

## 1100 Air Quality Management Section

### 1132 Transportation Conformity

Under federal SAFETEA – LU legislation that took effect on August 10, 2005, the federal transportation conformity requirements have been modified to streamline the requirements for state conformity SIPs. States are no longer required to address all of the federal conformity rule provisions in their conformity SIPs. Only the following sections of the federal rule are addressed in this regulation:

- 40 CFR 93.105, which addresses consultation procedures;
- 40 CFR 93.122(a)(4)(ii), which states that conformity SIPs must require that written commitments to control measures be obtained prior to a conformity determination if the control measures are not included in an MPO's transportation plan and TIP, and that such commitments be fulfilled; and
- 40 CFR 93.125(c), which states that conformity SIPs must require that written commitments to mitigation measures be obtained prior to a project level conformity determination, and that project sponsors comply with such commitments.

Although this change to 7 **DE Admin. Code** 1132 is extensive, the overall implementation and practice of transportation conformity does not change as the federal conformity rule applies for any provision not addressed in this Regulation.

11/11/2007

#### 1.0 Purpose

The purpose of this regulation is to implement section 176(c) of the Clean Air Act (CAA), as amended (42 U.S.C. 7401 et seq.), and the related requirements of 23 U.S.C. 109(j), with respect to the interagency consultation process and commitments to transportation control and mitigation measures.

This regulation only addresses the requirements of 40 CFR 93.105, 40 CFR 93.122(a)(4)(ii), and 40 CFR 93.125(c). All other conformity requirements are not addressed by this regulation, and are imposed solely pursuant to federal requirements.

All references to 40 C.F.R. Part 93 and 23 CFR Part 450 in this regulation refer to the Code of Federal Regulation publication of July 1, 2007.

11/11/2007

#### 2.0 Definitions

**“Applicable implementation plan”** means the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under CAA section 110, as amended, or promulgated under CAA section 110(c), as amended, or promulgated or approved pursuant to regulations promulgated under CAA section 301(d), as amended and which implements the relevant requirements of the CAA.

**“CAA”** means the Clean Air Act, as amended (42 U.S.C. 7401 et seq.).

**“Consultation Process Work Group”** means the body of agency representatives, as identified in 3.0 of this Regulation that are responsible for implementing this regulation.

**“Control strategy implementation plan revision”** means the implementation plan which contains specific strategies for controlling the emissions of and reducing ambient levels of

pollutants in order to satisfy CAA requirements for demonstrations of reasonable further progress and attainment (including implementation plan revisions submitted to satisfy CAA sections 172(c), 182(b)(1), 182(c)(2)(A), 182(c)(2)(B), 187(a)(7), 187(g), 189(a)(1)(B), 189(b)(1)(A), and 189(d); sections 192(a) and 192(b), for nitrogen dioxide.; and any other applicable CAA provision requiring a demonstration of reasonable further progress or attainment).

“**DelDOT**” means the Delaware Department of Transportation.

“**Department**” means the Delaware Department of Natural Resources and Environmental Control.

“**Design concept**” means the type of facility identified by the project, e.g., freeway, expressway, arterial highway, grade-separated highway, reserved right-of-way rail transit, mixed-traffic rail transit, exclusive busway, etc.

“**Design scope**” means the design aspects which will affect the proposed facility’s impact on regional emissions, usually as they relate to vehicle or person carrying capacity and control, e.g., number of lanes or tracks to be constructed or added, length of project, signalization, access control including approximate number and location of interchanges, preferential treatment for high-occupancy vehicles, etc.

“**DOT**” means the United States Department of Transportation.

“**Dover/Kent County MPO**” means the regional metropolitan planning organization for coordinating transportation planning in the Dover Urbanized area and the balance of Kent County. Members of the MPO Council include the Delaware Department of Transportation, the Delaware Transit Corporation, a representative of the Governor of Delaware, the City of Dover, Kent County municipalities and Kent County Levy Court. Membership in the MPO is established by the MPO agreement and is subject to change.

“**EPA**” means the Environmental Protection Agency.

“**FHWA**” means the Federal Highway Administration of DOT.

“**FHWA/FTA project, for the purpose of this regulation**” means any highway or transit project which is proposed to receive funding assistance and approval through the Federal-Aid Highway program or the Federal mass transit program, or requires Federal Highway Administration (FHWA) or Federal Transit Administration (FTA) approval for some aspect of the project, such as connection to an interstate highway or deviation from applicable design standards on the interstate system.

“**FTA**” means the Federal Transit Administration of DOT.

“**Highway project**” means an undertaking to implement or modify a highway facility or highway-related program. Such an undertaking consists of all required phases necessary for implementation. For analytical purposes, it must be defined sufficiently to:

- (1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;
- (2) Have independent utility or significance, i.e., be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and
- (3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

**“Hot-spot analysis”** means an estimation of likely future localized CO (Carbon Monoxide), PM<sub>10</sub> (Particulate Matter, 10 microns) and PM<sub>2.5</sub> (2.5 microns) pollutant concentrations and a comparison of those concentrations to the national ambient air quality standards. Hot-spot analysis assesses impacts on a scale smaller than the entire nonattainment or maintenance area, including, for example, congested roadway intersections and highways or transit terminals, and uses an air quality dispersion model to determine the effects of emissions on air quality.

**“Maintenance area”** means any geographic region of the United States previously designated nonattainment pursuant to the CAA Amendments of 1990 and subsequently redesignated to attainment subject to the requirement to develop a maintenance plan under section 175A of the CAA, as amended.

**“Metropolitan planning organization (MPO)”** means the policy board of an organization created as a result of the designation process in 23 U.S.C. 134(d).

**“Milestone”** has the meaning given in CAA sections 182(g)(1) and 189(c), as amended, for serious and above ozone nonattainment areas and PM<sub>10</sub> nonattainment areas, respectively. For all other nonattainment areas, a milestone consists of an emissions level and the date on which that level is to be achieved- as required by the applicable CAA provision for reasonable further progress towards attainment.

**“Motor vehicle emissions budget”** means that portion of the total allowable emissions defined in the submitted or approved control strategy implementation plan revision or maintenance plan for a certain date for the purpose of meeting reasonable further progress milestones or demonstrating attainment or maintenance of the NAAQS, for any criteria pollutant or its precursors, allocated to highway and transit vehicle use and emissions.

**“National ambient air quality standards (NAAQS)”** mean those standards established pursuant to Section 109 of the CAA.

**“NEPA”** means the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.).

**“Nonattainment area”** means any geographic region of the United States which has been designated as nonattainment under Section 107 of the CAA for any pollutant for which a national ambient air quality standard exists.

**“Project”** means a highway project or transit project.

**“Regionally significant project”** means a transportation project (other than an exempt project) that is on a facility which serves regional transportation needs (such as access to and from the area outside of the region, major activity centers in the region, major planned developments such as new retail malls, sports complexes, etc., or transportation terminals as well as most terminals themselves) and would normally be included in the modeling of a metropolitan area’s transportation network, including at a minimum all principal arterial highways and all fixed guideway transit facilities that offer an alternative to regional highway travel.

**“Salisbury/Wicomico MPO”** means the regional metropolitan planning organization for coordinating transportation planning in the portion of the urbanized area which includes Delmar, Delaware. Members of the MPO Council include the Delaware Department of Transportation (non-voting), the Maryland Department of Transportation, Wicomico County (MD), City of Salisbury (MD), City of Fruitland (MD), Town of Delmar (MD), Town of Delmar (DE) (non-voting), and the Tri-County Council for the Lower Eastern Shore of Maryland. Membership in the MPO is established by the MPO agreement and is subject to change.

**“Standard”** means a national ambient air quality standard.

**“Transit”** means mass transportation by bus, rail, or other conveyance which provides general or special service to the public on a regular and continuing basis. It does not include school buses or charter or sightseeing services.

**“Transit project”** means an undertaking to implement or modify a transit facility or transit-related program; purchase transit vehicles or equipment; or provide financial assistance for transit operations. It does not include actions that are solely within the jurisdiction of local transit agencies, such as changes in routes, schedules, or fares. It may consist of several phases. For analytical purposes, it must be defined inclusively enough to:

- (1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;
- (2) Have independent utility or independent significance, i.e., be a reasonable expenditure even if no additional transportation improvements in the area are made; and
- (3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

**“Transportation control measure (TCM)”** means any measure that is specifically identified and committed to in the applicable implementation plan, including a substitute or additional TCM that is incorporated into the applicable SIP through the process established in CAA section 176(c)(8), that is either one of the types listed in CAA section 108, or any other measure for the purpose of reducing emissions or concentrations of air pollutants from transportation sources by reducing vehicle use or changing traffic flow or congestion conditions.

**“Transportation improvement program (TIP)”** means a transportation improvement program developed by a metropolitan planning organization under 23-U.S.C. 134(j).

**“Transportation plan”** means the official intermodal metropolitan transportation plan that is developed through the metropolitan planning process for the metropolitan planning area, developed pursuant to 23 CFR Part 450.

**“Transportation project”** means a highway project or a transit project.

**“WILMAPCO”** means the Wilmington Area Planning Council, as designated by the Governors of Delaware and Maryland, is the MPO for New Castle County, Delaware and Cecil County, Maryland. Within the framework of Federal law and regulation, it serves as the transportation planning coordinating agency for the two-county WILMAPCO region, and its policies are established by the WILMAPCO Council, whose members are a representative of the Governors of Delaware and Maryland; the Delaware Secretary of Transportation, the Director of the Delaware Transit Corporation, the Mayor of Wilmington, the County Executive of New Castle County, New Castle and Cecil Counties Municipalities’ representatives, and Cecil County Commissioner.

**“Written commitment for the purposes of this regulation”** means a written commitment that includes a description of the action to be taken; a schedule for the completion of the action; a demonstration that funding necessary to implement the action has been authorized by the appropriating or authorizing body; and an acknowledgment that the commitment is an enforceable obligation under the applicable implementation plan.

11/11/2007

**3.0 Consultation**

3.1 General.

This regulation provides procedures for interagency consultation (Federal, State, and local) and resolution of conflicts. Such consultation procedures shall be undertaken by WILMAPCO, the Dover/Kent County MPO, the Salisbury/Wicomico MPO, DeIDOT and DOT with the Department and EPA before making conformity determinations, and by the Department and EPA with WILMAPCO, the Dover/Kent County MPO, the Salisbury/Wicomico MPO, DeIDOT, and DOT in developing applicable implementation plans.

3.2 Interagency consultation procedures: General factors.

3.2.1 Agency representation, roles and responsibilities.

3.2.1.1 Representatives of WILMAPCO, the Dover/Kent County MPO, the Salisbury/Wicomico MPO, the Department and DeIDOT shall undertake an interagency consultation process in accordance with this section and with local or regional offices of EPA, FHWA, and FTA on the development of the implementation plan, the list of TCMs in the applicable implementation plan, the unified planning work program under 23 CFR §450.314, the transportation plan, the TIP, any revisions to the preceding documents, and all conformity determinations required by 40 CFR Part 51 and 93.

3.2.1.2 The Department shall be the lead agency responsible for assuring the adequacy of the interagency consultation process with respect to the development of applicable implementation plans and control strategy implementation plan revisions and the credits associated with the list of TCMs in the applicable implementation plan. In their respective areas, WILMAPCO, the Dover/Kent County MPO or the Salisbury/Wicomico MPO, shall be the lead agency responsible for preparing the final document or decision and for assuring the adequacy of the interagency consultation process with respect to the development of the unified planning work program under 23 CFR § 450.314, the transportation plan, the TIP, and any amendments or revisions thereto. In the case of non-metropolitan areas, DeIDOT shall be the lead agency responsible for preparing the final document or decision and for assuring the adequacy of the interagency consultation process with respect to the development of the statewide transportation plan, the STIP, and any amendments or revisions thereto. The Dover/Kent County MPO, the Salisbury/Wicomico MPO, and WILMAPCO shall be the lead agency responsible for preparing the final document or decision and for assuring the adequacy of the interagency consultation process with respect to any determinations of conformity under this regulation for which the MPO is responsible.

3.2.1.3 In addition to the lead agencies identified in 3.2.1.2 of this regulation, other agencies entitled to participate in any interagency consultation process under this regulation include DeIDOT, WILMAPCO, the Salisbury/Wicomico MPO and the Dover/Kent County MPO, the Federal Highway Administration regional office and State division office, the Federal Transit Administration regional office, the US Environmental Protection Agency, the Maryland Department of the Environment, the Maryland Department of Transportation, the Department, and any local transportation agency or local government.

3.2.1.4 It shall be the role and responsibility of each lead agency in an interagency consultation process, as specified in 3.2.1.2 of this regulation, to confer with all other agencies identified under 3.2.1.3 of this regulation with an interest in the

document to be developed, provide all appropriate information to those agencies needed for meaningful input, solicit early and continuing input from those agencies, conduct the consultation process described in 3.2 of this regulation, where required, assure policy-level contact with those agencies, and, (except for actions subject to 3.3.1.6 of this regulation) prior to taking any action, consider the views of each such agency and respond to those views submitted in a timely, substantive written manner prior to any final decision on such document, and assure that such views and written response are made part of the record of any decision or action. It shall be the role and responsibility of each agency specified in 3.2.1.2 of this regulation, when not fulfilling the role and responsibilities of a lead agency, to confer with the lead agency and other participants in the consultation process, review and provide written comments on all proposed and final documents and decisions in a timely manner, attend consultation and decision meetings, assure policy-level contact with other participants, provide input on any area of substantive expertise or responsibility (such as planning assumptions, modeling, information on status of TCM implementation, and interpretation of regulatory or other requirements), and provide technical assistance to the lead agency or consultation process in accordance with this paragraph when requested.

3.2.1.5 Specific roles and responsibilities of various participants in the interagency consultation process shall be as follows:

3.2.1.5.1 The Department shall be responsible for developing:

3.2.1.5.1.1 emissions inventories,

3.2.1.5.1.2 emissions budgets,

3.2.1.5.1.3 air quality modeling,

3.2.1.5.1.4 attainment demonstrations,

3.2.1.5.1.5 control strategy implementation plan revisions,

3.2.1.5.1.6 updated motor vehicle emissions factors, and

3.2.1.5.1.7 involving the WILMAPCO, the Dover/Kent County MPO, the Salisbury/Wicomico MPO or DeIDOT continuously in the process.

3.2.1.5.2 The Dover/Kent County MPO, the Salisbury/Wicomico MPO or WILMAPCO shall be responsible, for:

3.2.1.5.2.1 developing transportation plans, Unified Planning Work Programs (UPWP) and Transportation Improvement Programs (TIP),

3.2.1.5.2.2 evaluating Transportation Control Measures (TCM) impacts based on technical support provided by DeIDOT,

3.2.1.5.2.3 approving transportation and socioeconomic data and planning assumptions and providing such data and planning assumptions to the Department and DeIDOT for use in air quality analysis to determine conformity of transportation plans, TIPs, and projects,

3.2.1.5.2.4 monitoring implementation of regionally significant projects as identified in the TIP,

3.2.1.5.2.5 approving TCMs, providing input to policy decisions on emissions budgets, assuring the proper and timely completion of transportation modeling, regional emissions analyses and documentation of timely implementation of TCMs needed for conformity assessments.

3.2.1.5.3 DeIDOT shall be responsible for:

3.2.1.5.3.1 developing Statewide transportation plans and TIPs,

3.2.1.5.3.2 providing technical comments on motor vehicle emissions inputs,

3.2.1.5.3.3 distributing draft and final air quality documents to other agencies,

3.2.1.5.3.4 convening air quality technical review meetings on specific projects when requested by other agencies or as necessitated by changes in schedule or scope,

3.2.1.5.3.5 providing timely travel demand forecasting and on-road mobile source emission inventories, and

3.2.1.5.3.6 involving WILMAPCO, the Dover/Kent County MPO, the Salisbury/Wicomico MPO and the Department continuously in the Consultation Process as described in this section.

3.2.1.5.4 The Delaware Department of Transportation, Division of Motor Vehicles shall be responsible for providing data such as motor vehicle registration data for use in the on-road mobile source emissions model;

3.2.1.5.5 FHWA and FTA shall be responsible for:

3.2.1.5.5.1 assuring timely action on final findings of conformity, after consultation with other agencies as provided in this section and 40 CFR § 51.402,

3.2.1.5.5.2 providing guidance on conformity and the transportation planning process to agencies in interagency consultation.

3.2.1.5.6 EPA shall be responsible for:

3.2.1.5.6.1 reviewing and approving updated motor vehicle emissions factors, and

3.2.1.5.6.2 providing guidance on conformity criteria and procedures to agencies in interagency consultation.

### 3.2.2 Consultation Process Work Group - Procedures

3.2.2.1 As described herein, various agencies have the primary responsibility as lead agency for the preparation, development, or performance of the various tasks required as part of the conformity and attainment processes. These agencies shall form a CONSULTATION PROCESS WORK GROUP (Work Group). As part of the consultation process described herein, it shall be the affirmative obligation of each such lead agency having the responsibility for preparation of a final document as set forth in this section to initiate the consultation process by notifying other participants and convening a PRODUCT DEVELOPMENT TASK FORCE (Task Force) composed of the other members of the Work Group. Such Task Force shall be chaired by the representative of the lead agency, unless the group, by consensus, selects another chair. Each such Task Force will begin consultation meetings early in the process of developing the final document, and shall prepare

all drafts and final documents and major supporting documents, or appoint the representatives or agencies that will prepare such documents. The Work Group and each Task Force shall be made up of policy level representatives or their designees and shall be assisted by such technical committees or technical engineering, planning, public works, air quality and administrative staff of member agencies as the Work Group deems appropriate. The chair of each Task Force shall appoint the conveners of technical meetings and shall be responsible for the ongoing and continuous process described herein. The lead agency shall assure that all relevant documents and information are supplied to all participants in the informal and formal consultation process in a timely manner.

In the event that an agency member of the Work Group or Task Force other than the lead agency would like to convene the Work Group or Task Force, either in a formal or informal session to discuss any matter concerning or related to this regulation, said agency shall notify the lead agency of its specific request and the lead agency shall, within seven (7) days, convene a session of the Work Group or Task Force.

- 3.2.2.2 Regular consultation on major activities such as the development of an implementation plan revision, the development of a transportation plan, the development of a TIP, or any determination of conformity of transportation plans or TIPs, shall include meetings of the Work Group on a regular scheduled basis as shall be determined by the consensus of the work group, but no less than on a semi-annual basis, until an attainment demonstration is approved by EPA.
- 3.2.2.3 At each meeting of the Work Group, the following shall be reviewed and approved:
- 3.2.2.3.1 The schedule for all formal meetings;
  - 3.2.2.3.2 The status and schedule for delivery of all documents, materials or products required to be developed by these regulations;
  - 3.2.2.3.2 The status and schedule of all Standing Committee or Sub-Committee activities;
  - 3.2.2.3.4 All Public Meetings, Hearings or other public involvement.
- 3.2.2.4 The Work Group may establish Standing Sub-Committees or Sub-Committees of limited duration when the Work Group determines that such are necessary to accomplish specific objectives or tasks.
- 3.2.2.5 As described in this section, various agencies have the primary obligation for the preparation, development, performance or the responsibility (legal or otherwise) to be the lead agency for the various tasks required as part of the conformity-attainment process. It shall be the affirmative responsibility of each such lead agency to involve each of the other agencies, on an informal basis and in an ongoing, continuous manner in the said preparation, development, performance, etc., as frequently as possible without detracting from said agency's ability to complete the task.
- 3.2.2.6 For the purposes of any activity relating to this regulation in New Castle County, the Air Quality Subcommittee of the WILMAPCO Technical Advisory Committee shall have all Work Group authorities described in this regulation.
- 3.2.2.7 For the purposes of any activity relating to this regulation in Delmar, Delaware, the technical advisory committee of the Salisbury/Wicomico MPO shall have all Work Group authorities described in this regulation.



3.2.3 Each lead agency for any Task Force or Sub-Committee, as part of the interagency consultation process under this section (including any Federal agency) shall provide each final document that is the product of such consultation process (including applicable implementation plans or implementation plan revisions, transportation plans, TIPs, and determinations of conformity), together with all supporting information, to each other agency that has participated in the consultation process within 30 calendar days of adopting or approving such document or making such determination. Any such agency may supply a checklist of available supporting information, which such other participating agencies may use to request all or part of such supporting information, in lieu of generally distributing all supporting information.

3.2.4 A meeting that is scheduled or required for another purpose may be used for the purposes of consultation if the conformity consultation purpose is identified in the public notice for the meeting.

3.3 Interagency consultation procedures: Specific processes

3.3.1 An interagency consultation process in accordance with 3.2 of this regulation shall be undertaken for the following:

3.3.1.1 Evaluating and choosing each model (or models) and associated methods; and

3.3.1.2 Determining and providing written notification to the affected agencies (i.e., by letter from the Chairman to be included in the documentation) which minor arterials and other transportation projects should be considered "regionally significant" for the purposes of regional emissions analysis (in addition to those functionally classified as principal arterial or higher or fixed guide way systems or extensions that offer an alternative to regional highway travel), and which projects should be considered to have a significant change in design concept and scope from the transportation plan or TIP, to be initiated by DeIDOT and conducted in accordance with 3.2.2 of this regulation;

3.3.1.3 Evaluating whether projects otherwise exempt should be treated as non-exempt in cases where potential adverse emissions impacts may exist for any reason, to be initiated by DeIDOT and conducted in accordance with 3.2.2 of this regulation;

3.3.1.4 Making a determination, whether past obstacles to implementation of TCMs which are behind the schedule established in the applicable implementation plan have been identified and are being overcome, and whether State and local agencies with influence over approvals or funding for TCMs are giving maximum priority to approval or funding for TCMs, to be initiated by DeIDOT and conducted in accordance with 3.2.2 of this regulation. This consultation process shall also consider whether delays in TCM implementation necessitate revisions to the applicable implementation plan to remove TCMs or substitute TCMs or other emission reduction measures;

3.3.1.5 Making a determination whether a project should be included in the regional emissions analysis supporting the TIP's conformity determination, even if the project is not strictly included in the TIP for the purposes of MPO project selection or endorsement, and whether the project's design concept and scope have not changed significantly from those which were included in the regional emissions analysis, or in a manner which would significantly impact use of the facility, to be initiated by DeIDOT and conducted in accordance with 3.2.2 of this regulation;

Identifying, projects located at sites in PM<sub>2.5</sub> nonattainment areas which have vehicle and roadway emission and dispersion characteristics which are essentially identical to those at sites which have violations verified by monitoring,

- and therefore require quantitative PM<sub>10</sub> hot-spot analysis, to be initiated by DelDOT and conducted in accordance with 3.2.2 of this regulation;
- 3.3.1.6 Notification of transportation plan or TIP revisions or amendments which merely add or delete exempt projects listed in 40 CFR §93.126, to be initiated by WILMAPCO, the Salisbury/Wicomico MPO, the Dover/Kent County MPO, or DelDOT in their respective areas, and conducted in accordance with 3.2.2 of this regulation, other than the requirement that such notice be provided prior to final action;
- 3.3.1.7 Determining what existing or forecast of vehicle miles traveled (VMT) to use in establishing or tracking emissions budgets, developing transportation plans, TIPs, or applicable implementation plans, or making conformity determinations, to be initiated by DelDOT and conducted in accordance with 3.2.2 of this regulation;
- 3.3.1.8 Determining what constitutes “reasonable professional practice” for the purpose of funding projects and performing emission analysis within the context thereof, to be initiated by DelDOT and conducted in accordance with 3.2.2 of this regulation;
- 3.3.1.9 Determining whether the project sponsor or MPO has demonstrated that the requirements of 40 CFR §93.118, and 40 CFR §93.124 are satisfied without a particular mitigation or control measure, as provided in 40 CFR §93.125, to be initiated by the Department and conducted in accordance with 3.2.2 of this regulation;
- 3.3.1.10 Any decision made under 3.3.1 of this regulation shall be conveyed in writing to all member agencies.
- 3.3.2 An interagency consultation process in accordance with 3.2 of this regulation shall be undertaken for the following:
- 3.3.2.1 Evaluating events which will require new conformity determinations to be initiated by WILMAPCO, the Salisbury/Wicomico MPO, the Dover/Kent County MPO, or DelDOT in their respective areas, and conducted in accordance with 3.2.2 of this regulation;
- 3.3.2.2 Consulting on emissions analysis for transportation activities which cross the borders of MPOs, or nonattainment areas, to be initiated by WILMAPCO, the Salisbury/Wicomico MPO, the Dover/Kent County MPO, or DelDOT in their respective areas, and conducted in accordance with 3.2.2 of this regulation.
- 3.3.3 Where the metropolitan planning area does not include the entire nonattainment or maintenance area, an interagency consultation process in accordance with 3.2 of this regulation involving the MPO and the State Department of Transportation shall be undertaken for cooperative planning and analysis for purposes of determining conformity of all projects outside the metropolitan area and within the nonattainment or maintenance area, to be initiated by WILMAPCO the Salisbury/Wicomico MPO or the Dover/Kent County MPO in their respective areas, and conducted in accordance with 3.2.2 of this regulation.
- 3.3.4 Regionally significant project - policy and procedures
- 3.3.4.1 An interagency consultation process in accordance with 3.2 of this regulation and including recipients of funds designated under title 23 U.S.C. or the Federal Transit Act shall be undertaken to assure that plans for construction of regionally significant projects which are not FHWA/FTA projects (including projects for which alternative locations, design concept and scope, or the no-build option are still

being considered), including all those by recipients of funds designated under title 23 U.S.C. or the Federal Transit Act are disclosed to the MPO on a regular basis, and are included in the TIP.

- 3.3.4.2 The sponsor of any such regionally significant project, and any agency that is responsible for taking action or actions on any such project (or otherwise) shall disclose such project to the MPO in a timely manner. Such disclosure shall be made not later than the first occasion on which any of the following actions is sought: any policy board action necessary for the project to proceed, the issuance of administrative permits for the facility or for construction of the facility, the execution of a contract to design or construct the facility, the execution of any indebtedness for the facility, any final action of a board, commission or administrator authorizing or directing employees to proceed with design, permitting or construction of the project, or the execution of any contract to design or construct or any approval needed for any facility that is dependent on the completion of the regionally significant project. To help assure timely disclosure, the sponsor of any potential regionally significant project shall disclose to the MPO annually, not later than June 1 for the TIP currently being developed each year, each project for which alternatives have been identified through the NEPA process, and in particular, any preferred alternative that may be a regionally significant project.
- 3.3.4.3 In the case of any such regionally significant project that has not been disclosed to the MPO and other interested agencies participating in the consultation process in a timely manner, such regionally significant project shall not be considered to be included in the regional emissions analysis supporting the currently conforming TIP's conformity determination and not to be consistent with the motor vehicle emissions budget in the applicable implementation plan.
- 3.3.5 An interagency consultation process in accordance with 3.2 of this regulation involving the MPO and other recipients of funds designated under title 23 U.S.C. or the Federal Transit Act shall be undertaken for developing assumptions regarding the location and design concept and scope of projects which are disclosed to the MPO as required by 3.3.4 of this regulation but whose sponsors have not yet decided these features, in sufficient detail to perform the regional emissions analysis according to the requirements of 40 CFR §93.122, to be initiated by DeIDOT and conducted in accordance with 3.2.2 of this regulation.
- 3.3.6 An interagency consultation process in accordance with 3.2 of this regulation shall be undertaken for the design, schedule, and funding of research and data collection efforts related to regional transportation model development (such as household/ travel transportation surveys), to be initiated by DeIDOT and conducted in accordance with 3.2 of this regulation.
- 3.4 Submittal process for determinations and amendments

Conformity is an affirmative responsibility of the Federal agency supporting the action. This final determination will be based on information developed by WILMAPCO, the Dover/Kent County MPO, the Salisbury/Wicomico MPO or DeIDOT in their respective areas, but FHWA/FTA will make an independent determination.

To accomplish this determination, the following procedures must be followed:

- 3.4.1 The completed air quality conformity determination, necessary supporting documentation and the TIP will be submitted to the FHWA Division Office and the FTA Regional Office. The FHWA Division Office will forward a copy of the conformity determination and TIP (including both highway and transit projects) to the EPA Regional Office for review and

comment. EPA will respond in writing, to the FTA Regional Office and FHWA Division Office, as soon as possible but not later than 30 days from the date of the FHWA transmittal.

- 3.4.2 EPA comments will be resolved by FHWA and FTA, in concert with EPA, with WILMAPCO, the Dover/Kent County MPO, the Salisbury/Wicomico MPO or DeIDOT in their respective areas, as necessary.
  - 3.4.3 FHWA and FTA will jointly prepare correspondence to make the conformity finding. Joint conformity findings will be addressed to WILMAPCO (with a copy to DeIDOT), to the Dover/Kent County MPO (with a copy to DeIDOT), the Salisbury/Wicomico MPO (with a copy to DeIDOT) or to DeIDOT in their respective areas, with copies to EPA and FTA. The findings of FTA and FHWA together constitute the DOT conformity findings.
  - 3.4.4 The FHWA Division Office will send a copy of the signed conformity determination and the TIPs to the Regional Office.
  - 3.4.5 In the event that WILMAPCO, the Dover/Kent County MPO, the Salisbury/Wicomico MPO or DeIDOT in their respective areas, wishes to amend the TIP to add projects that are exempt from the conformity analysis requirement, FHWA or FTA or both, if necessary, will concur in the amendment and re-affirm the original DOT conformity finding by letter. This re-affirmation letter will reference the date or dates of the original FHWA and FTA findings. In cases where the amendment involves projects that are not exempt, a new conformity analysis and determination will be required from WILMAPCO, the Dover/Kent County MPO, the Salisbury/Wicomico MPO or DeIDOT in their respective areas, and will, in turn, require a new DOT conformity finding.
  - 3.4.6 TIP amendments from non-attainment areas that require a new or revised conformity determination (i.e., addition of new exempt projects or scope changes to existing exempt projects in the TIP) require an FHWA/FTA conformity determination prior to being added to the TIP and STIP.
- 3.5 Department concurrence.
- 3.5.1 It is the responsibility of the Department to evaluate a complete conformity determination made by WILMAPCO, the Dover/Kent County MPO, the Salisbury/Wicomico MPO or DeIDOT in their respective areas, and a minimum of seven working days shall be provided to the Department to perform this evaluation. The Department must concur with this determination within 14 days of the date after the agency initiates public notice in any such final determination of conformity. If the Department does not take action within 14 days of such notice of public notice, WILMAPCO, the Dover/Kent County MPO, the Salisbury/Wicomico MPO or DeIDOT, in their respective areas, may proceed with the final determination.
  - 3.5.2 Any conflict among State agencies or between State agencies and WILMAPCO the Dover/Kent County MPO or the Salisbury/Wicomico MPO shall be escalated to the Governor if the conflict cannot be resolved by the heads of the involved agencies within 30 days of the Department finding of non-concurrence. In the first instance, such agencies shall make every effort to resolve any difference, including personal meetings between the heads of such agencies or their policy-level representatives, to the extent possible.
  - 3.5.3 The Governor may delegate the role of hearing any such appeal under this subsection and of deciding whether to concur in the conformity determination to another official or agency within the State, but not to the head or staff of the Department, DeIDOT, a State transportation commission or board, any agency that has responsibility for only one of these functions, WILMAPCO, the Dover/Kent County MPO or the Salisbury/Wicomico MPO.

3.6 Public consultation procedures.

Agencies making conformity determinations (MPOs, DelDOT, etc. as appropriate) on transportation plans, programs, and projects shall establish and continuously implement a proactive public involvement process which provides opportunity for public review and comment prior to taking formal action on a conformity determination for all transportation plans and TIPs consistent with the requirements of 23 CFR part 450, including §450.316(b)(1), §450.322(c), and §450.324(c). In addition, any such agency must specifically address in writing all public comments that known plans for a regionally significant project which is not receiving FHWA or FTA funding or approval have not been properly reflected in the emissions analysis supporting a proposed conformity finding for a transportation plan or TIP. Any such agency shall also provide opportunity for public involvement in conformity determinations for projects to the extent otherwise required by law (such as NEPA). The opportunity for public involvement provided under this subsection shall include reasonable access to information, emissions data, analyses, models and modeling assumptions used to perform a conformity determination, and the obligation of any such agency to consider and respond to significant comments. No transportation plan, TIP, or project may be found to conform unless the determination of conformity has been subject to a public involvement process in accordance with this subsection, without regard to whether the DOT has certified any process under 23 CFR Part 450.

11/11/2007

**4.0 Written Commitments for Control and Mitigation Measures**

- 4.1 Written commitments for control measures that are not included in the transportation.
- 4.2 Written commitments for mitigation measures must be obtained prior to a positive conformity determination, and that project sponsors must comply with such commitments.

**1 DE Reg. 1625 (04/01/98)**

**11 DE Reg. 682 (11/01/07)**

**12 DE Reg. 347 (09/01/08)**