

**TITLE 20 ENVIRONMENTAL PROTECTION
CHAPTER 11 ALBUQUERQUE / BERNALILLO COUNTY AIR QUALITY CONTROL BOARD
PART 4 GENERAL CONFORMITY**

20.11.4.1 ISSUING AGENCY: Albuquerque/ Bernalillo County Air Quality Control Board. P.O. Box 1293, Albuquerque, NM 87103. Telephone: (505) 768-2600.
[12/16/94 . . . 12/1/95; 20.11.4.1 NMAC – Rn, 20 NMAC 11.04.I.1, 10/1/02]

20.11.4.2 SCOPE:

A. The provisions of this Part shall apply in all nonattainment and maintenance areas of and within Bernalillo County.

B. **Exempt:** This Part does not apply to sources within Bernalillo County, which are located on Indian lands over which the Albuquerque/Bernalillo County Air Quality Control lacks jurisdiction.
[12/16/94 . . . 12/1/95; 20.11.4.2 NMAC – Rn, 20 NMAC 11.04.I.2, 10/1/02]

20.11.4.3 STATUTORY AUTHORITY: This Part is adopted pursuant to the authority provided in the New Mexico Air Quality Control Act, NMSA 1978 74-2-4, 74-2-5.C; the Joint Air Quality Control Board Ordinance, Bernalillo County Ordinance 94-5 4; and the Joint Air Quality Control Board Ordinance, Revised Ordinances of Albuquerque 1994 9-5-1-4.
[12/16/94 . . . 12/1/95; 20.11.4.3 NMAC – Rn, 20 NMAC 11.04.I.3, 10/1/02]

20.11.4.4 DURATION: Permanent.

[12/1/95; 20.11.4.4 NMAC – Rn, 20 NMAC 11.04.I.4, 10/1/02]

20.11.4.5 EFFECTIVE DATE: December 1, 1995, unless a later date is cited at the end of a section.
[12/1/95; 20.11.4.5 NMAC – Rn, 20 NMAC 11.04.I.5 & A, 10/1/02]

20.11.4.6 OBJECTIVE: The objective of this Part is to implement section 176(c) of the Clean Air Act (CAA), as amended (42 U.S.C. 7401 et seq.) and regulations under 40 CFR part 51 subpart W, with respect to conformity of general Federal actions to the applicable implementation plan. This rule sets forth policy, criteria, and procedures for demonstrating and assuring conformity of general Federal actions to the applicable implementation plan. Under these authorities:

A. 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 an applicable implementation plan.

B. A Federal agency must make a determination that a Federal action conforms to the applicable implementation plan in accordance with the requirements of this subpart before the action is taken.

C. Subsection B. of 20.11.4.6 NMAC does not include Federal actions where either:

(1) A National Environmental Policy Act (NEPA) analysis was completed as evidenced by a:

- (a) Final environmental assessment (EA);
- (b) Environmental impact statement (EIS), or;
- (c) Finding of no significant impact (FONSI) that was prepared prior to January 31, 1994;

(2) Or:

(a) Prior to January 31, 1994, an EA was commenced or a contract was awarded to develop the specific environmental analysis;

(b) Sufficient environmental analysis is 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 applicable State Implementation Plan (SIP) pursuant to the agency's affirmative obligation under section 176(c) of the Clean Air Act; and

(c) A written determination of conformity under section 176(c) of the CAA 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 conformance with the applicable implementation plan does not exempt the action from any other requirements of the applicable implementation plan, the NEPA, or the CAA.

[12/16/94 . . . 12/1/95; 20.11.4.6 NMAC – Rn, 20 NMAC 11.04.I.6, 10/1/02]

20.11.4.7 DEFINITIONS: Terms used but not defined in this Part shall have the meaning given them by the CAA and EPA's regulations, (40 CFR chapter I), in that order of priority. In addition to the definitions in 20.11.4.7 NMAC the definitions in 20.11.1.7 NMAC apply unless there is a conflict between definitions, in which case the definition in this Part shall govern.

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 CAA (42 U.S.C. 7472) that is located within 100 km of the proposed Federal action.

B. “Air Agency” means the Air Pollution Control Division (APCD) of the City of Albuquerque Environmental Health Department (EHD). The EHD, or its successor agency or authority, as represented by the department Director or his/her designee, is the lead air quality planning agency for the Albuquerque/Bernalillo County nonattainment/maintenance area. The EHD serves as staff to the Albuquerque/Bernalillo County (ABC) Air Quality Control Board (AQCB), also referred to as the ABC/AQCB, and is responsible for implementing AQCB regulations.

C. “Applicability Analysis” means the early quantification and evaluation during the conformity process where yearly quantities of criteria pollutants are calculated to determine if the thresholds of 20.11.4.12 NMAC are met.

D. “Applicable Implementation Plan or Applicable State Implementation Plan (SIP)” means the portion (or portions) of the SIP or most recent revision thereof, which has been approved under section 110 of the CAA, or promulgated under section 110(c) of the CAA (Federal implementation plan), or promulgated or approved pursuant to regulations promulgated under section 301(d) of the CAA and which implements the relevant E.

E. “Area wide Air Quality Monitoring 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.

F. “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.

G. “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.

H. “Criteria Pollutant or Standard” means any pollutant for which there is established a NAAQS at 40 CFR Part 50.

I. “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.

J. “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.

K. “Emissions Budgets” are those portions of the applicable SIP's projected emissions inventories that describe the levels of emissions (mobile, stationary, area, etc.) that provide for meeting reasonable further progress milestones, attainment, and/or maintenance for any criteria pollutant or its precursors.

L. “Emissions Offsets” for purposes of 20.11.4.5 NMAC are emissions reductions which are quantifiable, consistent with the applicable SIP attainment and reasonable further progress demonstrations, surplus to reductions required by, and credited to, other applicable SIP provisions, enforceable at both the State and Federal levels, and permanent within the timeframe specified by the program.

M. “Emissions that a Federal Agency has a Continuing Program Responsibility for” 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.

N. “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.

O. "Federal Agency" means a Federal department, agency, or instrumentality of the Federal government.

P. "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.

Q. "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 including, but not limited to:

(a) traffic on or to, or stimulated 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 such as employee work trips;

(c) emissions related to employee commuting and similar programs to increase average 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.

R. "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.

S. "Maintenance Area" means an area with a maintenance plan approved under section 175A of the CAA.

T. "Maintenance Plan" means a revision to the applicable SIP, meeting the requirements of section 175A of the CAA.

U. "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.

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

W. "National Ambient Air Quality Standards (NAAQS)" are those standards established pursuant to section 109 of the CAA and include standards for carbon monoxide (CO), lead (Pb), nitrogen dioxide (NO₂), ozone, particulate matter (PM₁₀), and sulfur dioxide (SO₂).

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

Y. "Nonattainment Area (NAA)" means an area designated as nonattainment under section 107 of the CAA and described in 40 CFR Part 81.

Z. "Precursors" of a criteria pollutant are:

(1) for ozone, nitrogen oxides (NO_x), unless an area is exempted from NO_x requirements under section 182(f) of the CAA, and volatile organic compounds (VOC); and

(2) for PM₁₀, those pollutants described in the PM₁₀ nonattainment area applicable SIP as significant contributors to the PM₁₀ levels.

AA. "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.

BB. **"Regional Water and/or Wastewater Projects Include"** construction, operation, and maintenance of water or wastewater conveyances, water or wastewater treatment facilities, and water storage reservoirs, which affect a large portion of a nonattainment or maintenance area.

CC. **"Regionally Significant Action"** means a Federal action for which the direct and indirect emissions of any pollutant represent 10 percent or more of a nonattainment or maintenance area's emissions inventory for that pollutant.

DD. **"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. The portion of emissions which are exempt or presumed to conform under Subsections C, D, or E, of 20.11.4.12 NMAC are not included in the "total of direct and indirect emissions." 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 regulation. In many cases, the overall set of activities described within an environmental document (e.g. environmental assessment, environmental impact statement), a master plan, site plan, land or facility management plan, or similar planning document will constitute the action(s) to be evaluated. Where phasing is anticipated, analyses may need to evaluate key logical steps in the implementation of the project or proposal.
[12/16/94. . .12/1/95; 20.11.4.7 NMAC – Rn, 20 NMAC 11.04.I.7, 10/1/02]

20.11.4.8 VARIANCES: [Reserved]

[12/1/95; 20.11.4.8 NMAC - Rn, 20 NMAC 11.04.I.8, 10/1/02]

20.11.4.9 SAVINGS CLAUSE: Any amendment to 20.11.4 NMAC, which is filed, with the State Records Center shall not affect actions pending for violation of a City or County ordinance, Air Quality Control Board Regulation 43, or Part 04. Prosecution for a violation under prior regulation wording shall be governed and prosecuted under the statute, ordinance, Part, or regulation section in effect at the time the violation was committed.
[12/16/94. . .12/1/95; 20.11.4.9 NMAC – Rn, 20 NMAC 11.04.I.9, 10/1/02]

20.11.4.10 SEVERABILITY: If any section, paragraph, sentence, clause, or word of this Part is for any reason held to be unconstitutional or otherwise invalid by any court, the decision shall not affect the validity of remaining provisions of this Part.

[12/16/94. . .12/1/95; 20.11.4.10 NMAC – Rn, 20 NMAC 11.04.I.10, 10/1/02]

20.11.4.11 DOCUMENTS: Documents incorporated and cited in this Part may be viewed at the Albuquerque Environmental Health Department, 400 Marquette Ave. NW, Albuquerque, NM.

[12/1/95; 20.11.4.11 NMAC – Rn, 20 NMAC 11.04.I.11 & A, 10/1/02]

20.11.4.12 DETERMINATIONS FOR CONFORMITY:

A. Conformity determinations for Federal actions related to transportation plans, programs, and projects developed, funded, or approved under title 23 USC. or the Federal Transit Act (49 U.S.C. 1601 et seq.) must meet the procedures and criteria of 20.11.3 NMAC Transportation Conformity, in lieu of the procedures set forth in this Part.

B. For Federal actions not covered by Subsection A, of 20.11.4.12 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 Paragraph (1) or (2) of Subsection B, of 20.11.4.12 NMAC. An applicability analysis shall be used to determine if an action meets these thresholds for actions, which are not otherwise exempted. In the event the requirements of in Paragraph (1) and (2), of Subsection B, of 20.11.4.12 NMAC are not met, a complete conformity determination will not be necessary. Agencies are nevertheless encouraged to coordinate with the air agency during the applicability analysis phase, especially when proposed actions are likely to produce meaningful levels of pollution even though the amount calculated may be below the identified thresholds. Awareness by the air agency of the many actions below the thresholds will assist the air agency in overall planning efforts (e.g. emission inventories).

(1) For purposes of Subsection B, of 20.11.4.12 NMAC, the following rates apply in nonattainment areas:

<u>NONATTAINMENT AREAS</u>	<u>TONS/YEAR</u>
Ozone (VOC's or NOx):	
Serious NAA's	50
Severe NAA's	25
Extreme NAA's	10
Other ozone NAA's outside an ozone transport region	100
Marginal and moderate NAA's inside an ozone transport region:	
VOC	50
NOx	100
Carbon monoxide:	
All NAA's	100
SO₂ or NO₂:	
All NAA's	100
PM₁₀:	
Moderate NAA's	100
Serious NAA's	70
Pb:	
All NAA's	25

(2) For the purposes of Subsection B, of 20.11.4.12 NMAC, the following rates apply in maintenance areas:

<u>MAINTENANCE AREAS</u>	<u>TONS/YEAR</u>
Ozone (NOx), SO₂ or NO₂:	
All maintenance areas	100
Ozone (VOC's):	
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

C. 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 20.11.4.12 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 reassessments 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) Actions, such as the following, 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, 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 effect 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 effect 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) Actions which implement a decision to conduct or carry out a conforming program such as prescribed burning actions which are consistent with a conforming land management plan.

D. 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 CAA) or the prevention of significant deterioration (PSD) program (Title I, Part C of the CAA).

(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 E, of 20.11.4.12 NMAC.

(3) Research, investigations, studies, demonstrations, or training (other than those exempted under Paragraph (2), of Subsection C of 20.11.4.12 NMAC), where no environmental detriment is incurred and/or, the particular action furthers air quality research, as determined by the air agency primarily responsible for the applicable SIP.

(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.

E. Federal actions which are part of a continuing response to an emergency or disaster under Paragraph (2), of Subsection D. of 20.11.4.12 NMAC and which are to be taken more than 6 months after the commencement of the response to the emergency or disaster under Paragraph (2), of Subsection D. of 20.11.4.12 NMAC are exempt from the requirements of this regulation only if:

(1) the Federal agency taking the actions makes a written determination that, for a specified period not to exceed an additional 6 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 E. of 20.11.4.12 NMAC, the Federal agency makes a new determination as provided in Paragraph (1), of Subsection E. of 20.11.4.12 NMAC.

F. Notwithstanding other requirements of this Part, actions specified by individual Federal agencies that have met the criteria set forth in either Paragraph (1) or (2), of Subsection G. of 20.11.4.12 NMAC and the procedures set forth in Subsection H. of 20.11.4.12 NMAC are presumed to conform, except as provided in Subsection J. of 20.11.4.12 NMAC.

G. The Federal agency must 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 A. of 20.11.4.12 NMAC:

(1) The Federal agency must clearly demonstrate using methods consistent with 20.11.4 NMAC 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 applicable 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 applicable 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 must 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 20.11.4.12 NMAC, based, for example, on similar actions taken over recent years.

H. In addition to meeting the criteria for establishing exemptions set forth Paragraphs (1) or (2), of Subsection G. of 20.11.4.12 NMAC, the following procedures must also be complied with to presume that activities will conform:

(1) the Federal agency must identify through publication in the Federal Register its list of proposed activities that are presumed to conform and the basis for the presumptions,

(2) the Federal agency must notify the EPA Region VI Office, the air agency and, where applicable, the agency designated under section 174 of the CAA and the MPO and provide at least 30 days for the public to comment on the list of proposed activities presumed to conform,

(3) the Federal agency must 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 must publish the final list of such activities in the Federal Register.

I. Notwithstanding the other requirements of 20.11.4 NMAC, 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 20.11.4.12 NMAC, but represents 10 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 20.11.4.6 NMAC and Sections 20.11.4.14 through 20.11.4.19 NMAC shall apply for the Federal action.

J. Where an action otherwise presumed to conform under Subsection F. of 20.11.4.12 NMAC is a regionally significant action or does not in fact meet one of the criteria in Paragraph (1), of Subsection G. of 20.11.4.12 NMAC, that action shall not be presumed to conform and the requirements of 20.11.4.6 NMAC and Sections 20.11.4.14 through 20.11.4.19 NMAC shall apply for the Federal action.

[12/16/94. . .12/1/95; 20.11.4.12 NMAC – Rn, 20 NMAC 11.04.I.12 & Repealed, 10/1/02; Rn, 20 NMAC 11.04.II.1, 10/1/02]

20.11.4.13 CONFORMITY ANALYSIS: Any Federal department, agency, or instrumentality of the Federal government taking an action subject to this regulation must make its own conformity determination consistent with the requirements of this regulation. In making its conformity determination, a Federal agency must 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.

[12/16/94, 20.11.4.13 NMAC – Rn, 20 NMAC 11.04.II.2, 10/1/02]

20.11.4.14 REPORTING REQUIREMENTS: A Federal agency making a conformity determination under 20.11.4.17 NMAC must provide to the EPA Region VI Office, the air agency and, where applicable, affected Federal land managers, the agency designated under Section 174 of the CAA and the MPO a 30 day notice which describes the proposed action and the Federal agency's draft conformity determination on the action. Draft conformity determinations shall describe the magnitude of the increase for relevant pollutants and the sources (including locations) for those pollutants as they relate to the proposed action.

[12/16/94. . .12/1/95; 20.11.4.14 NMAC – Rn, 20 NMAC 11.04.II.3, 10/1/02]

20.11.4.15 PUBLIC PARTICIPATION:

A. Upon request by any person regarding a specific Federal action, a Federal agency must make available for review its draft conformity determination under 20.11.4.17 NMAC with supporting materials which describe the analytical methods and conclusions relied upon in making the applicability analysis and draft conformity determination. It is advisable for agencies to maintain sufficiently detailed records of the actual assumptions, technical data, and analyses which lead to the conformity determination in order for interested parties to clearly understand the basis for the conformity determination. These shall be made available for review by the air agency and other interested parties where appropriate.

B. A Federal agency must make public its draft conformity determination under 20.11.4.17 NMAC by placing a notice by prominent advertisement in a daily newspaper of general circulation in the area affected by the action and by providing 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 must document its response to all the comments received on its draft conformity determination under 20.11.4.17 NMAC and make the comments and responses available, upon request by any person regarding a specific Federal action, within 30 days of the final conformity determination.

D. A Federal agency must make public its final conformity determination under 20.11.4.17 NMAC for a Federal action by placing a notice by prominent advertisement in a daily newspaper of general circulation in the area affected by the action within 30 days of the final conformity determination.

[12/16/94. . .12/1/95; 20.11.4.15 NMAC – Rn, 20 NMAC 11.04.II.4, 10/1/02]

20.11.4.16 FREQUENCY OF CONFORMITY DETERMINATIONS:

A. The conformity status of a Federal action automatically lapses 5 years from the date a final conformity determination is reported under 20.11.4.14 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 redetermination so long as such activities are within the scope of the final conformity determination reported under 20.11.4.14 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 20.11.4.12 NMAC, a new conformity determination is required.

[12/16/94. . .12/1/95; 20.11.4.16 NMAC – Rn, 20 NMAC 11.04.II.5, 10/1/02]

20.11.4.17 CRITERIA FOR DETERMINING CONFORMITY:

A. An action required under 20.11.4.12 NMAC to have a conformity determination for a specific pollutant, will be determined to conform to the applicable SIP if, for each pollutant that exceeds the rates in

Subsection B. of 20.11.4.12 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 20.11.4.17 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 applicable 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 applicable SIP or a similarly enforceable measure 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 20.11.4.17 NMAC, based on area wide air quality modeling analysis and local air quality modeling analysis; or

(b) meet the requirements of Paragraph (5), of Subsection A. of 20.11.4.17 NMAC and, for local air quality modeling analysis, the requirement of Subsection B. of 20.11.4.17 NMAC.

(4) For CO or PM₁₀:

(a) where the air agency primarily responsible for the applicable SIP determines that an area wide 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 20.11.4.17 NMAC, based on local air quality modeling analysis; or

(b) where the air agency primarily responsible for the applicable SIP determines that an area wide 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 20.11.4.17 NMAC, based on area wide modeling, or meet the requirements of Paragraph (5), of Subsection A. of 20.11.4.17 NMAC or

(5) For ozone or nitrogen dioxide, and for purposes of Subparagraph (b), of Paragraph (3), of Subsection A. of 20.11.4.17 NMAC and Subparagraph (b), of Paragraph (4), of Subsection A. of 20.11.4.12 NMAC, each portion of the action or the action as a whole meets any of the following requirements:

(a) Where EPA has approved a revision to an area's attainment or maintenance demonstration after 1990 and the State makes a determination as provided in Subparagraph (a), of Paragraph (5), of Subsection A. of 20.11.4.17 NMAC or where the State makes a commitment as provided in Subparagraph (b), of Paragraph (5), of Subsection A. of 20.11.4.17 NMAC:

(i) the total of direct and indirect emissions from the action (or portion thereof) is determined and documented by the air agency primarily responsible for the applicable SIP 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 applicable SIP;

(ii) the total of direct and indirect emissions from the action (or portion thereof) is determined by the air agency responsible for the applicable SIP 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 applicable SIP and the State Governor or the Governor's designee for SIP actions makes a written commitment to EPA which includes the following: 1. 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; 2. 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 applicable SIP; 3. A demonstration that all existing applicable 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; 4. A determination that the responsible Federal agencies have required all reasonable mitigation measures associated with their action; and 5. Written documentation including all air quality analyses supporting the conformity determination;

(iii) Where a Federal agency made a conformity determination based on a State commitment under Item (i), of Subparagraph (a), of Paragraph (5), of Subsection A. of 20.11.4.17 NMAC, such a State commitment is automatically deemed a call for a SIP revision by EPA under Section 110(k)(5) of the CAA, effective on the date of the Federal conformity determination and requiring response within 18 months or any shorter time within which a commitment is made to revise the applicable 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 applicable SIP under 20.11.3 NMAC, Transportation Conformity, or 40 CFR Part 93, Subpart A;

(c) The action (or portion thereof) fully offsets its emissions within the same nonattainment or maintenance area through a revision to the applicable 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 EPA has not approved a revision to the relevant SIP 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 20.11.4.18 NMAC) do not increase emissions with respect to the baseline emissions:

(i) the baseline emissions reflect the historical activity levels that occurred in the geographic area affected by the proposed Federal action during: 1. Calendar year 1990; 2. The calendar year that is the basis for the classification (or, where the classification is based on multiple years, the most representative year), if a classification is promulgated in 40 CFR Part 81; or 3. The year of the baseline inventory in the PM₁₀ applicable SIP;

(ii) the baseline emissions are the total of direct and indirect emissions calculated for the future years (described in Subsection D of 20.11.4.18 NMAC) using the historic activity levels (described in Subparagraph (d), of Paragraph (5), of Subsection A. of 20.11.4.17 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 applicable SIP.

B. The area wide and/or local air quality modeling analyses must:

(1) meet the requirements in 20.11.4.18 NMAC; and

(2) show that the action does not:

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

(b) increase the frequency or severity of any existing violation of any standard in any area.

C. Notwithstanding any other requirements of this section, an action subject to this regulation may not be determined to conform to the applicable SIP unless the total of direct and indirect emissions from the action is in compliance or consistent with all relevant requirements and milestones contained in the applicable 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 must be completed, and any mitigation requirements necessary for a finding of conformity must be identified before the determination of conformity is made.
[12/16/94 . . . 12/1/95; 20.11.4.17 NMAC – Rn, 20 NMAC 11.04.II.6, 10/1/02]

20.11.4.18 PROCEDURES FOR CONFORMITY DETERMINATIONS:

A. The analyses required under this regulation must be based on the latest planning assumptions.

(1) All planning assumptions (such as 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, woodstoves per household, and the geographic distribution of population growth) must be derived from the estimates of population, employment, travel, and congestion most recently approved by the MPO, or other agency authorized to make such estimates, where available.

(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 other agency authorized to make such estimates for the urban area.

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 EPA Regional 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 EPA and available for use in the preparation or revision of the applicable SIP must be used for the conformity analysis as specified in Subparagraph (a) and (b), of Paragraph (1), of Subsection B, of 20.11.4.18 NMAC:

(a) the EPA must 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 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 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 EPA.

(2) For non-motor vehicle sources, including stationary and area source emissions, the latest emission factors specified by EPA in the "Compilation of Air Pollutant Emission Factors (AP-42)" must 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 regulation must 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 (EPA publication no. 450/2-78-027R), 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 EPA Regional Administrator is obtained for any modification or substitution.

D. The analyses required under this regulation, except Paragraph (1), of Subsection A, of 20.11.4.17 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 CAA 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 applicable SIP specifies an emissions budget.

[12/16/94 . . . 12/1/95; 20.11.4.18 NMAC – Rn, 20 NMAC 11.04.II.7, 10/1/02]

20.11.4.19 MITIGATION OF AIR QUALITY IMPACTS:

A. Any measures that are intended to mitigate air quality impacts must be identified (such as the identification and quantification of all emission reductions claimed) and the process for implementation (such as any necessary funding of such measures and tracking of such emission reductions) and enforcement of such measures must 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 must obtain written commitments from the appropriate persons or agencies to implement any mitigation measures, which are identified as conditions for making conformity determinations. Written commitments shall describe such mitigation measures and the nature of the commitments, in a manner consistent with Subsection A. of 20.11.4.20 NMAC.

C. Persons or agencies voluntarily committing to mitigation measures to facilitate positive conformity determinations must 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.

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. Any proposed change in the mitigation measures is subject to the reporting requirements of 20.11.4.14 NMAC and the public participation requirements of 20.11.4.15 NMAC.

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

G. Any agreements, including mitigation measures, necessary for a conformity determination will be both State and federally enforceable. Enforceability through the applicable SIP will apply to all persons who agree to mitigate direct and indirect emissions associated with a Federal action for a conformity determination.

[12/16/94 . . . 12/1/95; 20.11.4.19 NMAC – Rn, 20 NMAC 11.04.II.8, 10/1/02]

HISTORY OF 20.11.4 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the commission of public records – state records center and archives.
Regulation No. 43, General Conformity, 12/16/94.

History of Repealed Material: [Reserved]

Other History: Regulation No. 43, General Conformity, filed 12/16/94 was **renumbered** and **reformatted** into first version of the New Mexico Administrative Code as 20 NMAC 11.04, General Conformity, filed 10-27-95. 20 NMAC 11.04, General Conformity, filed 10-27-95 was **renumbered, reformatted, amended and replaced** by 20.11.4 NMAC, effective 10/1/02.