

# TRANSCRIPT OF PROCEEDINGS

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IN THE MATTER OF: )  
 )  
REVISIONS TO THE GENERAL )  
CONFORMITY REGULATIONS )

Pages: 1 through 21  
Place: Washington, D.C.  
Date: March 14, 2008

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## HERITAGE REPORTING CORPORATION

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# ORIGINAL

IN THE ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF: )  
 )  
REVISIONS TO THE GENERAL )  
CONFORMITY REGULATIONS )

Room 1153  
East Building  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C.

Friday,  
March 14, 2008

The parties met, pursuant to notice of the Agency,  
at 9:04 a.m.

BEFORE: THOMAS CODA  
General Conformity Lead, Air Quality  
Policy Division, Office of Air Quality  
Planning and Standards

APPEARANCES:

For the Environmental Protection Agency:

KRISTI SMITH, Esquire  
Environmental Protection Agency  
NAAQS Implementation and Trading Practice Group  
Office of General Counsel

For the Science Applications International Corporation:

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P R O C E E D I N G S

(9:04 a.m.)

1  
2  
3 MR. CODA: Good morning, everybody. I think  
4 we'll go ahead and get started. It's a little after  
5 9:00.

6 I'm just going to start by making an opening  
7 statement, and then we will open up the microphone for  
8 comments from anyone who has registered. If you are  
9 here and you haven't registered, and you want to  
10 speak, you should go out to the table outside and do  
11 that.

12 So good morning, and thank you for attending  
13 the public hearing on the Environmental Protection  
14 Agency's proposed revision to the General Conformity  
15 Regulation. I recognize that some of you may have  
16 traveled quite a distance -- at least I did -- to be  
17 here, and I appreciate your efforts.

18 My name is Tom Coda, and I am the program  
19 lead for the General Conformity Program in the Office  
20 of Air Quality Planning and Standards, Air Quality  
21 Policy Division, which is part of EPA's Office of Air  
22 and Radiation.

23 I will be chairing today's hearing. We are  
24 here today to listen to your comments on EPA's  
25 proposed revisions to the General Conformity

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1 Regulations.

2 As a reminder, this is a hearing, an  
3 opportunity for public comment on EPA's proposed rule.  
4 The panel members answer questions that seek to  
5 clarify what is, what we have proposed, but the  
6 purpose of this hearing is to listen to your comments,  
7 not to discuss or debate the proposals.

8 Before we begin the comment period, I'd like  
9 to briefly describe the proposed rule that is the  
10 subject of today's hearing. This proposed rule was  
11 published in the Federal Register on January 8, 2008.  
12 Congress added the General Conformity Provisions to  
13 the Clean Air Act in 1990 amendments to ensure that  
14 federal agencies, when taking actions which increase  
15 emissions of pollutants, did not interfere with  
16 states' abilities to attain and maintain the national  
17 ambient air quality standards, including the  
18 provisions of state implementation plans.

19 In 1993, the U.S. Environmental Protection  
20 Agency promulgated its general conformity regulations  
21 implementing the provisions from the 1990 amendments.  
22 The EPA has not revised the general conformity  
23 regulations since they were first promulgated in 1993.  
24 Since that time, EPA states, and other federal  
25 agencies have gained experience with the

1 implementation of the existing rules.

2 The EPA's goal in revising the regulations  
3 was to maintain environment protections by promoting  
4 upfront planning and information sharing between  
5 states and federal agencies, while also eliminating or  
6 reducing redundancy and administrative burdens on  
7 states and federal agencies.

8 Through a stakeholder process, several  
9 issues were identified regarding the implementation of  
10 the regulations. Therefore, EPA initiated a program  
11 to review, revise, and streamline the regulations.  
12 The EPA is proposing to make only specific revisions  
13 to the regulations which meet the following seven  
14 goals.

15 One, to clarify the process. Two, to delete  
16 outdated or unnecessary requirements. Three,  
17 authorize innovative and flexible approaches. Four,  
18 streamline the process and reduce the paperwork  
19 burden. Five, provide transition tools for  
20 implementing new air quality standards. Six,  
21 harmonize the regulations with other federal agency  
22 requirements. And seven, provide a better explanation  
23 of regulations and policies.

24 In most cases where the federal agency is  
25 granted additional flexibility, the states and tribes

1 should approve the use of these flexibilities. But in  
2 all cases, the additional flexibility must be  
3 consistent with Clean Air Act requirements.

4 Several of the proposed revisions encourage  
5 both federal agencies and states and tribes to take  
6 action in advance of a federal project's environmental  
7 review. Such advanced action should speed up review  
8 process for the individual projects, and reduce the  
9 delays for projects, without impairing the  
10 environmental review.

11 The EPA invites comment on this approach in  
12 all aspects of the proposal. In the proposal, EPA has  
13 requested comment on seven specific proposed changes.  
14 They are, one, whether to allow longer time period for  
15 offsetting or mitigating the emission increases where  
16 there is a net long-term air quality benefit. And  
17 what mechanisms would be used to require greater than  
18 one-to-one reductions for the offsets and mitigation  
19 measures that occur in later years. Or alternately,  
20 if greater than one-to-one reductions should be  
21 required.

22 Two, whether to exempt emissions from short-  
23 term construction activities, as well as the  
24 appropriate definition of a short-term project.

25 Three, what actions should be considered to

1 constitute modifications for the purposes of  
2 conformity, and under what conditions, if any,  
3 subsequent actions should be considered a new action,  
4 versus a modification of an action for which previous  
5 de minimis determination is made.

6 Four, whether precursors, Particulate Matter  
7 2.5, should be treated the same as precursors of ozone  
8 and direct emission of PM 2.5, and how they -- I'm  
9 sorry, I'll say it again. Four, whether precursors of  
10 PM 2.5 should be treated the same as precursors of  
11 ozone, and direct emissions of 2.5 will be treated the  
12 same as COM PM 10.

13 Five, whether to allow federal agencies to  
14 presume that emissions from prescribed burns will  
15 conform, provided the burning is conducted under a  
16 state-certified, approved smoke management plan.  
17 Alternately, whether burns conducted using state-  
18 approved basic smoke management practices in a  
19 nonattainment or maintenance area should be presumed  
20 to conform with the state implementation plan.

21 Six, whether to limit the offsets of  
22 nonattainment and maintenance area of equal or higher  
23 classification, or permit broader application of all  
24 nonattainment and maintenance areas.

25 Seven, whether demonstrating conformity to a

1 budget in a milestone plan, in the absence of an  
2 attainment demonstration, is adequate to ensure that  
3 emissions from the action will not interfere with  
4 timely attainment of the NAAQS.

5 Additional information on the proposed rule  
6 can be found in the factsheet that is available on the  
7 web. Publications of the rule, on the January 8,  
8 2008, mark the beginning of a 60-day public comment  
9 period, which was to close March 10, 2008. However,  
10 in an announcement of this public hearing, we extended  
11 the comment period until April 14, 2008. We have a  
12 handout available at the registration table area with  
13 detailed information for submitting written comments.  
14 EPA plans to issue a final rule later this year, after  
15 considering all the comments.

16 Now let me turn my attention to this comment  
17 portion of today's hearing. We will be preparing a  
18 written transcript of the hearing. The transcript  
19 will be available as part of the official record of  
20 the rule.

21 Today's hearing will work as follows. I  
22 will call scheduled speakers to the microphone. If  
23 there are several of them, I may call them in pairs.  
24 Please state your name and your affiliation. It would  
25 be helpful to the court reporter if you could also

1 spell your name.

2 In order to be fair to everyone, we are  
3 asking that you limit your testimony to five minutes  
4 each if there are others waiting to speak, and to  
5 remain at the microphone until both speakers have  
6 spoken.

7 After you finish your testimony, a panel  
8 member may ask clarification questions. As I  
9 mentioned, we are transcribing today's hearing, and  
10 each speaker's oral testimony will become part of the  
11 official record. Please be sure to give a copy of any  
12 written comments to our staff at the registration  
13 table. We will put the full text of your written  
14 comments into the rules docket for you.

15 We will try to ensure that everyone has an  
16 opportunity to comment. If you would like to testify  
17 and have not registered to do so yet, please sign up  
18 at the registration table. We will take breaks  
19 periodically, if needed.

20 For those of you who have already registered  
21 to speak, we have tried to accommodate your requests  
22 for specific timeslots. We ask for your patience as  
23 we proceed through this list. We may need to make  
24 some minor adjustments throughout the day.

25 So now I'd like to introduce the EPA's

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1 representatives on our panel. Again, I'm Tom Coda,  
2 General Conformity Lead in the Air Quality Policy  
3 Division within the Office of Air Quality Planning and  
4 Standards.

5 To my left is Kristi Smith. She is an  
6 attorney for the NAAQS Implementation and Trading  
7 Practices Group within the Office of General Counsel.  
8 And also up here with me is Flint Webb, who provides  
9 contract support on this rulemaking.

10 So I'd like to thank you again for  
11 participating today, and let's get started. I think  
12 the first person scheduled to speak was Bill Baker.  
13 Bill? Becker, I'm sorry.

14 MR. BECKER: Good morning. This is so  
15 exciting. Good morning. My name is Bill Becker. I  
16 am the Executive Director of NACAA, the National  
17 Association of Clean Air Agencies, the organization of  
18 air pollution control officials and agencies in 53  
19 states and territories, and over 165 major  
20 metropolitan areas across the country. I'd like to  
21 thank EPA for this opportunity to provide our initial  
22 comments on EPA's proposed revisions to its general  
23 conformity regulations that were published earlier  
24 this year.

25 General conformity is an important provision

1 of the Clean Air Act of 1990. Section 176(c) of the  
2 Act clearly illustrates the intent of Congress with  
3 respect to this program by explicitly requiring  
4 federal actions to conform to the applicable state  
5 implementation plan, and to find conforming state  
6 action as one that does not, one, cause or contribute  
7 to a new violation of any health-based, air quality  
8 standard in any area; two, increase the severity or  
9 frequency of an existing violation of any standard in  
10 any area; or three, delay timely attainment of any  
11 standard required interim emission reduction or other  
12 milestone in any area.

13 NACAA participated actively in stakeholder  
14 discussions convened by EPA when the Agency developed  
15 the initial version of the general conformity rule in  
16 1993. And at that time, we had hoped the outcome  
17 would be a comprehensive planning process for  
18 addressing federal actions that result in air  
19 emissions that are not otherwise captured by state or  
20 federal review, but whose contributions to air  
21 pollution levels are no less significant.

22 We were, however, extremely disappointed  
23 that the outcome was quite the opposite. A weak  
24 regulation that in our association's estimation failed  
25 to achieve the purpose, failed to achieve the purpose

1 Congress intended.

2 We are now further disappointed that in this  
3 proposal, EPA seeks, under the auspices of  
4 flexibility, innovation, and streamlining, to weaken  
5 the rule even further.

6 The intent of the Clean Air Act's General  
7 Conformity Provision is to encourage a process where  
8 federal agencies would work with their counterparts at  
9 state and local levels to coordinate review of  
10 projects whose air quality impacts are real, but which  
11 do not fit neatly into the stationary source box,  
12 where applicable processes and requirements are more  
13 well-defined.

14 Given the potential for a well-crafted  
15 general conformity program to play a meaningful role  
16 in future efforts by states, localities, and federal  
17 agencies to address emissions from federal projects,  
18 NACAA recommends that rather than further relaxing the  
19 rule, EPA should withdraw this proposal, and instead  
20 work with state, local, and federal agencies to craft  
21 a workable revision to the 1993 rule that facilitates  
22 the goals of innovation, while at the same time helps  
23 state and local agencies meet and maintain the  
24 federally mandated health-based air quality standards.

25 Although EPA bills its proposed rule

1 revisions as providing "innovative and flexible  
2 approaches," and "streamlining and burden reduction  
3 measures," upon closer review of the actual revisions,  
4 it appears these words are used to distract from the  
5 true effect of the proposed changes. Which is the  
6 virtual elimination of what little effectiveness there  
7 is in this already weak rule.

8           Understanding the real impacts requires  
9 burrowing into the text of the proposed changes to  
10 definitions which EPA describes in the preamble as  
11 "minor." For example, one of these so-called minor  
12 changes would allow project applicants to segregate  
13 project emissions among two different air quality  
14 management areas to avoid triggering state review.

15           Another change, also labeled by EPA as  
16 minor, would allow the definition of "temporary" to  
17 apply to activities that may go on for as long as five  
18 years. Our association strongly objects not only to  
19 both of these proposed definition changes, as well as  
20 others, but also to EPA's characterization of them as  
21 minor.

22           It also appears that EPA is attempting in  
23 the proposed rule to replicate and recycle several new  
24 source review concepts, including some that have not  
25 been adopted. These provisions include voluntary

1 development of a facilitywide emissions limit for  
2 general conformity purposes, the use of offsets  
3 allowing both interprecursor offsets -- that is, NOX  
4 reductions to offset VOC reductions -- and obtaining  
5 emission offsets from another nearby nonattainment or  
6 maintenance area of equal or higher classification.  
7 And permission for temporary activities without  
8 requiring agency review.

9 Further, by EPA's own admission, the 10-  
10 percent significance threshold for general conformity  
11 has very rarely, if ever, been triggered over the past  
12 15 years. NACAA believes that rather than eliminating  
13 this clearly ineffective threshold entirely, as EPA  
14 proposes, the Agency should strengthen it to a more  
15 meaningful level.

16 EPA also seeks comments on two alternatives  
17 fore essentially exempting from general conformity  
18 emissions from prescribed fires. Under one  
19 alternative, emissions from prescribed fire would be  
20 presumed to conform if the burn is conducted under  
21 basic smoke-management practices.

22 NACAA believes this option is unacceptable.  
23 Because some basic smoke-management practices are in  
24 no way connected to air quality, and will not ensure  
25 that the prescribed burn and resulting emissions

1 conform to the SIP.

2 The other option, in which emissions from  
3 prescribed fire would be presumed to conform, if the  
4 burn is conducted under a state smoke-management plan,  
5 appears to have the potential of providing some degree  
6 of environmental protection. However, given the lack  
7 of detail in the proposal, and the fact that EPA has  
8 not yet promulgated its final wildland fire policy,  
9 it's unclear whether air quality would be adequately  
10 protected.

11 Among other proposed changes that are of  
12 concern to NACAA are the following. Allowing state  
13 and federal agencies to negotiate alternate schedules  
14 for mitigation measures, and allowing states to make  
15 enforceable commitments to include emissions in future  
16 SIPs without consideration of the potential impact of  
17 emissions from such actions on downwind states.

18 Exempting emissions from construction  
19 activity related to federal projects and exempting  
20 aircraft operations above 3,000 feet, notwithstanding  
21 the fact that many states know from experience that  
22 even above 3,000 feet, such emissions can have adverse  
23 air quality effects.

24 In addition, several years ago, when EPA  
25 adopted rules to transition ozone nonattainment areas

1 from the one-hour standard to the more protective  
2 eight-hour ozone standard, the general conformity rule  
3 was not updated to prevent backsliding under the Clean  
4 Air Act.

5 For example, areas previously classified as  
6 serious nonattainment under the one-hour standard that  
7 were classified as moderate under the eight-hour  
8 standard, realized a more lenient threshold for  
9 conformity review for oxides of nitrogen, 100 tons per  
10 year versus 50 tons per year, despite the need of  
11 these areas to further reduce emissions to meet the  
12 more protective ozone standard. NACAA believes this  
13 backsliding issue must be addressed.

14 In drafting Section 176 of the Clean Air  
15 Act, Congress clearly sought to ensure that the  
16 federal government shall be subject to and comply with  
17 the same federal, state, interstate, and local  
18 requirements, administrative authority and sanctions  
19 with respect to the control and abatement of air  
20 pollution, in the same manner and to the same extent  
21 as any nongovernmental entity.

22 Federal agencies are to be afforded no  
23 special privileges, and may do no less than  
24 nongovernmental entities.

25 NACAA believes it is imperative that this

1 tenet be preserved, and moreover, that the general  
2 conformity rule be amended to embody it, rather than  
3 evade it.

4 Our association will continue to study and  
5 analyze EPA's proposal in the coming weeks, and  
6 provide written comments prior to the close of the  
7 comment period. And I thank you for the opportunity  
8 to testify.

9 MR. CODA: Thank you. I actually do have  
10 just a couple --

11 MR. BECKER: I'm not running. Go ahead.

12 MR. CODA: -- simple questions, if I could,  
13 just to help clarify and maybe help you provide us  
14 better comments in your written comments.

15 You mentioned about the aircraft operations  
16 above 3,000 feet that states know from experience --

17 MR. BECKER: Yes.

18 MR. CODA: -- that those could impact, have  
19 adverse impacts. If, when you provide your written  
20 comments, if there is some specific specifics of that,  
21 either cases or studies or what backs that experience  
22 that leads to that conclusion, that would be helpful  
23 to know.

24 MR. BECKER: Sure. May I ask questions of  
25 you all?

1 MR. CODA: Sure, yes.

2 MR. BECKER: When you did your analysis, did  
3 you not find any examples of impacts above 3,000 feet?

4 MR. CODA: We relied on a study that the FAA  
5 had done, which is part of the record.

6 MR. BECKER: The FAA.

7 MR. CODA: Yes, had done that study.

8 MR. BECKER: So you relied on the one study?

9 MR. CODA: Yes.

10 MR. BECKER: Okay.

11 MR. CODA: They had done a study  
12 specifically looking at that issue, yes.

13 MR. BECKER: Okay, thank you.

14 MR. CODA: And I guess just the other thing,  
15 just for clarity. You mentioned all the states and  
16 agencies that your organization represents. Do these  
17 comments, are they representative of -- I mean, is  
18 there a consensus or majority, or how would you --

19 MR. BECKER: Well, let me answer it two  
20 ways. Let me answer it with a statement and a  
21 question.

22 I don't ask EPA whether the position that  
23 they articulate is unanimous or is representative of  
24 the final process, whatever you go through. Whatever  
25 comes out of EPA is EPA's position.

1           The same holds true with us. But to answer  
2 your question more directly, I don't know whether this  
3 is a unanimous position. I'm assuming it's not, but  
4 we go through our own process. We develop, we have a  
5 committee, the committee addresses these issues. This  
6 draft went out to every single state and local agency  
7 in the country. It embodies their comments.

8           And so I feel very comfortable that the  
9 comments that I'm reflecting here are representative  
10 of certainly a majority of the state and local  
11 agencies, and perhaps an overwhelming majority. But  
12 does it represent unanimity? Probably not, but I  
13 don't know that for a fact.

14           MR. CODA: That's clearly understandable.

15           MR. BECKER: Okay.

16           MR. CODA: I just wanted to know if you had  
17 a read on that. Great. That's all I have.

18           MS. SMITH: I just had one question. You  
19 had talked about the antibacksliding measures, and  
20 that we needed to address them in the rule. I just  
21 think, as Tom said, it might be helpful in your  
22 comments if you can be more specific about exactly how  
23 you think those should be addressed.

24           MR. BECKER: I think that's a very fair  
25 question to ask of us. I'm not prepared to provide

1 guidance now, but I'll make sure that we, that we  
2 address that in our written comments.

3 MR. CODA: Great.

4 MR. BECKER: Any other --

5 MR. CODA: No. There was only a couple  
6 things I wanted to get some clarity on, and hopefully  
7 help you provide us some more information.

8 MR. BECKER: Okay. Well, thanks very much  
9 for hosting this.

10 MR. CODA: Great, thanks for coming. Sure,  
11 thank you.

12 I don't, I haven't been informed that  
13 there's anyone else that is registered to speak, but  
14 the microphone is open if there's anyone here that  
15 would like to make comments. And not seeing anyone,  
16 we will, as we said in the notice we sent out, we will  
17 be here to accept comments an hour, at least an hour  
18 after the last scheduled speaker, which that speaker  
19 was the last scheduled speaker.

20 So what we will do now is we will take a  
21 temporary recess, but we will remain here. If anyone  
22 else comes to speak, we will listen to them. Right  
23 now it appears to be about 9:28, so we will definitely  
24 be here until 10:28. So I will now put this hearing  
25 in recess.

1 (Whereupon, a short recess was taken.)

2 MR. CODA: Okay. I'm reconvening this  
3 public hearing. It's now, what, is it -- that clock  
4 is wrong, isn't it -- 10:33? So there have been no  
5 more speakers signed in. It's been an hour since the  
6 last testimony was given. So at this point I will  
7 adjourn this hearing, at 10:33. Thanks.

8 (Whereupon, at 10:33 a.m., the hearing in  
9 the above-entitled matter was concluded.)

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REPORTER'S CERTIFICATE

DOCKET NO.: \_\_\_\_\_

CASE TITLE: Revisions to the General Conformity Regulations

HEARING DATE: 3/14/08

LOCATION: Washington, DC

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before Environmental Protection Agency.

Date: 3/14/08

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