct and indirect emissions from the action for the future years (described in subsection D of 20.2.98.114 NMAC) do not increase emissions with respect to the baseline emissions, and:~~

~~(i) The baseline emissions reflect the historical activity levels that occurred in the geographic area affected by the proposed Federal action during: a) calendar year 1990, b) The calendar year that is the basis for the classification (or, where the classification is based on multiple years, the year that is most representative in terms of the level of activity), if a classification is promulgated in 40 CFR part 81, or c) The year of the baseline inventory in the PM10 SIP;~~

~~(ii) The baseline emissions are the total of direct and indirect emissions calculated for the future years (described in subsection D of 20.2.98.114 NMAC) using the historic activity levels (described in item (i) of subparagraph (d) of paragraph (5) of subsection A of 20.2.98.113 NMAC) and appropriate emission factors for the future years; or~~

~~(e) Where the action involves regional water and/or wastewater projects, such projects are sized to meet only the needs of population projections that are in the SIP, based on assumptions regarding per capita use that are developed or approved in accordance with subsection A of 20.2.98.114 NMAC.~~

~~B. Either the areawide or local air quality modeling analyses, or both, must:~~

~~(1) Meet the requirements in 20.2.98.114 NMAC; and~~

~~(2) Show that the action does not:~~

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

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

~~C. Notwithstanding any other requirements of this section (20.2.98.113 NMAC), an action subject to this Part may not be determined to conform to the SIP unless the total of direct and indirect emissions from the action is in compliance with or consistent with all relevant requirements and milestones contained in the SIP, such as elements identified as part of the reasonable further progress schedules, assumptions specified in the attainment or maintenance demonstration, prohibitions, numerical emission limits, and work practice requirements.~~

~~D. Any analyses required under this section (20.2.98.113 NMAC) shall be completed, and any mitigation requirements necessary for a finding of conformity must be identified as being in compliance with 20.2.98.115 NMAC, before the determination of conformity is made.~~

~~[12/14/94; 08/02/96; 20.2.98.113 NMAC - Rn, 20 NMAC 2.98.113 10/31/02]~~

~~20.2.98.114 PROCEDURES FOR MAKING CONFORMITY DETERMINATIONS OF GENERAL FEDERAL ACTIONS:~~

~~A. The analyses required under this Part shall be based on the latest planning assumptions.~~

~~(1) All planning assumptions shall be derived from the estimates of current and future population, employment, travel, and congestion most recently approved by the MPO or the Department. Planning assumptions may include, but are not limited to, the following: per capita water and sewer use, vehicle miles traveled per capita or per household, trip generation per household, vehicle occupancy, household size, vehicle fleet mix, vehicle ownership, wood stoves per household, the geographic distribution of population growth, and current and future population estimates.~~

~~(2) Any revisions to these estimates used as part of the conformity determination, including projected shifts in geographic location or level of population, employment, travel, and congestion, must be approved by the MPO or the Department.~~

~~B. The analyses required under this Part must be based on the latest and most accurate emission estimation techniques available as described below, unless such techniques are inappropriate. If such techniques are inappropriate and written approval of the US EPA Region 6 Administrator is obtained for any modification or substitution, they may be modified or another technique substituted on a case-by-case basis or, where appropriate, on a generic basis for a specific Federal agency program.~~

~~(1) For motor vehicle emissions, the most current version of the motor vehicle emissions model specified by US EPA for use in the preparation or revision of implementation plans in the State or area must be used for the conformity analysis as specified below:~~

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

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

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

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

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

~~(2) Written approval of the US EPA Region 6 Administrator is obtained for any modification or substitution.~~

~~D. The analyses required under this Part, except paragraph (1) of subsection A of 20.2.98.113 NMAC, must be based on the total of direct and indirect emissions from the action and must reflect emission scenarios that are expected to occur under each of the following cases:~~

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

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

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

~~[12/14/94; 08/02/96; 20.2.98.114 NMAC - Rn, 20 NMAC 2.98.114 10/31/02]~~

~~20.2.98.115 MITIGATION OF AIR QUALITY IMPACTS:~~

~~A. Any measures that are intended to mitigate air quality impacts shall be identified (including the identification and quantification of all emission reductions claimed) and the process for implementation (including any necessary funding of such measures and tracking of such emission reductions) and enforcement of such measures shall be described, including an implementation schedule containing explicit timelines for implementation.~~

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

~~commitments shall describe such mitigation measures and the nature of the commitments, in a manner consistent with subsection A of 20.2.98.115 NMAC.~~

~~C. Persons or agencies voluntarily committing to mitigation measures to facilitate positive conformity determinations shall comply with the obligations of such commitments.~~

~~D. In instances where the Federal agency is licensing, permitting or otherwise approving the action of another governmental or private entity, approval by the Federal agency must be conditioned on the other entity meeting the mitigation measures set forth in the conformity determination, as provided in subsection A of 20.2.98.115 NMAC.~~

~~E. When necessary because of changed circumstances, mitigation measures may be modified so long as the new mitigation measures continue to support the conformity determination in accordance with 20.2.98.113 NMAC, 20.2.98.114 NMAC and 20.2.98.115 NMAC. Any proposed change in the mitigation measures is subject to the reporting requirements of 20.2.98.110 NMAC and the public participation requirements of 20.2.98.111 NMAC.~~

~~F. Written commitments to mitigation measures shall be obtained prior to a positive conformity determination and such commitments shall be fulfilled.~~

~~G. After this regulation is approved by US EPA, any agreements, including mitigation measures, necessary for a conformity determination will be both State and federally enforceable. Enforceability through the SIP will apply to all persons who agree to mitigate direct and indirect emissions associated with a Federal action for a conformity determination.~~

~~[12/14/94; 08/02/96; 20.2.98.115 NMAC - Rn, 20 NMAC 2.98.115 10/31/02]~~

~~**20.2.98.116 SAVINGS PROVISION:** The Federal conformity rules under 40 CFR part 51 subpart W, in addition to any existing applicable State requirements, establish the conformity criteria and procedures necessary to meet the requirements of section 176(c)of the Clean Air Act 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) State criteria and procedures would govern conformity determinations and the Federal conformity regulations contained in 40 CFR part 93 would apply only for the portion, if any, of the State's conformity provisions that is not approved by US EPA. In addition, any previously applicable SIP requirements relating to conformity remain enforceable until the State revises its SIP to specifically remove them and that revision is approved by US EPA.~~

~~[12/14/94; 08/02/96; 20.2.98.116 NMAC - Rn, 20 NMAC 2.98.116 10/31/02]~~

~~**20.2.98.117 FEDERAL DOCUMENTS:** Federal documents cited in this regulation may be viewed at the New Mexico Environment Department, Air Quality Bureau, Harold Runnels Building, 1190 St. Francis Drive, Santa Fe, New Mexico [2048 Galisteo St., Santa Fe, NM 87505].]~~

HISTORY OF 20.2.98 NMAC:

Pre-NMAC History: None.

History of Repealed Material: [RESERVED]

Other History:

20 NMAC 2.98, Conformity Of General Federal Actions To The State Implementation Plan, filed 11/14/94 was replaced by 20 NMAC 2.98, Conformity Of General Federal Actions To The State Implementation Plan, filed 06/19/96.

20 NMAC 2.98, Conformity Of General Federal Actions To The State Implementation Plan, filed 06/19/96 was **renumbered, reformatted and replaced** by 20.2.98 NMAC, Conformity Of General Federal Actions To The State Implementation Plan, effective 10/31/02.