

# ENVIRONMENTAL QUALITY

## CHAPTER 8

### AIR QUALITY

#### Subchapter 13

##### Conformity

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## Subchapter 13

## Conformity

17.8.1301 DEFINITIONS (1) For the purposes of this subchapter, terms have the meaning as defined in 40 CFR 93.101, except that the definition of "regionally significant project" is modified below.

(2) For the purposes of this subchapter and 40 CFR Part 93, subpart A, as adopted by reference in this subchapter, the following additional definitions apply:

(a) "Adoption or approval of a regionally significant project" means, for the purposes of 40 CFR 93.121, the first time action necessary to authorize a project occurs, such as 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 metropolitan planning organization or the local agency that the project may be adopted or approved.

(b) "Consulted agency" means a federal, state, or local agency or MPO required to be consulted pursuant to this subchapter.

(c) "MPO" means a metropolitan planning organization created pursuant to 23 CFR Part 450, subpart C (Metropolitan Transportation Planning and Programming) for the purpose of carrying out transportation planning in urban areas. This includes the MPOs in Billings, Great Falls, and Missoula, any successors to these MPOs, and any MPO that is subsequently created for any area.

(d) "Regionally significant project" means a transportation project (other than an exempt project) that is on a facility that 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 rural nonattainment area or metropolitan area's transportation network, including at a minimum all principal arterial highways and all fixed guideway transit facilities that will offer an alternative to regional highway travel.

(e) "Responsible entity" means a federal, state, or local government agency having primary responsibility for planning or approving an action for which consultation is required under 40 CFR Part 93, subpart A or this subchapter.

(f) "State air quality agency" means the Montana Department of Environmental Quality ("department" or "DEQ") or its successor agency.

(g) "State Department of Transportation" means the Montana Department of Transportation ("MDT") provided for in 2-15-2501, MCA, or its successor agency. (History: 75-2-111, MCA; IMP, 75-2-202, MCA; NEW, 1996 MAR p. 2299, Eff. 8/23/96; AMD, 1999 MAR p. 1216, Eff. 6/4/99.)

17.8.1302 INCORPORATION BY REFERENCE (1) For the purposes of this subchapter, the board adopts and incorporates by reference 40 CFR Part 93, subpart A, which sets forth the conformity to state or federal implementation plans of transportation plans, programs, and projects developed, funded, or approved under Title 23 USC or the Federal Transit Act.

(2) Copies of materials incorporated by reference in this subchapter may be obtained as referenced in ARM 17.8.102(3) and (4). (History: 75-2-111, MCA; IMP, 75-2-202, MCA; NEW, 1996 MAR p. 2299, Eff. 8/23/96; AMD, 1997 MAR p. 1581, Eff. 9/9/97; AMD, 1999 MAR p. 1216, Eff. 6/4/99; AMD, 2005 MAR p. 959, Eff. 6/17/05; AMD, 2007 MAR p. 1663, Eff. 10/26/07; AMD, 2018 MAR p. 438, Eff. 2/24/18.)

Rule 17.8.1303 reserved

17.8.1304 DETERMINING CONFORMITY OF TRANSPORTATION PLANS, PROGRAMS, AND PROJECTS TO STATE OR FEDERAL IMPLEMENTATION PLANS (1) Any entity responsible for preparing any transportation plan, program, or project developed, funded, or approved under Title 23 USC or the Federal Transit Act shall comply with 40 CFR Part 93, subpart A and this subchapter.

(2) Any entity responsible for developing transportation related air quality emission inventories or implementation plans shall comply with 40 CFR Part 93, subpart A and this subchapter. (History: 75-2-111, MCA; IMP, 75-2-202, MCA; NEW, 1996 MAR p. 2299, Eff. 8/23/96.)

17.8.1305 CONSULTATION REQUIREMENTS: APPLICABILITY

(1) The consultation procedures set out in this subchapter must be utilized by the department and local air quality agencies in developing applicable air quality control plans, and by the Federal Highway Administration (FHWA) and Federal Transit Administration (FTA), MDT, MPOs, and local transportation planning agencies in making conformity determinations or in deciding that a conformity determination is not necessary because a revision to a transportation plan or transportation improvement program merely adds or deletes an exempt project listed in 40 CFR Part 93, subpart A.

(2) Tables A through E below identify the specific actions for which consultation is required under this subchapter, and specify the parties, timing, methods, and documentation required for consultations.

TABLE A

ACTION: Research and Data Collection.

RESPONSIBLE ENTITY: MDT, DEQ, MPO, local air quality and transportation planning agencies

Action Step	Consult with	When to Consult	Consultation Method	Consultation Documentation
1. Design/scheduling funding of research and data collection for transportation related air quality inventories, transportation modeling, or planning efforts	local air and transportation agencies, MPO, DEQ, MDT	before starting research or data collection	letter of notification (meet at consulted agency request)	not required
2. Completion of project	same as above	project completion	distribute summary of findings	not required

TABLE B

ACTION: Preparation or revision of emission inventory (involving transportation-related emission sources).

RESPONSIBLE ENTITY: Local air quality agency or DEQ.

Action Step	Consult with	When to Consult	Consultation Method	Consultation Documentation
1. Selection of methods, models, assumptions, data sources for determining transportation emissions	local transportation and air agencies, MPO, DEQ, MDT, EPA, FHWA, FTA	before starting analysis using these parameters	letter of notification (meet at consulted agency request)	describe consultation, response, and response use in draft inventory
2. Release of draft emission inventory	same as above	release of draft inventory	distribution of draft inventory	discuss in final inventory
3. Release of final emission inventory	same as above	release of final inventory	distribution of final inventory *	not required

\* If consultation on draft does not result in any revisions, distribution of a separate final document is not required. In this case consulted agencies may simply be notified that the draft has been adopted as final.

TABLE C

ACTION: Preparation or revision of air quality control plan.

RESPONSIBLE ENTITY: Local air quality agency or DEQ.

Action Step	Consult with	When to Consult	Consultation Method	Consultation Documentation
1. Selection of methods, models, assumptions, data sources for determining transportation-related emissions*	local transportation and air agencies, MPO, DEQ, MDT, FTA, FHWA, EPA	before starting analysis using these parameters	letter of notification (meet at consulted agency request)	describe consultation, response, and response use in draft control plan
2. Selecting transportation-related control strategies, transportation control measures (TCMs), and proposed transportation emissions budget	same as above	before strategy /TCM selection and budget allocation	letter of notification (meet at consulted agency request)	draft control plan
3. Distribution of draft control plan	same as above	release of proposed control plan	Distribute proposed control plan	Written response to consulted agency comment
4. State conflict resolution appeal period, per ARM 17.8.1312	local transportation and air agencies, MPO, DEQ, MDT	initiated by responsible entity written response to comments on draft	appeals to governor by consulted agencies	discuss comments on draft, appeals (if any), and appeal resolution in final document
5. Adoption of final control plan (emission budget determination)	local transportation and air agencies, MPO, DEQ, MDT, FHWA, FTA, EPA	upon end of appeal period or resolution of any appeals	distribute final control plan**	not required

\* Consultation at this step is not required if these factors are unchanged from those used in an emission inventory on which consultation requirements were fulfilled.

\*\* If consultation on draft does not result in an appeal to the governor or in any revisions to the draft, distribution of a separate final document is not required. In this case consulted agencies may simply be notified that the draft has been adopted as final.

TABLE D

**ACTION:** Transportation Conformity Determination (for Transportation Plan, Transportation Improvement Program (TIP), Transportation Project, and Hot-Spot Analyses.

**RESPONSIBLE ENTITY:** MPO (MDT outside metropolitan areas and for issues covered in ARM 17.8.1310(1)(h) and (i)).

**\*\* NOTE \*\*** For guidance relating to the specific action steps required for plan, TIP, project, or hot-spot analysis (and directions for accomplishing those steps) refer to 40 CFR Part 93.

Action Step	Consult with	When to Consult	Consultation Method	Consultation Documentation
1. Selection of methods, models, assumptions, data sources, and routes (including any minor arterials and projects otherwise exempted) to be used in emissions analysis*	local transportation and air agencies, DEQ, MDT, FHWA, FTA, EPA	before starting analysis using these parameters	letter of notification (meet at consulted agency request)	discuss consultation, response, and response use in draft determination
2. Identify projects to be included in the analysis (include exempt projects treated as nonexempt)*	same as above	upon initial selection and any revisions during analysis	same as above	same as above
3. Determine TCM implementation status per 40 CFR 93.113*	same as above	before starting emission analysis	same as above	discuss in draft conformity determination
4. Draft conformity determination release	same as above	before or with draft plan, TIP, or project document release	distribute determination	written response to comment on draft determination

\* Consultation on these steps will often be done concurrently.

(Table D continued next page)

Table D (Continued)

Action Step	Consult with	When to Consult	Consultation Method	Consultation Documentation
5. State conflict resolution appeal period, per ARM 17.8.1312	local air and transportation agencies, MPO, DEQ, MDT	initiated by responsible entity written response to comments on draft determination	appeals to governor by consulted agencies	discuss comments on draft, appeals (if any), and appeal resolution in final determination
6. Responsible entity final conformity determination	FHWA, FTA (notify local air and transportation agencies, MPO, DEQ, MDT)	upon conclusion of appeal period or resolution of any appeals	distribute and request concurrence from FHWA and FTA	not required
7. Conformity determination concurrence by FHWA and FTA	local air and transportation agencies, DEQ, MDT, FHWA, FTA, EPA	upon notice of FHWA and FTA concurrence	distribute final plan, TIP, or project document	summarize consultation process and conformity determination in final plan, TIP, or project document

TABLE E

**ACTION:** Determination that a transportation plan or TIP revision or amendment merely adds or deletes exempt projects listed in 40 CFR 93.126.

**RESPONSIBLE ENTITY:** MPO or MDT.

Action Step	Consult with	When to Consult	Consultation Method	Consultation Documentation
1. Identification of projects included in the revision or amendment and initial finding that all are exempt and do not hinder TCM implementation	local transportation and air agencies, DEQ, MDT, FHWA, FTA, EPA	upon preliminary determination that all projects are exempt	letter of notification (meet at consulted agency request)	describe consultation, response, and response use in notice of final determination
2. Determination that all included projects are exempt and do not interfere with TCM implementation	same as above	upon responsible entity determination	same as above	not required
<u>OR</u> 3. Determination that one or more included projects are not exempt or do interfere with TCM implementation	same as above	upon responsible entity determination	same as above	implement conformity determination process, per Table D

(History: 75-2-111, MCA; IMP, 75-2-202, MCA; NEW, 1996 MAR p. 2299, Eff. 8/23/96; AMD, 1999 MAR p. 1216, Eff. 6/4/99; AMD, 2005 MAR p. 959, Eff. 6/17/05.)

17.8.1306 CONSULTATION PROCEDURES (1) Responsible entities shall conduct consultations in accordance with the specific procedures set out in Tables A through E of ARM 17.8.1305. In conducting consultations, responsible entities shall comply with the following general requirements:

(a) The responsible entity shall allow reasonable time for consultation.

Because the time available to accomplish many of the actions required under this subchapter will be limited, consulted agencies shall make a reasonable effort to develop response procedures that will allow them to respond quickly. In its request for consultation, the responsible entity shall specify the date by which a response is needed. If a consulted agency is unable to respond by the date specified, it shall contact the responsible entity to arrange a mutually acceptable date.

(b) The responsible entity shall provide sufficient information to provide a basis for meaningful consultation. If the supporting materials for a particular action are too voluminous for reasonable circulation, the responsible entity shall summarize and make available the materials not circulated. The responsible entity shall provide additional information upon request of a consulted agency.

(c) The responsible entity may use meetings for consultation and shall convene a consultation meeting upon request of a consulted agency. If a meeting is scheduled, the responsible entity shall notify all consulted agencies of the meeting. The responsible entity shall make a written record of the issues discussed and any decisions or commitments made during a consultation meeting.

(d) The responsible entity shall include in the draft and final documentation of the actions covered by this subchapter a description of the consultation opportunities provided during accomplishment of the action, a summary of the responses received, and a discussion of how those responses were used in accomplishing the action.

(2) For purposes of consultation contacts, the department shall maintain a list of offices and officials from each federal, state, and local government agency involved in actions requiring consultation pursuant to 40 CFR Part 93. The department shall distribute the list to all involved agencies, and update the list as necessary. (History: 75-2-111, MCA; IMP, 75-2-202, MCA; NEW, 1996 MAR p. 2299, Eff. 8/23/96; AMD, 1999 MAR p. 1216, Eff. 6/4/99.)

Rules 17.8.1307 through 17.8.1309 reserved

17.8.1310 SPECIAL ISSUES (1) In conducting consultations pursuant to ARM 17.8.1306, responsible entities shall ensure that the following special issues are addressed, when applicable:

(a) evaluating and choosing a model or models and associated methods and assumptions to be used in hot-spot analyses and regional emissions analyses (see Table D, action step number 1);

(b) determining which minor arterials and other transportation projects should be considered "regionally significant" for the purposes of regional emissions analysis (in addition to those functionally classified as principal arterial or higher or fixed guideway systems or extensions that offer an alternative to regional highway travel) (see Table D, action step number 1), and which projects should be considered to have a significant change in design concept and scope from the transportation plan or TIP (see Table D, action step number 2);

(c) evaluating whether projects otherwise exempted from meeting the requirements of 40 CFR Part 93, subpart A (see 40 CFR 93.126 and 93.127) should be treated as nonexempt in cases where potential adverse emissions impacts may exist for any reason (see Table E);

(d) determining, as required by 40 CFR 93.113(c)(1), whether past obstacles to implementation of transportation control measures ("TCMs") that are behind the schedule established in the applicable implementation plan have been identified and are being overcome, and whether state and local agencies with influence over approvals or funding for TCMs are giving maximum priority to approval or funding for TCMs. This process shall also consider whether delays in TCM implementation necessitate revisions to the applicable implementation plan to remove TCMs or substitute TCMs or other emission reduction measures (see Table D, action step number 3);

(e) identifying, as required by 40 CFR 93.123(b), projects located at sites in PM-10 nonattainment areas that have vehicle and roadway emission and dispersion characteristics that are essentially identical to those at sites for which violations have been verified by monitoring, and therefore require quantitative PM-10 hot-spot analysis (see Table D, action step number 1);

(f) choosing conformity tests and methodologies for isolated rural nonattainment and maintenance areas as required by 40 CFR 93.109(l)(2)(iii) (see Table D, action step number 1);

(g) determining which transportation plan or TIP revisions or amendments merely add or delete exempt projects listed in 40 CFR Part 93, subpart A (see Table E);

(h) consulting on emissions analysis for transportation activities which cross the borders of MPOs or nonattainment areas or air basins (see Table D, action step number 1);

(i) whenever the MPO does not include the entire nonattainment or maintenance area, determining conformity of all projects outside the metropolitan area and within the nonattainment or maintenance area (see Table D, action step number 1);

(j) designing, scheduling, and funding research and data collection efforts and regional transportation model development by the MPO or MDT (e.g., household/travel transportation surveys) (see Table A, action step number 1).

(History: 75-2-111, MCA; IMP, 75-2-202, MCA; NEW, 1996 MAR p. 2299, Eff. 8/23/96; AMD, 1999 MAR p. 1216, Eff. 6/4/99; AMD, 2005 MAR p. 959, Eff. 6/17/05.)

#### 17.8.1311 NOTICE REQUIREMENTS FOR NON-FHWA/FTA PROJECTS

(1) Any state or local agency having the authority for planning or approving the construction of non-FHWA/FTA transportation project (including those by recipients of funds designated under Title 23 USC or the Federal Transit Act) shall ensure that the MPO and MDT are informed of project plans and plan changes on a timely basis. This requirement includes projects for which alternative locations, design concept and scope, or the no-build option are still being considered. Notice to the MPO and MDT must be in accordance with the following procedures:

(a) The agency planning or approving the project shall inform the MPO and MDT prior to obligating or expending funds for project design or construction or when the first consultation request following project concept identification is received from a responsible entity performing an action covered by this subchapter, whichever occurs first.

(b) Whenever the project information provided by an agency planning or approving a project is not adequate to determine whether the project is regionally significant or to perform a regional emissions analysis, the responsible entity shall coordinate with the agency planning or approving the project to reach agreement on significance and the assumptions about project parameters to be used in the responsible entity's analysis.

(c) If a project has not been disclosed to the responsible entity in accordance with (a) and is subsequently disclosed and determined to be regionally significant, the project must be deemed not to meet the requirements of 40 CFR 93.121 for adoption, approval, or funding. (History: 75-2-111, MCA; IMP, 75-2-202, MCA; NEW, 1996 MAR p. 2299, Eff. 8/23/96; AMD, 1999 MAR p. 1216, Eff. 6/4/99.)

17.8.1312 CONFLICT RESOLUTION (1) Conflicts among state agencies or between state agencies and an MPO or a local agency that arise during consultations conducted pursuant to this subchapter may be appealed to the governor as follows if the conflict cannot be resolved by the affected agencies:

(a) A consulted agency that has submitted comments pursuant to this subchapter on a proposed implementation plan or conformity determination has 14 days to appeal to the governor after being notified by the responsible entity of the response to the consulted agency's comments. The specific actions that start the 14-day appeal period are identified in Tables C and D of ARM 17.8.1305.

(b) The consulted agency must provide written notice of the appeal to the responsible entity and to the governor.

(c) If no appeal is filed within 14 days, the responsible entity may proceed with the final implementation plan or conformity determination. If an appeal is filed within 14 days, the final implementation plan or conformity determination must have the concurrence of the governor.

(2) The governor may delegate the conflict resolution and concurrence roles to another official or agency within the state, but not to the Montana Board of Environmental Review, the Environmental Quality Council, the Montana Transportation Commission, the directors or staffs of the department or MDT, or the MPO or local government entity involved in the dispute. (History: 75-2-111, MCA; IMP, 75-2-202, MCA; NEW, 1996 MAR p. 2299, Eff. 8/23/96; AMD, 1999 MAR p. 1216, Eff. 6/4/99.)

17.8.1313 PUBLIC CONSULTATION PROCEDURES (1) The following public consultation procedures must be adhered to during actions required by 40 CFR Part 93, subpart A, or this subchapter:

(a) Local air quality agencies and the department shall utilize a proactive public involvement process which provides opportunity for public review and comment prior to taking formal action establishing emissions budgets or allocating budgets among sources.

(b) MPOs and MDT shall utilize 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 conformity determinations for all transportation plans and TIPs, consistent with the requirements of 23 CFR Part 450.316(b). Any charges imposed for public inspection and copying must be consistent with the fee schedule contained in 49 CFR 7.95, except that state agency charges must be consistent with the governor's April 9, 1996, or most current, guidelines for responding to requests for access to, and/or copying, of agency documents. In addition, state agencies shall specifically address in writing all public comments that known plans for a regionally significant project that 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. State agencies shall also provide opportunity for public involvement in conformity determinations for projects where otherwise required by law. (History: 75-2-111, MCA; IMP, 75-2-202, MCA; NEW, 1996 MAR p. 2299, Eff. 8/23/96; AMD, 1999 MAR p. 1216, Eff. 6/4/99.)