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## **TITLE 326 AIR POLLUTION CONTROL BOARD**

### **FINDINGS AND DETERMINATION OF THE COMMISSIONER PURSUANT TO IC 13-14-9-8 AND DRAFT RULE #05-80(APCB)**

## **DEVELOPMENT OF AMENDMENTS TO RULES CONCERNING INCORPORATION BY REFERENCE OF TRANSPORTATION CONFORMITY RULE AMENDMENTS**

### **PURPOSE OF NOTICE**

The Indiana Department of Environmental Management (IDEM) has developed draft rule language to incorporate by reference 69 FR 40072 at 326 IAC 19-2-1 for the purpose of updating the transportation conformity rules and has scheduled a public hearing/meeting before the air pollution control board (board) for consideration of preliminary adoption of these rules.

**CITATIONS AFFECTED:** 326 IAC 19-2-1.

**AUTHORITY:** IC 13-14-8; IC 13-14-9; IC 13-17-3-4; IC 13-17-3-11.

### **STATUTORY REQUIREMENTS**

IC 13-14-9-8 recognizes that under certain circumstances it may be appropriate to reduce the number of public comment periods routinely provided. In cases where the commissioner determines that there is no anticipated benefit from the first and second public comment periods, IDEM may forego these comment periods and proceed directly to the public hearing and board meeting at which the draft rule is considered for preliminary adoption. Two (2) opportunities for public comment (at the public hearings prior to preliminary and final adoption of the rule) remain under this procedure.

If the Commissioner makes the determination of no anticipated benefit required by IC 13-14-9-8, the Commissioner shall prepare written findings and publish those findings in the Indiana Register prior to the board meeting at which the draft rule is to be considered for preliminary adoption, and include them in the board packet prepared for that meeting. This document constitutes the commissioner's written findings pursuant to IC 13-14-9-8.

The statute provides for this shortened rulemaking process if the commissioner determines that:

(1) the rule constitutes:

(A) an adoption or incorporation by reference of a federal law, regulation, or rule that:

(i) is or will be applicable to Indiana; and

(ii) contains no amendments that have a substantive effect on the scope or intended application of the federal law or rule;

(B) a technical amendment with no substantive effect on an existing Indiana rule; or

(C) a substantive amendment to an existing Indiana rule, the primary and intended purpose of which is to clarify the existing rule; and

(2) the rule is of such nature and scope that there is no reasonably anticipated benefit to the environment or the persons referred to in IC 13-14-9-7(a)(2) from:

(A) exposing the rule to diverse public comment under section IC 13-14-9-3 or IC 13-14-9-4;

(B) affording interested or affected parties the opportunity to be heard under IC 13-14-9-3 or IC 13-14-9-4; and

(C) affording interested or affected parties the opportunity to develop evidence in the record collected under IC 13-14-9-3 and IC 13-14-9-4.

### **BACKGROUND**

Transportation conformity is required under Clean Air Act Section 176(c) to ensure that federally supported highway and transit project activities are consistent with or "conform to" state implementation plans (SIP) for air quality. Conformity currently applies under the U.S. Environmental Protection Agency's (U.S. EPA) rules to areas that are designated nonattainment, and those redesignated to attainment after 1990 for the following criteria pollutants: ozone, particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM<sub>10</sub>), carbon monoxide (CO), nitrogen dioxide (NO<sub>2</sub>) and sulfur dioxide (SO<sub>2</sub>).

Conformity for the purpose of the SIP means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment of the relevant national ambient air quality standards (NAAQS). U.S. EPA's transportation conformity rule establishes the criteria and procedures for determining whether transportation activities conform to the SIP.

U.S. EPA first promulgated the transportation conformity rule on November 24, 1993 (58 FR 62188), and subsequently published a comprehensive set of amendments on August 15, 1997 (62 FR 43780), that clarified and streamlined language from the 1993 rule. The 1997 rules allowed local officials to approve transportation projects without a currently conforming transportation plan and SIP if the project was part of a plan and transportation program that had previously conformed but had lapsed. On March 2, 1999, the U.S. Court of Appeals for the District of Columbia Circuit ruled that this so-called grandfathering of transportation projects violated provisions of the Clean Air Act. U.S. EPA has made amendments to the 1997 rules reflecting the court's decision and other issues. These amendments include a proposal published on June 30, 2003 (68 FR 38974), which addresses the court decision and a proposal published on November 5, 2003 (68 FR 62690), which addresses 8-hour ozone and PM<sub>2.5</sub> NAAQS. These proposals were published as amendments to the transportation conformity rule on July 1, 2004 (69 FR 40072).

This rulemaking will incorporate by reference the transportation conformity amendments published on July 1, 2004. The proposed amendments to 326 IAC 19-2-1(c)(1) are technical and non substantive. The proposed amendments to 326 IAC 19-2-1(c)(2) incorporate the U.S. EPA and the U.S. Department of Transportation (U.S. DOT) guidance that has been used in place of certain regulatory provisions of the rule. The amendments include criteria and procedures for the new 8-hour ozone and PM<sub>2.5</sub> NAAQS and apply the conformity rule provisions to PM<sub>2.5</sub> nonattainment areas. The amendments also address the 1999 court decision. This rulemaking will also eliminate an exemption that was included in state rules; thereby ensuring that Indiana's transportation conformity rule is identical to the federal transportation conformity rule.

Incorporation of the transportation conformity amendments is necessary so that Indiana's federally supported highway and transit project activities are consistent with the SIP. The transportation conformity amendments will ensure that conformity is practicably implemented for the new and current air quality standards in a manner consistent with the Clean Air Act's public health and environmental goals. The federal transportation conformity amendments became effective on August 2, 2004.

#### **IDENTIFICATION OF RESTRICTIONS AND REQUIREMENTS NOT IMPOSED UNDER FEDERAL LAW**

No element of the draft rule imposes either a restriction or a requirement on persons to whom the draft rule applies that is not imposed under federal law because it is a direct adoption of federal requirements that are applicable to Indiana and contains no amendments that have a substantive effect on the scope or application of the federal rule.

#### **POTENTIAL FISCAL IMPACT**

The transportation conformity amendment is a federal rule applicable to local and state planning entities. Costs to implement the rule are a result of the federal rule and not this rulemaking.

#### **FINDINGS**

The commissioner of IDEM has prepared findings regarding this rulemaking on incorporation by reference of transportation conformity amendments as required by federal rule. These findings are prepared under IC 13-14-9-8 and are as follows:

- (1) This rule is the direct adoption of federal requirements that are applicable to Indiana and it contains no amendments that have a substantive effect on the scope or intended application of the federal rule.
- (2) Indiana is required by federal law to incorporate transportation conformity requirements as part of its transportation conformity SIP.
- (3) The public will benefit from prompt adoption of this rule, because the state will be able to legally enforce criteria and procedures for determining if transportation activities conform to the new 8-hour ozone and PM<sub>2.5</sub> NAAQS.
- (4) I have determined that under the specific circumstances pertaining to this rule, there would be no benefit to the environment or to persons to be regulated or otherwise affected by this rule from the first and second public comment periods.
- (5) The draft rule is hereby incorporated into these findings.

Thomas W. Easterly  
Commissioner  
Indiana Department of Environmental Management

#### **ADDITIONAL INFORMATION**

Additional information regarding this action may be obtained from Sky Schelle, Rule Development Section, Office of Air Quality (317) 234-3533 or (800) 451-6027 (in Indiana).

#### **DRAFT RULE**

SECTION 1. 326 IAC 19-2-1 IS AMENDED TO READ AS FOLLOWS:

**326 IAC 19-2-1 Applicability; incorporation by reference of federal standards**

**Authority:** IC 13-14-8; IC 13-17-3-4; IC 13-17-3-11

**Affected:** IC 13-15; IC 13-17

Sec. 1. (a) This rule, unless specifically exempted in the applicability section of 40 CFR 93, Subpart A\*, applies to transportation plans, programs, and projects in nonattainment or maintenance areas for transportation-related criteria pollutants that are developed, funded, or approved by the United States Department of Transportation (DOT) and by metropolitan planning organizations (MPOs) or other recipients of funds under Title 23 United States Code (U.S.C.) or the Federal Transit Laws.

(b) This rule applies to regionally significant projects, regardless of funding source, located in nonattainment or maintenance areas for transportation-related criteria pollutants for which the area is designated nonattainment or has a maintenance plan.

(c) The air pollution control board incorporates by reference the following:

(1) 40 CFR 51, Subpart T\*. ~~“Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded, or Approved under Title 23 U.S.C. or the Federal Transit Laws”\*~~.

(2) 40 CFR 93, Subpart A\*. ~~“Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded, or Approved under Title 23 U.S.C. or the Federal Transit Laws”\*~~, with the exception of Section 93.102(d)\*. **as amended by 69 FR 40072, July 1, 2004\*.**

\*These documents are incorporated by reference. Copies may be obtained from the Government Printing Office, 732 North Capitol Street NW, Washington, D.C. 20401 or are also available for review and copying at the Indiana Department of Environmental Management, Office of Air Quality, Indiana Government Center-North, Tenth Floor, 100 North Senate Avenue, Indianapolis, Indiana 46204. (*Air Pollution Control Board; 326 IAC 19-2-1; filed Apr 28, 1997, 4:00 p.m.: 20 IR 2298; filed Oct 20, 1998, 4:45 p.m.: 22 IR 751; filed May 21, 2002, 10:20 a.m.: 25 IR 3085*)

***Notice of First Meeting/Hearing***

*Under IC 4-22-2-24, IC 13-14-8-1, IC 13-14-8-2, and IC 13-14-9, notice is hereby given that on June 1, 2005, at 1:00 p.m., at the Indiana Government Center-South, 402 West Washington Street, Conference Center Room A, Indianapolis, Indiana, the Air Pollution Control Board will hold a public hearing on new amendments to 326 IAC 19-2-1.*

*The purpose of this hearing is to receive comments from the public prior to preliminary adoption of these rules by the board. All interested persons are invited and will be given reasonable opportunity to express their views concerning the proposed amendments. Oral statements will be heard, but, for the accuracy of the record, all comments should be submitted in writing.*

*Additional information regarding this action may be obtained from Sky Schelle, Rule Development Section, Office of Air Quality, (317) 234-3533 or (800) 451-6027 (in Indiana).*

*Individuals requiring reasonable accommodations for participation in this event should contact the Indiana Department of Environmental Management, Americans with Disabilities Act coordinator at:*

*Attn: ADA Coordinator*

*Indiana Department of Environmental Management*

*100 North Senate Avenue*

*Indianapolis, Indiana 46204*

*or call (317) 233-0855) or (317) 233-6565 (TDD). Speech and hearing impaired callers may contact IDEM via the Indiana Relay Service at 1-800-743-3333. Please provide a minimum of 72 hours' notification.*

*Copies of these rules are now on file at the Office of Air Quality, Indiana Government Center-North, 100 North Senate Avenue, Tenth Floor East and Legislative Services Agency, One North Capitol, Suite 325, Indianapolis, Indiana and are open for public inspection.*