

ALTSHULER, BERZON, NUSSBAUM, RUBIN & DEMAIN

ATTORNEYS AT LAW

177 POST STREET, SUITE 300

SAN FRANCISCO, CALIFORNIA 94108

(415) 421-7151

FAX (415) 362-8064

www.altshulerberzon.com

FRED H. ALTSHULER
STEPHEN P. BERZON
BARBARA J. CHISHOLM
JEFFREY B. DEMAIN
REBEKAH B. EVENSON
EILEEN B. GOLDSMITH
LAURA P. JURAN
SCOTT A. KRONLAND
DANIELLE E. LEONARD
STACEY M. LEYTON
LINDA LYE
PETER D. NUSSBAUM
DANIEL T. PURTELL
MICHAEL RUBIN
JONATHAN WEISSGLASS

ADAM B. WOLF
FELLOW

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Docket Management Facility
U.S. Department of Transportation
400 Seventh Street, SW
Nassif Building, Room PL-401
Washington, DC 20590
Fax: (202) 493-2251

Comments of Public Citizen, International Brotherhood of Teamsters, California Labor Federation, and Environmental Law Foundation Regarding National Environmental Policy Act Implementing Procedures

Public Citizen, International Brotherhood of Teamsters, California Labor Federation, and Environmental Law Foundation submit these comments for the record on FMCSA's draft Order on procedures for implementing the National Environmental Policy Act ("NEPA").

Although many issues in the draft Order may arise as it is applied in varying contexts, our primary concern at this time is with Appendix 14 – Air Quality Analysis Guidance. The comments below are limited to Appendix 14.

The draft Order correctly concludes that the NEPA analysis is related to, but different from the General Conformity Analysis required by the Clean Air Act. The NEPA analysis must examine the air quality impact of major FMCSA actions and relate that impact to harm to human health and the environment. The Conformity Analysis is meant to ensure that the federal action conforms to each applicable state implementation plan ("SIP"), regardless of the impact of the action on human health or the environment.

There are, however, a few misstatements in the current draft, and there are also several places where amplification or clarification is warranted.

First, as a general matter, Appendix 14 appears to be very old and outdated. The agency needs to revise this Appendix in light of current standards and the possibility of large-scale projects. The agency should ensure that it does not limit its inquiry into air quality impacts based on old standards or limitations that are no longer in place.

Second, the last sentence in the first full paragraph on page 100 notes that “rulemaking” is on the list of categorical exclusions from general conformity determinations. The Ninth Circuit has recently held that only the process of developing and issuing regulations is exempt, but that the outcome of the rulemaking process – the substantive result of the rule’s implementation – is definitely not exempt. *See Public Citizen v. DOT*, 316 F.3d 1002, 1030-31 (9th Cir. 2003). In that case, the court held that FMCSA was required to prepare a conformity analysis for rules that it had promulgated. Although a petition for writ of certiorari is pending in the case, the government did not ask the Supreme Court to review the rulemaking holding. FMCSA should clarify its guidance to include and explain the application of a requirement for conformity determinations in the context of this holding and the agency’s planned practices.

Third, the first full sentence of the third full paragraph on page 100 is mistaken. The comparison that is involved in a conformity analysis is not a comparison between a SIP and a federal implementation plan (“FIP”). A FIP is an implementation plan prepared by the Environmental Protection Agency when the state has failed to prepare an adequate SIP. *See* 42 U.S.C. §7410(c). FIPs are in fact fairly rare.

The proper comparison for a conformity analysis is between the existing SIP (or, in the absence of an SIP, an FIP) and the SIP (or FIP) as amended to incorporate the federal action. In order for the federal action to “conform” to the SIP, it must not cause or contribute to any new violation of an applicable air quality standard, increase the frequency or severity of an existing violation, or delay timely attainment of any applicable standard, interim-reduction requirement or other milestone. For federal actions that contribute additional emissions of a nonattainment pollutant to an area that is in nonattainment for that pollutant, this will ordinarily require a revision of the SIP (or FIP) in a way that yields enforceable offsetting emissions reductions from other sources. FMCSA must revise its statements to reflect that conformity determinations must include a comparison between the existing SIP or FIP and changes that will be made to that document following the federal action at issue.

Fourth, in the list of factors in the second full paragraph of page 101, the last factor is inconsistent with the agency’s conformity responsibilities. The emissions estimate must extend to every year that is relevant to the nonattainment area, and not just the “year when the maximum emissions are expected to occur.” For most nonattainment areas, the analysis will have to extend to at least three years beyond the attainment deadline. The projection may have to extend even farther into the future if needed for an accurate assessment of the impact of the federal action on future “maintenance” plans for nonattainment areas that achieve attainment status in the future.

FMCSA should acknowledge this greater responsibility as well as the need for possible future projections if accuracy so demands.

Fifth, the first full paragraph on page 102 is inconsistent with the agency's conformity obligations insofar as it limits the analysis of mitigation measures or offsets necessary to achieve conformity to "the extent known." This misconceives the nature of the agency's conformity obligation. The agency is required to identify mitigation measures or offsets and to ensure that they are incorporated into legally enforceable requirements in the relevant SIPs (or FIPs). Only after this has been accomplished may the agency action proceed consistently with the conformity requirements of the Clean Air Act.

Finally, throughout Appendix 14, the discussion has erroneously been limited to carbon monoxide ("CO"). In particular, the discussion of "special considerations" on page 102 should not limit the analysis to CO. Although it is true that CO is an important mobile source pollutant, mobile sources regulated by FMCSA also emit particulates (PM10 and PM2.5), and the ozone precursors – volatile organic compounds ("VOCs") and oxides of nitrogen ("NOx"). Analysis of toxics should also be included.

In view of these facts, it is incorrect for the agency to assert on the same page that ozone "is not a concern at the Federal action level." If the federal action will result in emissions of more than *de minimis* levels of ozone precursors, then ozone is definitely a concern for purposes of determining whether that action conforms with SIPs for ozone nonattainment areas. The fact that ozone is an "area-wide" pollutant is not at all relevant to an assessment of the conformity of a federal action with relevant SIPs. The same is true for particulate emissions. FMCSA's analysis must include ozone, particulate matter, and all other relevant impacts.

Sincerely,

Joan Claybrook
President, Public Citizen

International Brotherhood of Teamsters

California Labor Federation

Environmental Law Foundation

Sent by:
Jonathan Weissglass
Altshuler, Berzon, Nussbaum, Rubin & Demain