

# DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

## DIVISION OF AIR AND WASTE MANAGEMENT

Statutory Authority: 7 Delaware Code, Chapter 60, (7 Del.C. Ch. 60)

### PROPOSED

#### 1135 Conformity of General Federal Actions to the State Implementation Plans

#### ~~Regulation No. 35~~ 1135 Conformity of General Federal Actions to the State Implementation Plans

08/14/1996

~~Section 1~~

#### **1.0 Purpose**

- 1.1     ~~a)~~ The purpose of this regulation is to implement §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 (July 1, 1994), with respect to the conformity of general federal actions to the applicable implementation plan. Under those authorities, 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. This regulation sets forth policy, criteria, and procedures for demonstrating and assuring conformity of such actions to the applicable implementation plan.
- 1.2     ~~b)~~ Under CAA §176(c) and 40 CFR Part 51 Subpart W (July 1, 1994), a federal agency must make a determination that a federal action conforms to the applicable implementation plan in accordance with the requirements of this regulation before the action is taken.
- 1.3     ~~c)~~ The preceding sentence does not include federal actions where either:
  - 1.3.1     ~~(1)~~ A National Environmental Policy Act (NEPA) analysis was completed as evidenced by a final environmental assessment (EA), environmental impact statement (EIS), or finding of no significant impact (FONSI) that was prepared prior to January 31, 1994, or
  - 1.3.2     ~~(2)~~
    - 1.3.2.1     ~~(i)~~ Prior to January 31, 1994, an EA was commenced or a contract was awarded to develop the specific environmental analysis,
    - 1.3.2.2     ~~(ii)~~ 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 implementation plan pursuant to the agency's affirmative obligation under §176(c) of the CAA, and
    - 1.3.2.3     ~~(iii)~~ A written determination of conformity under §176(c) of the CAA has been made by the federal agency responsible for the federal action by March 15, 1994.
- 1.4     ~~d)~~ Notwithstanding any provision of this regulation, a determination that an action is in conformity with the applicable implementation plan does not exempt the action from any other requirements of the applicable implementation plan, NEPA, or the CAA.

08/14/1996

~~Section 2~~

#### **2.0 Definitions**

Terms used but not defined in this regulation shall have the meaning given them by the CAA and EPA's regulations, in that order of priority.

~~AFFECTED FEDERAL LAND MANAGER~~ **"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.

~~APPLICABLE IMPLEMENTATION PLAN~~ **"Applicable implementation plan"** means the portion or portions of the implementation plan, or most recent revision thereof, which has been approved under §110 of the CAA, or promulgated under §110(c) of the CAA (Federal implementation plan), or promulgated or approved pursuant to regulations promulgated under §301(d) of the CAA and which implements the relevant requirements of the CAA.

~~AREAWIDE AIR QUALITY MODELING ANALYSIS~~ **"Area-wide air quality modeling 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.

**"CAA"** means the Clean Air Act, as amended in 1990.

~~CAUSE OR CONTRIBUTE TO A NEW VIOLATION~~ **"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.

~~CAUSED BY, AS USED IN THE TERMS "DIRECT EMISSIONS" and "INDIRECT EMISSIONS,"~~ **"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.

~~CONSULTATION~~ **"Consultation"** means that one party confers with another identified party, provides all information to that party needed for meaningful input, and, prior to taking any action, considers the views of that party and responds to those views in a timely, substantive written manner prior to any final decision on such action. Such views and written response shall be made part of the record of any decision or action.

~~CRITERIA POLLUTANT OR STANDARD~~ **"Criteria pollutant or standard"** means any pollutant for which there is established a NAAQS at 40 CFR Part 50 (July 1, 1994).

~~DEPARTMENT~~ **"Department"** means the Department of Natural Resources and Environmental Control for the State of Delaware.

~~DIRECT EMISSIONS~~ **"Direct emissions"** mean 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.

~~EMERGENCY~~ **"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 regulation, such as natural disasters like hurricanes or earthquakes, civil disturbances such as terrorist acts, and military mobilizations.

~~EMISSIONS BUDGETS~~ are **"Emission budgets"** mean those portions of the total allowable emissions defined in an EPA-approved revision to the applicable implementation plan for a certain date for the purpose of meeting reasonable further progress milestones or attainment or maintenance demonstrations, for any criteria pollutant or its precursors, specifically allocated by the applicable implementation plan to mobile sources, to any stationary source or class of stationary sources, to any Federal action or class of action, to any class of area sources, or to any subcategory of the emissions inventory. The allocation system must be specific enough to assure meeting the criteria of §176(c)(1)(B) of the CAA. An emissions budget may be expressed in terms of an annual period, a daily period, or other period established in the applicable implementation plan.

~~EMISSION OFFSETS, FOR PURPOSES OF SECTION 8~~ are **"Emission offsets"** (for purpose of 8.0 of this regulation) mean emissions reductions which are quantifiable, consistent with the applicable implementation plan attainment and reasonable further progress demonstrations, surplus to reductions required by, and credited to, other applicable implementation plan provisions, enforceable under both

State of Delaware and Federal law, and permanent within the time frame specified by the program. Emissions reductions intended to be achieved as emissions offsets under this regulation must be monitored and enforced in a manner equivalent to that under EPA's New Source Review (NSR) rules.

~~EMISSIONS THAT A FEDERAL AGENCY HAS A CONTINUING PROGRAM RESPONSIBILITY FOR~~ **"Emissions that a federal agency has a continuing program responsibility for"** mean 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.

~~EPA~~ **"EPA"** means the Environmental Protection Agency.

~~FEDERAL ACTION~~ **"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.

~~FEDERAL AGENCY~~ **"Federal agency"** means, for purposes of this regulation, a Federal department, agency, or instrumentality of the Federal government.

~~INCREASE THE FREQUENCY OR SEVERITY OF ANY EXISTING VIOLATION OF ANY STANDARD IN ANY AREA~~ **"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 or would otherwise exist during the future period in question, if the project were not implemented.

~~INDIRECT EMISSIONS~~ **"Indirect emissions"** mean those emissions of a criteria pollutant or its precursors that:

- (1) are caused by the Federal action, but may occur later in time 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,
  - (i) traffic on, to, stimulated or accommodated by, a proposed facility which is related to increases or other changes in the scale or timing of operations of such facility;
  - (ii) emissions related to the activities of employees of contractors or Federal employees;
  - (iii) emissions related to employee commutation and similar programs to increase average vehicle occupancy imposed on all employers of a certain size in the locality;
  - (iv) emissions related to the use of Federal facilities under lease or temporary permit;
  - (v) 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~~

[NOTE: This term does not have the same meaning as given to an indirect source of emissions under §110(a)(5) of the CAA.]

~~LOCAL AIR QUALITY MODELING ANALYSIS~~ **"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.

~~MAINTENANCE AREA~~ **"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 §175A of the CAA.

~~MAINTENANCE PLAN~~ **Maintenance plan** means a revision to the applicable implementation plan, meeting the requirements of §175A of the CAA.

~~METROPOLITAN PLANNING ORGANIZATION (MPO)~~ is **Metropolitan planning organization (MPO)** means that organization designated as being responsible, together with the State of Delaware, for conducting the continuing, cooperative, and comprehensive planning process under 23 U.S.C. 134 and 49 U.S.C. 1607.

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

~~NATIONAL AMBIENT AIR QUALITY STANDARDS (NAAQS)~~ are **National ambient air quality standards (NAAQS)** mean those standards established pursuant to §109 of the CAA and include standards for carbon monoxide (CO), lead (Pb), nitrogen dioxide (NO<sub>2</sub>), ozone, particulate matter (PM<sub>10</sub>), and sulfur dioxide (SO<sub>2</sub>).

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

~~NONATTAINMENT AREA (NAA)~~ **Nonattainment area (NAA)** means any geographic area of the United States which has been designated as nonattainment under §107 of the CAA and described in 40 CFR Part 81 (July 1, 1990).

~~PRECURSORS OF A CRITERIA POLLUTANT ARE~~ **Precursors of a criteria pollutant** mean:

- (1) For ozone, nitrogen oxides (NO<sub>x</sub>) (unless an area is exempted from NO<sub>x</sub> requirements under §182(f) of the CAA), and volatile organic compounds (VOC); and
- (2) For PM<sub>10</sub>, those pollutants described in the PM<sub>10</sub> nonattainment area applicable implementation plan as significant contributors to the PM<sub>10</sub> levels.

~~REASONABLY FORESEEABLE EMISSIONS~~ are **Reasonably foreseeable emissions** mean projected future indirect emissions that are identified at the time the conformity determination is made; the location of such emissions is known to the extent adequate to determine the impact of such emissions; 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.

~~REGIONALLY SIGNIFICANT ACTION~~ **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.

~~REGIONAL WATER OR WASTEWATER PROJECTS~~ include **Regional water or wastewater projects** mean 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.

~~TOTAL OF DIRECT AND INDIRECT EMISSIONS~~ **Total of direct and indirect emissions** mean 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. Any emissions decreases used to reduce such total shall have already occurred or shall be enforceable under state and federal law. The portions of emissions which are exempt or presumed to conform under ~~Sections 3(e), (d), (e), or (f)~~ **3.3, 3.4, 3.5 or 3.6 of this regulation** are not included in the "total of direct and indirect emissions", except as provided in ~~Section 3(j)~~ **3.10 of this regulation**. 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.

08/14/1996

Section 3—

### **3.0 Applicability**

- 3.1** (a) Conformity determinations for federal actions 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.) must meet the procedures and criteria of ~~Regulation No. 32 7~~ **DE Admin. Code 1132**

(Transportation Conformity) of 7 DE Admin. Code 1100, the Delaware Regulations Governing the Control of Air Pollution.

3.2 ~~(b)~~ For federal actions not covered by ~~paragraph (a) of this Section 3.1 of this regulation~~, 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 ~~paragraphs (b)(1) or (2) of this Section 3.2.1 or 3.2.2 of this regulation~~.

3.2.1 ~~(1)~~ For purposes of ~~paragraph (b) of this Section 3.2 of this regulation~~, the following rates apply in nonattainment areas (NAAs):

Ozone (VOC or NO <sub>x</sub> )	Tons/Year
Serious NAAs	50
Severe NAAs	25
Extreme NAAs	10
Other ozone NAAs outside an ozone transport region	100
Marginal and moderate NAAs inside an ozone transport region	
VOC	50
NO <sub>x</sub>	100
Carbon monoxide	
All NAAs	100
SO <sub>2</sub> or NO <sub>2</sub>	
All NAAs	100
PM <sub>10</sub>	
Moderate NAAs	100
Serious NAAs.	70
Pb	
All NAAs	25

3.2.2 ~~(2)~~ For purposes of ~~paragraph (b) of this Section 3.2 of this regulation~~, the following rates apply in maintenance areas:

Ozone (NO <sub>x</sub> ), SO <sub>2</sub> or NO <sub>2</sub>	Tons/Year
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All maintenance areas	100
Ozone (VOC)	
Maintenance areas inside an ozone transport region	50
Maintenance areas outside an ozone transport region	100
Carbon monoxide	
All maintenance areas	10
PM <sub>10</sub>	
All maintenance areas	100
Pb	
All maintenance areas	25

3.3 ~~(e)~~ The requirements of this regulation shall not apply to:

3.3.1 ~~(1)~~ Actions where the total of direct and indirect emissions are below the emissions levels specified in ~~paragraph (b) of this Section 3.2 of this regulation.~~

3.3.2 ~~(2)~~ The following actions which would result in no emissions increase or an increase in emissions that is clearly de minimis:

3.3.2.1 ~~(i)~~ Judicial and legislative proceedings.

3.3.2.2 ~~(ii)~~ Continuing and recurring activities such as permit renewals where activities conducted will be similar in scope and operation to activities currently being conducted.

3.3.2.3 ~~(iii)~~ Rulemaking and policy development and issuance.

3.3.2.4 ~~(iv)~~ Routine maintenance and repair activities, including repair and maintenance of administrative sites, roads, trails, and facilities.

3.3.2.5 ~~(v)~~ Civil and criminal enforcement activities, such as investigations, audits, inspections, examinations, prosecutions, and the training of law enforcement personnel.

3.3.2.6 ~~(vi)~~ 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.

3.3.2.7 ~~(vii)~~ The routine, recurring transportation of material and personnel.

3.3.2.8 ~~(viii)~~ Routine movement of mobile assets, such as ships and aircraft, in homeport reassignments and stations (when no new support facilities or personnel are required) to perform as operational groups or for repair or overhaul.

3.3.2.9 (ix) Maintenance dredging and debris disposal where no new depths are required, applicable permits are secured, and disposal will be at an approved disposal site.

3.3.2.10 ~~(x)~~ 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, actions such as

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.

3.3.2.11 ~~(xi)~~ 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.

3.3.2.12 ~~(xii)~~ Planning, studies, and provision of technical assistance.

3.3.2.13 ~~(xiii)~~ Routine operation of facilities, mobile assets and equipment.

3.3.2.14 ~~(xiv)~~ Transfers of ownership, interests, and titles in land, facilities, and real and personal properties, regardless of the form or method of the transfer.

3.3.2.15 ~~(xv)~~ The designation of empowerment zones, enterprise communities, or viticultural areas.

3.3.2.16 ~~(xvi)~~ 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.

3.3.2.17 ~~(xvii)~~ Actions by the Board of Governors of the Federal Reserve System or any Federal Reserve Bank to effect monetary or exchange rate policy.

3.3.2.18 ~~(xviii)~~ Actions that implement a foreign affairs function of the United States.

3.3.2.19 ~~(xix)~~ 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.

3.3.2.20 ~~(xx)~~ 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.

3.3.2.21 ~~(xxi)~~ Actions by the Department of the Treasury to affect fiscal policy and to exercise the borrowing authority of the United States.

3.3.3 ~~(3)~~ The following actions where the emissions are not reasonably foreseeable:

3.3.3.1 ~~(i)~~ 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.

3.3.3.2 ~~(ii)~~ Electric power marketing activities that involve the acquisition, sale and transmission of electric energy.

3.3.4 ~~(4)~~ Individual actions which implement a decision to conduct or carry out an implementation plan, such as prescribed burning actions which are consistent with a land management plan that has been found to conform to the applicable implementation plan. Such land management plan shall have been found to conform within the past five years.

3.4 ~~(4)~~ Notwithstanding the other requirements of this regulation, a conformity determination is not required for the following Federal actions (or portion thereof):

3.4.1 ~~(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 (§173 of the CAA) or the prevention of significant deterioration (PSD) program (Title I, Part C of the CAA).

3.4.2 ~~(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 ~~paragraph (e) of this Section~~ 3.5 of this regulation.

- 3.4.3 ~~(3)~~ Research, investigations, studies, demonstrations, or training (other than those exempted under ~~Section 3(e)(2)~~ 3.3.2 of this regulation), where no environmental detriment is incurred or the particular action furthers air quality research, as determined by the Department which is responsible for the applicable implementation plan.
- 3.4.4 ~~(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).
- 3.4.5 ~~(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.
- 3.5 ~~(e)~~ Federal actions which are part of a continuing response to an emergency or disaster under ~~Section 3(d)(2)~~ 3.4.2 of this regulation and which are to be taken more than ~~6~~ six months after the commencement of the response to the emergency or disaster under ~~Section 3(d)(2)~~ 3.4.2 of this regulation are exempt from the requirements of this regulation only if:

  - 3.5.1 ~~(1)~~ The federal agency taking the actions makes a written determination that, for a specified period not to exceed an additional ~~6~~ six 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
  - 3.5.2 ~~(2)~~ For actions which are to be taken after those actions covered by ~~paragraph (e)(1) of this Section 3.5.1 of this regulation~~, the federal agency makes a new determination as provided in ~~paragraph (e)(1) of this Section 3.5.1 of this regulation~~.
- 3.6 ~~(f)~~ Notwithstanding other requirements of this regulation, individual actions or classes of actions specified by individual Federal agencies that have met the criteria set forth in either ~~paragraph (g)(1) or (g)(2)~~ 3.7.1 or 3.7.2 of this regulation and the procedures set forth in ~~paragraph (h) of this Section 3.8 of this regulation~~ are presumed to conform, except as provided in ~~paragraph (j) of this Section 3.10 of this regulation~~.
- 3.7 ~~(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 (g)(1) or (g)(2) of this Section 3.7.1 or 3.7.2 of this regulation~~:

  - 3.7.1 ~~(1)~~ The federal agency must clearly demonstrate using methods consistent with this regulation that the total of direct and indirect emissions from the type of activities which would be presumed to conform would not:

    - 3.7.1.1 ~~(i)~~ Cause or contribute to any new violation of any standard in any area;
    - 3.7.1.2 ~~(ii)~~ Interfere with provisions in the applicable implementation plan for maintenance of any standard;
    - 3.7.1.3 ~~(iii)~~ Increase the frequency or severity of any existing violation of any standard in any area; or
    - 3.7.1.4 ~~(iv)~~ 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 implementation plan for purposes of:

      - 3.7.1.4.1 ~~(A)~~ A demonstration of reasonable further progress;
      - 3.7.1.4.2 ~~(B)~~ A demonstration of attainment; or
      - 3.7.1.4.3 ~~(C)~~ A maintenance plan; or
  - 3.7.2 ~~(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 ~~paragraph (b) of this Section 3.2 of this regulation~~, based, for example, on similar actions taken over recent years.



- 3.8 ~~(h)~~ In addition to meeting the criteria for establishing exemptions set forth in ~~paragraphs (g)(1) or (g)(2) of this Section 3.7.1 or 3.7.2 of this regulation~~, the following procedures must also be complied with to presume that activities will conform:
- 3.8.1 ~~(1)~~ The federal agency must identify through publication in the Federal Register its list of proposed activities that are presumed to conform and the analysis, assumptions, emissions factors, and criteria used as the basis for the presumptions;
- 3.8.2 ~~(2)~~ The federal agency must notify the appropriate EPA Regional Office(s) ~~or Offices~~, the Department and, where applicable, the agency designated under §174 of the Act and the MPO and provide at least 30 days for the public to comment on the list of proposed activities presumed to conform;
- 3.8.3 ~~(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
- 3.8.4 ~~(4)~~ The federal agency must publish the final list of such activities in the Federal Register.
- 3.9 ~~(i)~~ Notwithstanding the other requirements of this regulation, when the total of direct and indirect emissions of any pollutant from a federal action does not equal or exceed the rates specified in ~~paragraph (b) of this Section 3.2 of this regulation~~, 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 ~~Sections 1 and 5 through 10 1.0 and 5.0 through 10.0 of this regulation~~ shall apply for the Federal action.
- 3.10 ~~(j)~~ Where an action presumed to be de minimis under ~~paragraphs (c)(1) or (c)(2) of this Section 3.3.1 or 3.3.2 of this regulation~~ or otherwise presumed to conform under ~~paragraph (f) of this Section 3.6 of this regulation~~ is a regionally significant action or where an action otherwise presumed to conform under ~~paragraph (f) of this Section 3.6 of this regulation~~ does not in fact meet one of the criteria in ~~paragraph (g)(1) of this Section 3.7.1 of this regulation~~, that action shall not be considered de minimis or presumed to conform and the requirements of ~~Sections 1 and 5 through 10 1.0 and 5.0 through 10.0 of this regulation~~ shall apply for the federal action.
- 3.11 ~~(k)~~ The provisions of this regulation shall apply in all nonattainment and maintenance areas.
- 3.12 ~~(l)~~ Any measures used to affect or determine applicability of this regulation, as determined under ~~this Section 3.0 of this regulation~~, must result in projects that are in fact de minimis, must result in such de minimis levels prior to the time the applicability determination is made, and must be state or federally enforceable. Any measures that are intended to reduce air quality impacts for this purpose must be identified (including the identification and quantification of all emission reductions claimed) and the process for implementation (including 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 timeliness for implementation. Prior to a determination of applicability, the Federal agency making the determination must obtain written commitments from the appropriate persons or agencies to implement any measures which are identified as conditions for making such determinations. Such written commitment shall describe such mitigation measures and the nature of the commitment, in a manner consistent with the previous sentence. After this implementation plan revision is approved by EPA, enforceability through the applicable implementation plan of any measures necessary for a determination of applicability will apply to all persons who agree to reduce direct and indirect emissions associated with a federal action for a conformity applicability determination.

08/14/1996

Section 4—

#### **4.0 Conformity Analysis**

- 4.1 ~~(a)~~ Any federal department, agency, or instrumentality of the federal government taking an action subject to 40 CFR Part 51 Subpart W (July 1, 1994), and 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.

08/14/1996

~~Section 5~~

## **5.0 Reporting Requirements**

- 5.1 ~~(a)~~ A federal agency making a conformity determination under ~~Section 8 8.0 of this regulation~~ must provide to the appropriate EPA Regional Office~~(s)~~ or Offices, the Department and, where applicable, affected Federal land managers, the agency designated under §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 and an opportunity for consultation on the draft conformity determination.
- 5.2 ~~(b)~~ A federal agency must notify the appropriate EPA Regional Office~~(s)~~ or Offices, the Department and, where applicable, affected federal land managers, the agency designated under §174 of the CAA and the MPO within 30 days after making a final conformity determination under ~~Section 8 8.0 of this regulation~~.

08/14/1996

~~Section 6~~

## **6.0 Public Participation and Consultation**

- 6.1 ~~(a)~~ Upon request by any person regarding a specific Federal action, a federal agency must make available for review its draft conformity determination under ~~Section 8 8.0 of this regulation~~ with supporting materials which describe the analytical methods, assumptions, and conclusions relied upon in making the applicability analysis and draft conformity determination.
- 6.2 ~~(b)~~ A federal agency must make public its draft conformity determination under ~~Section 8 8.0 of this regulation~~ by placing a notice by prominent advertisement in a daily newspaper of general circulation in the areas 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.
- 6.3 ~~(c)~~ A federal agency must document its response to all the comments received on its draft conformity determination under ~~Section 8 8.0 of this regulation~~ 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.
- 6.4 ~~(d)~~ A federal agency must make public its final conformity determination under ~~Section 8 8.0 of this regulation~~ for a Federal action by placing a notice by prominent advertisement in a daily newspaper of general circulation in the areas affected by the action within 30 days of the final conformity determination.

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~~Section 7~~

## **7.0 Frequency of Conformity Determinations**

- 7.1 ~~(a)~~ The conformity status of a federal action automatically lapses ~~5~~ five years from the date a final conformity determination is reported under ~~Section 5 5.0 of this regulation~~, unless the Federal action has been completed or a continuous program has been commenced to implement that Federal action within a reasonable time.
- 7.2 ~~(b)~~ Ongoing federal activities at a given site showing continuous progress are not new actions and do not require periodic redeterminations so long as the emissions associated with such activities are within the scope of the final conformity determination reported under ~~Section 5 5.0 of this regulation~~.

- 7.3 ~~(e)~~ 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 ~~Section 3(b)~~ 3.2 of this regulation, a new conformity determination is required.

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~~Section 8~~

**8.0 Criteria for Determining Conformity of General Federal Actions.**

- 8.1 ~~(a)~~ An action required under ~~Section 3~~ 3.0 of this regulation to have a conformity determination for a specific pollutant, will be determined to conform to the applicable implementation plan if, for each pollutant that exceeds the rates in ~~Section 3(b)~~ 3.2 of this regulation, or otherwise requires a conformity determination due to the total of direct and indirect emissions from the action, the action meets the requirements of ~~paragraph (c) of this Section~~ 8.3 of this regulation, and meets any of the following requirements:
- 8.1.1 (1) For any criteria pollutant, the total of direct and indirect emissions from the action.
- 8.1.2 (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 implementation plan or a measure similarly enforceable under State and Federal law that affects emission reductions so that there is no net increase in emissions of that pollutant;
- 8.1.3 (3) For any criteria pollutant, except ozone and nitrogen dioxide, the total of direct and indirect emissions from the action meet the requirements:
- 8.1.3.1 (i) specified in ~~paragraph (b) of this Section~~ 8.2 of this regulation, based on area-wide air quality modeling analysis and local air quality modeling analysis, or
- 8.1.3.2 (ii) specified in ~~paragraph (a)(5)~~ 8.1.5 of this regulation and, for local air quality modeling analysis, the requirement of ~~paragraph (b) of this Section~~ 8.2 of this regulation;
- 8.1.4 (4) For CO or PM<sub>10</sub>.
- 8.1.4.1 (i) Where the Department which is responsible for the applicable implementation plan determines (in accordance with ~~Sections 5 and 6~~ 5.0 and 6.0 of this regulation and consistent with the applicable implementation plan) 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 ~~paragraph (b) of this Section~~ 8.2 of this regulation, based on local air quality modeling analysis, or
- 8.1.4.2 (ii) Where the Department which is responsible for the applicable implementation plan determines (in accordance with ~~Sections 5 and 6~~ 5.0 and 6.0 of this regulation and consistent with the applicable implementation plan) 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 ~~paragraph (b) of this Section~~ 8.2 of this regulation, based on area-wide modeling, or meet the requirements of ~~paragraph (a)(5) of this Section~~; or 8.1.5 of this regulation.
- 8.1.5 (5) For ozone or nitrogen dioxide, and for purposes of ~~paragraphs (a)(3)(ii) and (a)(4)(ii) of this Section~~ 8.1.3.2 and 8.1.4.2 of this regulation, each portion of the action or the action as a whole meets any of the following requirements:
- 8.1.5.1 (i) Where EPA has approved a revision to an area's attainment or maintenance demonstration after 1990 and the Department makes a determination as provided in ~~paragraph (A)~~ 8.1.5.1.1 of this regulation or where the State makes a commitment as provided in ~~paragraph (B)~~ 8.1.5.1.2 of this regulation. Any such determination or commitment shall be made in compliance with ~~Sections 5 and 6~~ 5.0 and 6.0 of this regulation:
- 8.1.5.1.1 (A) The total of direct and indirect emissions from the action (or portion thereof) is determined and documented by the Department which is responsible for the applicable implementation plan 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 implementation plan.

8.1.5.1.2 ~~(B)~~ The total of direct and indirect emissions from the action (or portion thereof) is determined by the Department which is responsible for the applicable implementation plan 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 implementation plan and the Governor [or, if appropriate, the Governor's designee for SIP actions under State of Delaware law] makes a written commitment to EPA which includes the following:

8.1.5.1.2.1 ~~(I)~~ A specific schedule for adoption and submittal of a revision to the applicable implementation plan which would achieve the needed emission reductions prior to the time emissions from the Federal action would occur;

8.1.5.1.2.2 ~~(II)~~ Identification of specific measures for incorporation into the applicable implementation plan 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 implementation plan;

8.1.5.1.2.3 ~~(III)~~ A demonstration that all existing applicable implementation plan 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;

8.1.5.1.2.4 ~~(IV)~~ A determination that the responsible Federal agencies have required all reasonable mitigation measures associated with their action; and

8.1.5.1.2.5 ~~(V)~~ Written documentation including all air quality analyses supporting the conformity determination.

8.1.5.1.3 ~~(C)~~ Where a Federal agency made a conformity determination based on a state commitment under ~~subparagraph (a)(5)(i)(B) of this paragraph~~ 8.1.5.1.2 of this regulation, such a State commitment is automatically deemed a call for an implementation plan revision by EPA under §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 the State commits to revise the applicable implementation plan;

8.1.5.2 ~~(ii)~~ 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 implementation plan under ~~Regulation No. 32 7 DE Admin Code 1132 (Transportation Conformity). in the Delaware Regulations Governing the Control of Air Pollution;~~

8.1.5.3 ~~(iii)~~ The action (or portion thereof) fully offsets its emissions within the same nonattainment or maintenance area through a revision to the applicable implementation plan or an equally enforceable measure that affects 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;

8.1.5.4 ~~(iv)~~ Where EPA has not approved a revision to the relevant implementation plan attainment or maintenance demonstration since 1990, the total of direct and indirect emissions from the action for the future years (described in ~~paragraph (d) of Section 9 9.4 of this regulation~~) do not increase emissions with respect to the baseline emissions, and:

8.1.5.4.1 ~~(A)~~ The baseline emissions reflect the historical activity levels that occurred in the geographic area affected by the proposed Federal action during:

8.1.5.4.1.1 ~~(I)~~ Calendar year 1990,

8.1.5.4.1.2 ~~(II)~~ The calendar year that is the basis for the classification (or, where the classification is based on multiple years, the year that is most representative in terms of the level of activity), if a classification is promulgated in 40 CFR Part 81 (July 1, 1994), or

- 8.1.5.4.1.3 ~~(H)~~ The year of the baseline inventory in the PM<sub>10</sub> applicable implementation plan;
- 8.1.5.4.2 ~~(B)~~ The baseline emissions are the total of direct and indirect emissions calculated for the future years [described in ~~paragraph (d) of Section 9 9.4 of this regulation~~] using the historic activity levels (described in ~~subparagraph (a)(5)(iv)(A) of this paragraph 8.1.5.4.1 of this regulation~~) and appropriate emission factors for the future years; or
- 8.1.5.5 ~~(v)~~ Where the action involves regional water or wastewater projects, such projects are sized to meet only the needs of population projections that are in the applicable implementation plan, based on assumptions regarding per capita use that are developed or approved in accordance with ~~Section 9(a) 9.1 of this regulation~~.
- 8.2 ~~(b)~~ The area-wide and local air quality modeling analyses must:
  - 8.2.1 ~~(1)~~ Meet the requirements in ~~Section 9 9.0 of this regulation~~ and
  - 8.2.2 ~~(2)~~ Show that the action does not:
    - 8.2.2.1 ~~(i)~~ Cause or contribute to any new violation of any standard in any area; or
    - 8.2.2.2 ~~(ii)~~ Increase the frequency or severity of any existing violation of any standard in any area.
- 8.3 ~~(c)~~ Notwithstanding any other requirements of ~~this Section 8.0 of this regulation~~, an action subject to this regulation may not be determined to conform to the applicable implementation plan 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 implementation plan, 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, and such action is otherwise in compliance with all relevant requirements of the applicable implementation plan.
- 8.4 ~~(d)~~ Any analyses required under ~~this Section 8.0 of this regulation~~ must be completed, and any mitigation requirements necessary for a finding of conformity must be identified in compliance with ~~Section 10 10.0 of this regulation~~, before the determination of conformity is made.

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Section 9—

## **9.0 Procedures for Conformity Determinations of General Federal Actions**

- 9.1 ~~(a)~~ The analyses required under this regulation must be based on the latest planning assumptions.
  - 9.1.1 ~~(1)~~ All planning assumptions (including, but not limited to, 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, wood stoves per household, and the geographic distribution of population growth) must be derived from the estimates of current and future population, employment, travel, and congestion most recently developed by the MPO. The conformity determination must also be based on the latest assumptions about current and future background concentrations and other Federal actions.
  - 9.1.2 ~~(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 area,
- 9.2 ~~(b)~~ The analyses required under this regulation 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.
  - 9.2.1 ~~(1)~~ For motor vehicle emissions, the most current version of the motor vehicle emissions model specified by EPA for use in the preparation or revision of implementation plans in the State or area must be used for the conformity analysis as specified below:

- 9.2.1.1 (†) The EPA must publish in the Federal Register a notice of availability of any new motor vehicle emissions model; and
- 9.2.1.2 (‡) 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~~ three 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, if a final determination as to conformity is made within ~~3~~ three years of such analysis.
- 9.2.2 (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.
- 9.3 (e) 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:
- 9.3.1 (†) 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
- 9.3.2 (2) Written approval of the EPA Regional Administrator is obtained for any modification or substitution.
- 9.4 (d) The analyses required under this regulation 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:
- 9.4.1 (†) The CAA mandated attainment year or, if applicable, the farthest year for which emissions are projected in the maintenance plan;
- 9.4.2 (2) The year during which the total of direct and indirect emissions from the action for each pollutant analyzed is expected to be the greatest on an annual basis; and
- 9.4.3 (3) Any year for which the applicable implementation plan specifies an emissions budget.

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Section 10—

## **10.0 Mitigation of Air Quality Impacts**

- 10.1 (a) Any measures that are intended to mitigate air quality impacts must be identified (including the identification and quantification of all emission reductions claimed) and the process for implementation (including 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 timeliness for implementation.
- 10.2 (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. Such written commitment shall describe such mitigation measures and the nature of the commitment, in a manner consistent with ~~paragraph (a)~~ 10.1 of this regulation.
- 10.3 (e) Persons or agencies voluntarily committing to mitigation measures to facilitate positive conformity determinations must comply with the obligations of such commitments.
- 10.4 (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, as provided in ~~paragraph (a)~~ 10.1 of this regulation.
- 10.5 (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 in accordance

with ~~Sections 8 and 9 and this Section~~ 8.0, 9.0 and 10.0 of this regulation. Any proposed change in the mitigation measures is subject to the reporting requirements of ~~Section 5~~ 5.0 of this regulation and the public participation requirements of ~~Section 6~~ 6.0 of this regulation.

10.6 (f) Written commitments to mitigation measures must be obtained prior to a positive conformity determination and such commitments must be fulfilled.

10.7 (g) After this implementation plan revision is approved by EPA any agreements, including mitigation measures, necessary for a conformity determination will be both state and federally enforceable. Enforceability through the applicable implementation plan will apply to all persons who agree to mitigate direct and indirect emissions associated with a Federal action for a conformity determination

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~~Section 11~~

### **11.0 Savings Provision**

11.1 (a) The federal conformity rules under 40 CFR Part 51, Subpart W (July 1, 1994), in addition to any existing applicable State requirements, establish the conformity criteria and procedures necessary to meet the requirements of Clean Air Act §176(c) until such time as this conformity implementation plan revision is approved by EPA. Following EPA approval of this revision to the applicable implementation plan (or a portion thereof), the approved (or approved portion of the) state criteria and procedures would govern conformity determinations and the Federal conformity regulations contained in 40 CFR Part 93 (July 1, 1994), would apply only for the portion, if any, of the State's conformity provisions that is not approved by EPA. In addition, any previously applicable implementation plan requirements relating to conformity remain enforceable until the State revises its applicable implementation plan to specifically remove them and that revision is approved by EPA.

**12 DE Reg. 29 (07/01/08) (Prop.)**