

# 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

#### REGISTER NOTICE

SAN #2007-16

**1. Title of the Regulations:**

Proposal to amend Regulation 32, Transportation Conformity, of the State of Delaware, "Regulations Governing the Control of Air Pollution."

**2. Brief Synopsis of the Subject, Substance and Issues:**

The proposed amendments to Regulation 32 will simplify Delaware's transportation conformity regulations, and will bring the Salisbury/Wicomico Metropolitan Planning Organization (MPO) into the Interagency Transportation Conformity Consultation Workgroup.

Federal Safe, Accountable, Flexible, and Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) legislation that took effect on August 10, 2005 streamlined the federal transportation conformity requirements on States. The legislation allows states to forgo the burden of having to adopt and maintain a full transportation conformity rule, and to only adopt provisions concerning the consultation process and commitments relative to transportation control measures. States and MPOs are still bound by federal transportation conformity rules so this streamlining would not change the overall implementation and practice of transportation conformity. DNREC is proposing to take advantage of this streamlining by revising Reg. 32, Transportation Conformity, to address only the mandatory provisions.

The Salisbury/Wicomico MPO will be added as a new member of the Delaware Interagency Transportation Conformity Consultation Workgroup. DNREC is proposing this change because the Town of Delmar, Delaware is now part of the Salisbury/Wicomico MPO. The change will require that any conformity determination performed for Sussex County must be in consultation with the Salisbury/Wicomico MPO.

In addition to the above revisions, Reg. 32 has been renumbered and reformatted in accordance with the Code of Delaware Regulations style manual.

**3. Possible Terms of the Agency Action:**

None.

**4. Statutory Basis or Legal Authority to Act:**

7 Del.C., Chapter 60, Environmental Control

**5. Other Regulations That May Be Affected by the Proposal:**

None

**6. Notice of Public Comment:**

Statements and testimony may be presented either orally or in writing at a public hearing to be held on Monday, September 24, 2007, beginning at 6 PM in the Priscilla Building, 156 S. State Street, Dover, Delaware. Interested parties may submit comments in writing to: Philip Wheeler, DNREC Air Quality Management Section, 156 South State Street, Dover, Delaware 19901.

**7. Prepared By:**

Philip Wheeler, Planner IV, 739-9402,

[philip.wheeler@state.de.us](mailto:philip.wheeler@state.de.us)

## Regulation 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 Regulation 32 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.

4/11/98 ~~xx/xx/2007~~

### 1.0 Section 1 - **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), ~~and regulations under 40 CFR Part 51 subpart T, with respect to the conformity of transportation plans, programs, and projects which are developed, funded, or approved by the United States Department of Transportation (DOT), and by metropolitan planning organizations (MPOs) or other recipients of funds under title 23 U.S.C. or the Federal Transit Laws (49 U.S.C. Chapter 53). This regulation sets forth policy, criteria, and procedures for demonstrating and assuring conformity of such activities to this applicable implementation plan developed and applicable pursuant to §110 and Part D of the CAA interagency consultation process and commitments to transportation control and mitigation measures.~~

~~This regulation, consistent with 40 CFR Part 51, codifies and perhaps simplifies a pre-existing spirit of cooperation, and is not intended to undermine, duplicate or eliminate efforts already being undertaken within the various Federal, State and local entities involved in this process.~~

~~Hereinafter, the short title for this regulation is the Transportation Conformity Regulation.~~

~~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.~~

4/11/98 ~~xx/xx/2007~~

### 2.0 Section 2 - **Definitions.**

~~Terms used but not defined in this regulation shall have the meaning given them by the CAA, titles 23 and 49 U.S.C., other Environmental Protection Agency (EPA) regulations, or other DOT regulations, in that order of priority.~~

~~“**Adopt or approve of a regionally significant project, for the purposes of Sections 6 and 30**”, means the first time any action necessary to authorize a project occurs, such as 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 construct the facility, any final action of a board, commission or administrator authorizing or directing employees to proceed with construction of the project, or any written decision or authorization from the MPO that the project may be adopted or approved.~~

~~“**Applicable implementation plan**” is defined in §302(q) of the CAA and 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.)

**“Cause or contribute to a new violation for a project”** means:

(1) ~~To cause or contribute to a new violation of a standard in the area substantially affected by the project or over a region which would otherwise not be in violation of the standard during the future period in question, if the project were not implemented;~~ or

(2) ~~To contribute to a new violation in a manner that would increase the frequency or severity of a new violation of a standard in such area.~~

~~Clean data means air quality monitoring data determined by EPA to meet the requirements of 40 CFR part 58 that indicate attainment of the national ambient air quality standard.~~

**“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 is”** 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), and 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 is”** 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, is”** 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.

~~**“Forecast period with respect to a transportation plan is”** means the period covered by the transportation plan pursuant to 23 CFR part 450.~~

**“Highway project is”** 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~~ Connect logical termini and be of sufficient length to address environmental matters on a broad scope;

(2) ~~have~~ 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~~ Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

~~**Horizon year** is a year for which the transportation plan describes the envisioned transportation system according to Section 7 of this regulation.~~

~~**Hot-spot analysis** is” means an estimation of likely future localized CO and (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.~~

~~**Increase the frequency or severity**” means to cause a location or region to exceed a standard more often or to cause a violation at a greater concentration than previously existed and/or would otherwise exist during the future period in question, if the project were not implemented.~~

~~Intermodal means the connection or interface between transportation modes such as auto, train or bus~~

~~**Lapse**” means that the conformity determination for a transportation plan or TIP has expired, and thus there is no currently conforming transportation plan and TIP.~~

~~**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.~~

~~**Maintenance plan**” means an implementation plan under §175A of the CAA, as amended.~~

~~**Metropolitan planning organization (MPO)**” is that organization designated as being responsible, together with the State, for conducting the continuing, cooperative, and comprehensive planning process under 23 U.S.C. 134 and 49 U.S.C. 5303. It is the forum for cooperative transportation decision making. 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) of the CAA. A), 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 required to be achieved. as required by the applicable CAA provision for reasonable further progress towards attainment.~~

~~**Motor vehicle emissions budget** is” 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.~~

~~Multimodal means a transportation planning system containing multiple transportation modes.~~

~~**National ambient air quality standards (NAAQS)**” are 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.).~~

~~**NEPA process completion, for the purposes of this regulation with respect to FHWA or FTA,**” means the point at which there is a specific action to make a determination that a project is categorically excluded, to make a Finding of No Significant Impact, or to issue a record of decision on a Final Environmental Impact Statement under NEPA.~~

~~**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.~~

~~**Protective finding** is a determination by EPA that a submitted control strategy implementation plan revision contains adopted control measures or written commitments to adopt enforceable control measures that fully satisfy the emissions reductions requirements relevant to the statutory provision for which the implementation plan revision was submitted, such as reasonable further progress or attainment.~~

~~**Recipient of funds designated under title 23 U.S.C. or the Federal Transit Laws**” means any agency at any level of State, county, city, or regional government that routinely receives title 23 U.S.C. or Federal Transit Laws funds to construct FHWA/FTA projects, operate FHWA/FTA projects or equipment, purchase equipment, or undertake other services or operations via contracts or agreements. This definition does not include private landowners or developers, or contractors or entities that are only paid for services or products created by their own employees.~~

~~**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.

**“Safety margin”** means the amount by which the total projected emissions from all sources of a given pollutant are less than the total emissions that would satisfy the applicable requirement for reasonable further progress, attainment, or maintenance.

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

~~Statewide transportation improvement program (STIP) means a staged, multi-year, intermodal program of transportation projects covering the State, which is consistent with the statewide transportation plan and metropolitan transportation plans, and developed pursuant to 23 CFR part 450.~~

~~Statewide transportation plan means the official intermodal statewide transportation plan that is developed through the statewide planning process for the State, developed pursuant to 23 CFR part 450.~~

**“Transit is”** 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 is”** 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~~ Connect logical termini and be of sufficient length to address environmental matters on a broad scope;

(2) ~~have~~ 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~~ Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

**“Transportation control measure (TCM) is”** 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 of the CAA, 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. ~~Notwithstanding the above, vehicle technology based, fuel based, and maintenance based measures which control the emissions from vehicles under fixed traffic conditions are not TCMs for the purposes of this regulation.~~

**“Transportation improvement program (TIP)”** means a staged, multiyear, intermodal program of transportation projects covering improvement program developed by a metropolitan planning area which is consistent with the metropolitan transportation plan, and developed pursuant to organization under 23 CFR part 450. 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~~ Part 450.

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

**U.S.C.** means the United States Code

**“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 President 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.

4/11/98

~~Section 3—Applicability~~

~~(a) Action applicability.~~

~~(1) Except as provided for in paragraph (c) of this section, conformity determinations are required for:~~

~~(i) The adoption, acceptance, approval or support of transportation plans and transportation plan amendments developed pursuant to 23 CFR part 450 or 49 CFR part 613 by an MPO or DOT;~~

~~(ii) The adoption, acceptance, approval or support of TIPs and TIP amendments developed pursuant to 23 CFR part 450 or 49 CFR part 613 by an MPO or DOT; and~~

~~(iii) The approval, funding, or implementation of FHWA/FTA projects.~~

~~(2) Conformity determinations are not required under this regulation for individual projects which are not FHWA/FTA projects. However, Section 22 applies to such projects if they are regionally significant.~~

~~(3) Conformity determinations for Cecil County, Maryland shall be conducted in accordance with conformity procedures established in the Code of Maryland regulations (COMAR) and in the Maryland State Implementation Plan.~~

~~(b) Geographic Applicability. The provisions of this regulation shall apply in all nonattainment and maintenance areas for transportation related criteria pollutants for which the area is designated nonattainment or has a maintenance plan.~~

~~(1) The provisions of this regulation apply with respect to emissions of the following criteria pollutants: ozone, carbon monoxide (CO), nitrogen dioxide (NO<sub>2</sub>), and particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM<sub>10</sub>).~~

~~(2) The provisions of this regulation apply with respect to emissions of the following precursor pollutants:~~

~~(i) Volatile organic compounds (VOC) and nitrogen oxides (NO<sub>x</sub>) in ozone areas;~~

~~(ii) NO<sub>x</sub> in NO<sub>2</sub> areas; and~~

~~(iii) VOC, NO<sub>x</sub>, and PM<sub>10</sub> in PM<sub>10</sub> areas if the EPA Regional Administrator or the director of the State air agency has made a finding that transportation related precursor emissions within the nonattainment area are a significant contributor to the PM<sub>10</sub> nonattainment problem and has so notified the MPO and DOT, or if the applicable implementation plan (or implementation plan submission) establishes a budget for such emissions as part of the reasonable further progress, attainment or maintenance strategy.~~

~~(3) The provisions of this regulation apply to maintenance areas for 20 years from the date EPA approves the area's request under §107(d) of the CAA for redesignation to attainment, unless the applicable implementation plan specifies that the provisions of this regulation shall apply for more than 20 years.~~

~~(c) Limitations:~~

~~(1) Projects subject to this regulation for which the NEPA process and a conformity determination have been completed by DOT may proceed toward implementation without further conformity determinations unless more than three years have elapsed since the most recent major step (NEPA process completion; start of final design; acquisition of a significant portion of the right of way; or approval of the plans, specifications and estimates) occurred. All phases of such projects which were considered in the conformity determination are also included, if those phases were for the purpose of funding final design, right of way acquisition, construction, or any combination of these phases.~~

~~(2) A new conformity determination for the project will be required if there is a significant change in project design concept and scope, if a supplemental environmental document for air quality purposes is initiated, or if three years have elapsed since the most recent major step to advance the project occurred.~~

~~(d) Grace period for new nonattainment areas. For areas or portions of areas which have been~~

~~designated attainment for either ozone, CO, PM<sub>10</sub> or NO<sub>2</sub> since 1990 and are subsequently redesignated to nonattainment for any of these pollutants, the provisions of this regulation shall not apply for 12 months following the date of final designation to nonattainment for such pollutant.~~

~~(e) Should any county become nonattainment for the pollutants described in Sections 17, 18, and 24, these applicable sections shall become effective twelve (12) months after notification of such nonattainment status from EPA to the State.~~

4/11/98 xx/xx/2007

**3.0 Section 6 - Consultation.**

~~(a) 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, DelDOT 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, DelDOT, and DOT in developing applicable implementation plans.

~~(b) 3.2 Interagency consultation procedures: General factors.~~

~~(i) 3.2.1 Agency representation, roles and responsibilities.~~

~~(ii) 3.2.1.1 Representatives of WILMAPCO, the Dover/Kent County MPO, the Salisbury/Wicomico MPO, the Department and DelDOT 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 this regulation 40 CFR Part 51 and 93.~~

~~(iii) 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 ~~or~~ 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, DelDOT 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.~~

~~(iii) 3.2.1.3 In addition to the lead agencies identified in subparagraph (ii), 3.2.1.2, other agencies entitled to participate in any interagency consultation process under this regulation include DelDOT, ~~the Department of Public Safety,~~ 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.~~

~~(iv) 3.2.1.4 It shall be the role and responsibility of each lead agency in an interagency consultation process, as specified in subparagraph (ii), 3.2.1.2, to confer with all other agencies identified under subparagraph (iii) 3.2.1.3 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 ~~the applicable paragraphs of Section 6 (b), 3.2,~~ where required, assure policy-level contact with those agencies, and, (except for actions subject to ~~Section 6 (b)(7) or (c)(1)(vii)~~ 3.3.1.6) 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 ~~subparagraph (C), 3.2.1.2,~~ 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.

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

(A) 3.2.1.5.1 The Department shall be responsible for developing:

(i) 3.2.1.5.1.1 emissions inventories,

(ii) 3.2.1.5.1.2 emissions budgets,

(iii) 3.2.1.5.1.3 air quality modeling,

(iv) 3.2.1.5.1.4 attainment demonstrations,

(v) 3.2.1.5.1.5 control strategy implementation plan revisions,

(vi) 3.2.1.5.1.6 updated motor vehicle emissions factors, and

(vii) 3.2.1.5.1.7 involving the WILMAPCO, the Dover/Kent County MPO,

the Salisbury/Wicomico MPO or DeIDOT continuously in the process;

(B) 3.2.1.5.2 The Dover/Kent County MPO ~~and~~, the Salisbury/Wicomico MPO or WILMAPCO shall be responsible, for:

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

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

(iii) 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,

(iv) 3.2.1.5.2.4 monitoring implementation of regionally significant projects as identified in the TIP;

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

(C) 3.2.1.5.3 DeIDOT shall be responsible for:

(i) 3.2.1.5.3.1 developing Statewide transportation plans and TIPs,

(ii) 3.2.1.5.3.2 providing technical comments on motor vehicle emissions inputs,

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

(iv) 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,

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

(vi) 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;

(D) 3.2.1.5.4 The Department of ~~Public Safety~~ 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;

(E) 3.2.1.5.5 FHWA and FTA shall be responsible for:

(i) 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.

(ii) 3.2.1.5.5.2 providing guidance on conformity and the transportation planning process to agencies in interagency consultation; and

(F) 3.2.1.5.6 EPA shall be responsible for:

(i) 3.2.1.5.6.1 reviewing and approving updated motor vehicle emissions factors, and

(H) 3.2.1.5.6.2 providing guidance on conformity criteria and procedures to agencies in interagency consultation-

(2) CONSULTATION PROCESS WORK GROUP - procedures

(i) 3.2.2.1 As described herein, various agencies have the primary responsibility as lead agency for the preparation, development, and/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.

(ii) 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.

(iii) 3.2.2.3 At each meeting of the Work Group, the following shall be reviewed and approved:

(A) 3.2.2.3.1 The schedule for all formal meetings;

(B) 3.2.2.3.2 The status and schedule for delivery of all documents, materials or products required to be developed by these regulations;

(C) 3.2.2.3.2 The status and schedule of all Standing Committee and/or Sub-Committee activities;

(D) 3.2.2.3.4 All Public Meetings, Hearings and/or other public involvement.

(iv) 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.

(v) 3.2.2.5 As described in this section, various agencies have the primary obligation for the preparation, development, performance and/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) 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.

(4) 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.

(e) 3.3 Interagency consultation procedures: Specific processes

(+) 3.3.1 An interagency consultation process in accordance with ~~paragraph (b)~~ 3.2 shall be undertaken for the following:

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

(ii) 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 DelDOT and conducted in accordance with ~~paragraph (b)(2) of this section~~ 3.2.2;

(iii) 3.3.1.3 Evaluating whether projects otherwise ~~exempted from meeting the requirements of this regulation (see Sections 27 and 28)~~ exempt should be treated as non-exempt in cases where potential adverse emissions impacts may exist for any reason, to be initiated by DelDOT and conducted in accordance with ~~paragraph (b)(2) of this section~~ 3.2.2;

(iv) 3.3.1.4 Making a determination, ~~as required by Section 14(c)(1)~~, 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 DelDOT and conducted in accordance with ~~paragraph (b)(2) of this section~~ 3.2.2. 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;

(v) 3.3.1.5 Making a determination, ~~as required by Section 22(b)~~, 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 DelDOT and conducted in accordance with ~~paragraph (b)(2) of this section~~ 3.2.2;

(vi) Identifying, ~~as required by Section 24(d)~~, projects located at sites in PM<sub>10</sub> 2.5 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 ~~paragraph (b)(2) of this section~~ 3.2.2;

(vii) 3.3.1.6 Notification of transportation plan or TIP revisions or amendments which merely add or delete exempt projects listed in ~~Section 27~~ 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 ~~paragraph (b)(2) of this section~~ 3.2.2, other than the requirement that such notice be provided prior to final action;

(viii) 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 ~~paragraph (b)(2) of this section~~ 3.2.2;

(ix) 3.3.1.8 Determining what constitutes "reasonable professional practice" for the ~~purposes of Sections 23 and 24(b)~~, purpose of funding projects and performing emission analysis within the context thereof, to be initiated by DelDOT and conducted in accordance with ~~paragraph (b)(2) of this section~~ 3.2.2.

(x) 3.3.1.9 Determining whether the project sponsor or MPO has demonstrated that

the requirements of ~~Sections 19, 24 and 25~~ 40 CFR §93.118, and 40 CFR §93.124 are satisfied without a particular mitigation or control measure, as provided in ~~Section 26(d)~~ 40 CFR §93.125, to be initiated by the Department and conducted in accordance with ~~paragraph (b)(2) of this section~~ 3.2.2;

3.3.1.10 Any decision made under ~~paragraph (c)(1) of this section~~ 3.3.1 shall be conveyed in writing to all member agencies.

(2) 3.3.2 An interagency consultation process in accordance with ~~paragraph (b) of this section~~ 3.2 shall be undertaken for the following:

(i) 3.3.2.1 Evaluating events which will require new conformity determinations ~~in addition to those triggering events established in Section 5~~, to be initiated by WILMAPCO, the Salisbury/Wicomico MPO, the Dover/Kent County MPO, or DeIDOT in their respective areas, and conducted in accordance with ~~paragraph (b)(2) of this section~~ 3.2.2;

(ii) 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 DeIDOT in their respective areas, and conducted in accordance with ~~paragraph (b)(2) of this section~~ 3.2.2.

(3) 3.3.3 Where the metropolitan planning area does not include the entire nonattainment or maintenance area, an interagency consultation process in accordance with ~~paragraph (b) of this section~~ 3.2 involving the MPO and the State Department of Transportation(s) 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 ~~and~~, the Salisbury/Wicomico MPO or the Dover/Kent County MPO in their respective areas, and conducted in accordance with ~~paragraph (b)(2) of this section~~ 3.2.2.

(4) 3.3.4 Regionally significant project - policy and procedures

(i) 3.3.4.1 An interagency consultation process in accordance with ~~paragraph (b) 3.2~~ 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.

(ii) 3.3.4.2 The sponsor of any such regionally significant project; and any agency that is responsible for taking action(s) 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.

(iii) 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, ~~for the purposes of Section 22~~.

(5) 3.3.5 An interagency consultation process in accordance with ~~paragraph (b) of this section~~ 3.2 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 ~~paragraph (c)(4) of this section~~ 3.3.4 but whose sponsors have not yet decided these features, in sufficient detail to perform the regional emissions analysis according to the requirements of ~~Section 23~~ 40 CFR §93.122, to be initiated by DeIDOT and conducted in accordance with ~~paragraph (b)(2) of this section~~ 3.2.2.

(6) 3.3.6 An interagency consultation process in accordance with ~~paragraph (b) of this~~

section 3.2 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 ~~paragraph (b)(2) of this section~~ 3.2.

(d) 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:

(1) 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.

(2) 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) 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.

(4) 3.4.4 The FHWA Division Office will send a copy of the signed conformity determination and the TIPs to the Regional Office.

(5) 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(s) 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.

(6) 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.

(7) ~~For TIP actions which do not involve transit projects, the FTA will prepare a letter of acknowledgment and concurrence on the draft conformity finding, indicating that the TIP action in question does not contain any projects in FTA's area of responsibility. Similarly for TIP actions which do not involve highway projects, the FHWA will prepare a letter of acknowledgment and concurrence on the draft conformity finding, indicating that the TIP action in question does not contain any projects in FHWA's area of responsibility. In either event, the issuance of the signed version of the draft conformity finding letter will constitute the DOT conformity finding for the TIP action in question.~~

(e) 3.5 Department concurrence.

(1) 3.5.1 It is the responsibility of the Department to evaluate ~~any final~~ 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 (7) 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. ~~A determination of non concurrence must be in accordance with Sections 10-19.~~ 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.

(2) 3.5.2 Any conflict among State agencies or between State agencies and ~~either~~ WILMAPCO ~~or~~ 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) 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 or the Dover/Kent County MPO or the Salisbury/Wicomico MPO.

~~(f) 3.6~~ Public consultation procedures.

Agencies making conformity determinations (MPOs, DeIDOT, 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) ~~as in effect on the date of adoption of this regulation~~. 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~~ Part 450.

4/11/98

#### ~~Section 4—Priority~~

~~When assisting or approving any action with air quality related consequences, FHWA and FTA shall give priority to the implementation of those transportation portions of an applicable implementation plan prepared to attain and maintain the NAAQS. This priority shall be consistent with statutory requirements for allocation of funds among States or other jurisdictions.~~

xx/xx/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.

4/11/98

#### ~~Section 5—Frequency of Conformity Determinations.~~

~~(a) Conformity determinations and conformity redeterminations for transportation plans, TIPs, and FHWA/FTA projects must be made according to the requirements of this section and the applicable implementation plan.~~

~~(b) Frequency of conformity determinations for transportation plans.~~

~~(1) Each new transportation plan must be demonstrated to conform before the transportation plan is approved by the MPO or accepted by DOT.~~

~~(2) All transportation plan revisions must be found to conform before the transportation plan revisions are approved by the MPO or accepted by DOT, unless the revision merely adds or deletes exempt projects listed in Sections 27 or 28. The conformity determination must be based on the transportation plan and the revision taken as a whole.~~

~~(3) The MPO and DOT must determine the conformity of the transportation plan no less frequently than every three years. If more than three years elapse after DOT's conformity determination without the MPO and DOT determining conformity of the transportation plan, the existing conformity determination will lapse.~~

~~(c) Frequency of conformity determinations for transportation improvement programs.~~

~~(1) A new TIP must be demonstrated to conform before the TIP is approved by the MPO or accepted by DOT.~~

(2) A TIP amendment requires a new conformity determination for the entire TIP before the amendment is approved by the MPO or accepted by DOT, unless the amendment merely adds or deletes exempt projects listed in Sections 27 or 28.

(3) The MPO and DOT must determine the conformity of the TIP no less frequently than every three years. If more than three years elapse after DOT's conformity determination without the MPO and DOT determining conformity of the TIP, the existing conformity determination will lapse.

(4) After an MPO adopts a new or revised transportation plan, conformity of the TIP must be redetermined by the MPO and DOT within six months from the date of DOT's conformity determination for the transportation plan, unless the new or revised plan merely adds or deletes exempt projects listed in Sections 27 or 28. Otherwise, the existing conformity determination for the TIP will lapse.

(d) Projects. FHWA/FTA projects must be found to conform before they are adopted, accepted, approved, or funded. Conformity must be redetermined for any FHWA/FTA project if three years have elapsed since the most recent major step to advance the project (NEPA process completion; start of final design; acquisition of a significant portion of the right of way; or approval of the plans, specifications and estimates) occurred.

(e) Triggers for transportation plan and TIP conformity determinations. Conformity of existing transportation plans and TIPs must be redetermined within 18 months of the following, or the existing conformity determination will lapse, and no new project level conformity determinations may be made until conformity of the transportation plan and TIP has been determined by the MPO and DOT.

(1) November 24, 1993;

(2) The date of the State's initial submission to EPA of each control strategy implementation plan or maintenance plan establishing a motor vehicle emissions budget;

(3) EPA approval of a control strategy implementation plan revision or maintenance plan which establishes or revises a motor vehicle emissions budget;

(4) EPA approval of an implementation plan revision that adds, deletes, or changes TCMs; and

(5) EPA promulgation of an implementation plan which establishes or revises a motor vehicle emissions budget or adds, deletes, or changes TCMs.

4/11/98

#### Section 7—Content of Transportation Plans

(a) Transportation plans adopted after January 1, 1995, in New Castle and Kent Counties.

The transportation plan must specifically describe the transportation system envisioned for certain future years which shall be called horizon years.

(1) The agency or organization developing the transportation plan, after consultation in accordance with Section 6, may choose any years to be horizon years, subject to the following restrictions:

(i) Horizon years may be no more than 10 years apart.

(ii) The first horizon year may be no more than 10 years from the base year used to validate the transportation demand planning model.

(iii) If the attainment year is in the time span of the transportation plan, the attainment year must be a horizon year.

(iv) The last horizon year must be the last year of the transportation plan's forecast period.

(2) For these horizon years:

(i) The transportation plan shall quantify and document the demographic and employment factors influencing expected transportation demand, including land use forecasts (whether separate or incorporated into other factors), in accordance with implementation plan provisions and Section 6;

(ii) The highway and transit system shall be described in terms of the regionally significant additions or modifications to the existing transportation network which the transportation plan envisions to be operational in the horizon years. Additions and modifications to the highway network shall be sufficiently identified to indicate intersections with existing regionally significant facilities, and to determine their effect on route options between transportation analysis zones. Each added or modified highway segment shall also be sufficiently identified in terms of its design concept and design scope to allow modeling of travel times under various traffic

volumes, consistent with the modeling methods for area wide transportation analysis in use by the MPO. Transit facilities, equipment, and services envisioned for the future shall be identified in terms of design concept, design scope, and operating policies that are sufficient for modeling of their transit ridership. Additions and modifications to the transportation network shall be described sufficiently to show that there is a reasonable relationship between expected land use and the envisioned transportation system; and

(iii) Other future transportation policies, requirements, services, and activities, including intermodal activities, shall be described.

(b) Moderate areas reclassified to serious. Ozone or CO nonattainment areas which are reclassified from moderate to serious and have an urbanized population greater than 200,000 must meet the requirements of paragraph (a) of this section within two years from the date of reclassification.

(c) Transportation plans for other areas. Transportation plans for other areas must meet the requirements of paragraph (a) of this section at least to the extent it has been the previous practice of the MPO to prepare plans which meet those requirements. Otherwise, the transportation system envisioned for the future must be sufficiently described within the transportation plans so that a conformity determination can be made according to the criteria and procedures of Sections 10 through 20.

(d) Savings. The requirements of this section supplement other requirements of applicable law or regulation governing the format or content of transportation plans.

4/11/98

#### Section 8—Relationship of Transportation Plan and TIP Conformity with the NEPA Process

The degree of specificity required in the transportation plan and the specific travel network assumed for air quality modeling do not preclude the consideration of alternatives in the NEPA process or other project development studies. Should the NEPA process result in a project with design concept and scope significantly different from that in the transportation plan or TIP, the project must meet the criteria in Sections 10 through 20 for projects not from a TIP before NEPA process completion.

4/11/98

#### Section 9—Fiscal Constraints for Transportation Plans and Tips

Transportation plans and TIPs must be fiscally constrained consistent with DOT's metropolitan planning regulations at 23 CFR part 450 in order to be found in conformity.

4/11/98

#### Section 10—Criteria and Procedures for Determining Conformity of Transportation Plans, Programs, and Projects: General

(a) In order for each transportation plan, program, and FHWA/FTA project to be found to conform, the MPO and DOT must demonstrate that the applicable criteria and procedures in this regulation are satisfied, and the MPO and DOT must comply with all applicable conformity requirements of implementation plans and of court orders for the area which pertain specifically to conformity. The criteria for making conformity determinations differ based on the action under review (transportation plans, TIPs, and FHWA/FTA projects), the relevant pollutant(s), and the status of the implementation plan.

(b) The following table indicates the criteria and procedures in Sections 10 through 20 which apply for transportation plans, TIPs, and FHWA/FTA projects. Paragraphs (c) through (f) of this section explain when the budget, emission reduction, and hot spot tests are required for each pollutant. Paragraph (g) of this section addresses isolated rural nonattainment and maintenance areas.

Table 1.—Conformity Criteria

#### ALL ACTIONS AT ALL TIMES

Section 11	Latest planning assumptions
Section 12	Latest emissions model
Section 13	Consultation

## TRANSPORTATION PLAN

Section 14(b) TCMs

Sections 19 or 20 Emissions budget OR Emission reduction

## TIP

Section 14(e) TCMs

Sections 19 or 20 Emissions budget OR Emission reduction

## PROJECT (FROM A CONFORMING PLAN AND TIP)

Section 15 Currently conforming plan and TIP

Section 16 Project from a conforming plan and TIP

Section 17 CO and PM<sub>10</sub> hot spots

Section 18 PM<sub>10</sub> control measures

## PROJECT (NOT FROM A CONFORMING PLAN AND TIP)

Section 14(d) TCMs

Section 15 Currently conforming plan and TIP

Section 16 CO and PM<sub>10</sub> hot spots

Section 18 PM<sub>10</sub> control measures

Sections 19 or 20 Emissions budget OR Emission reduction

(c) ~~Ozone nonattainment and maintenance areas. In addition to the criteria listed in table 1 that are required to be satisfied at all times, in ozone nonattainment and maintenance areas conformity determinations must include a demonstration that the budget and/or emission reduction tests are satisfied as described in the following paragraphs.~~

~~(1) In ozone nonattainment and maintenance areas the budget test must be satisfied as required by Section 19 for conformity determinations made:~~

~~(i) 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared the motor vehicle emissions budget inadequate for transportation conformity purposes; or~~

~~(ii) After EPA has declared that the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan is adequate for transportation conformity purposes.~~

~~(2) In ozone nonattainment areas that are required to submit a control strategy implementation plan revision (usually moderate and above areas), the emission reduction tests must be satisfied as required by Section 20 for conformity determinations made:~~

~~(i) During the first 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared a motor vehicle emissions budget adequate for transportation conformity purposes; or~~

~~(ii) If EPA has declared the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan inadequate for transportation conformity purposes, and there is no previously established motor vehicle emissions budget in the approved implementation plan or a previously submitted control strategy implementation plan revision or maintenance plan.~~

~~(3) An ozone nonattainment area must satisfy the emission reduction test for NO<sub>x</sub>, as required by Section 20, if the implementation plan or plan submission that is applicable for the purposes of conformity determinations is a 15% plan or Phase I attainment demonstration that does not include a motor vehicle emissions budget for NO<sub>x</sub>. The implementation plan will be considered to establish a motor vehicle emissions budget for NO<sub>x</sub> if the implementation plan or plan submission contains an explicit NO<sub>x</sub> motor vehicle emissions budget that is intended to act as a ceiling on future NO<sub>x</sub> emissions, and the NO<sub>x</sub> motor vehicle emissions budget is a net reduction from NO<sub>x</sub> emissions levels in 1990.~~

~~(4) Ozone nonattainment areas that have not submitted a maintenance plan and that are not required to submit a control strategy implementation plan revision (usually marginal and below areas) must satisfy one of the following requirements:~~

(i) The emission reduction tests required by Section 20; or  
(ii) The State shall submit to EPA an implementation plan revision that contains motor vehicle emissions budget(s) and an attainment demonstration, and the budget test required by Section 19 must be satisfied using the submitted motor vehicle emissions budget(s) (as described in paragraph (c)(1) of this section).

5) Notwithstanding paragraphs (c)(1) and (c)(2) of this section, moderate and above ozone nonattainment areas with three years of clean data that have not submitted a maintenance plan and that EPA has determined are not subject to the Clean Air Act reasonable further progress and attainment demonstration requirements must satisfy one of the following requirements:

(i) The emission reduction tests as required by Section 20; or  
(ii) The budget test as required by Section 19, using the motor vehicle emissions budgets in the submitted control strategy implementation plan (subject to the timing requirements of paragraph (c)(1) of this section); or

(iii) The budget test as required by Section 19, using the motor vehicle emissions of ozone precursors in the most recent year of clean data as motor vehicle emissions budgets, if such budgets are established by the EPA rulemaking that determines that the area has clean data.

(d) CO nonattainment and maintenance areas. In addition to the criteria listed in Table 1 that are required to be satisfied at all times, in CO nonattainment and maintenance areas conformity determinations must include a demonstration that the hot spot, budget and/or emission reduction tests are satisfied as described in the following paragraphs:

(1) FHWA/FTA projects in CO nonattainment or maintenance areas must satisfy the hot spot test required by Section 17(a) at all times. Until a CO attainment demonstration or maintenance plan is approved by EPA, FHWA/FTA projects must also satisfy the hot spot test required by Section 17(b).

(2) In CO nonattainment and maintenance areas the budget test must be satisfied as required by Section 19 for conformity determinations made:

(i) 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared the motor vehicle emissions budget inadequate for transportation conformity purposes; or

(ii) After EPA has declared that the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan is adequate for transportation conformity purposes.

(3) Except as provided in paragraph (4) below, in CO nonattainment areas the emission reduction tests must be satisfied as required by Section 20 for conformity determinations made:

(i) During the first 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared a motor vehicle emissions budget adequate for transportation conformity purposes; or

(ii) If EPA has declared the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan inadequate for transportation conformity purposes, and there is no previously established motor vehicle emissions budget in the approved implementation plan or a previously submitted control strategy implementation plan revision or maintenance plan.

(4) CO nonattainment areas that have not submitted a maintenance plan and that are not required to submit an attainment demonstration (e.g., moderate CO areas with a design value of 12.7 ppm or less or not classified CO areas) must satisfy one of the following requirements:

(i) The emission reduction tests required by Section 20; or  
(ii) The State shall submit to EPA an implementation plan revision that contains motor vehicle emissions budget(s) and an attainment demonstration, and the budget test required by Section 19 must be satisfied using the submitted motor vehicle emissions budget(s) (as described in paragraph (d)(2) of this section).

(e) PM<sub>10</sub> nonattainment and maintenance areas. In addition to the criteria listed in Table 1 that are required to be satisfied at all times, in PM<sub>10</sub> nonattainment and maintenance areas conformity determinations must include a demonstration that the hot spot, budget and/or emission reduction tests are satisfied as described in the following paragraphs:

(1) FHWA/FTA projects in PM<sub>10</sub> nonattainment or maintenance areas must satisfy the hot spot test required by Section 17 (a).

(2) In PM<sub>10</sub> nonattainment and maintenance areas the budget test must be satisfied as

required by Section 19 for conformity determinations made:

(i) 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared the motor vehicle emissions budget inadequate for transportation conformity purposes; or

(ii) After EPA has declared that the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan is adequate for transportation conformity purposes.

(3) In PM<sub>10</sub> nonattainment areas the emission reduction tests must be satisfied as required by Section 20 for conformity determinations made:

(i) During the first 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared a motor vehicle emissions budget adequate for transportation conformity purposes;

(ii) If EPA has declared the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan inadequate for transportation conformity purposes, and there is no previously established motor vehicle emissions budget in the approved implementation plan or a previously submitted control strategy implementation plan revision or maintenance plan; or

(iii) If the submitted implementation plan revision is a demonstration of impracticability under CAA § 189(a)(1)(B)(ii) and does not demonstrate attainment.

(f) NO<sub>2</sub> nonattainment and maintenance areas. In addition to the criteria listed in Table 1 that are required to be satisfied at all times, in NO<sub>2</sub> nonattainment and maintenance areas conformity determinations must include a demonstration that the budget and/or emission reduction tests are satisfied as described in the following paragraphs.

(1) In NO<sub>2</sub> nonattainment and maintenance areas the budget test must be satisfied as required by Section 19 for conformity determinations made:

(i) 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared the motor vehicle emissions budget inadequate for transportation conformity purposes; or

(ii) After EPA has declared that the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan is adequate for transportation conformity purposes.

(2) In NO<sub>2</sub> nonattainment areas the emission reduction tests must be satisfied as required by Section 20 for conformity determinations made:

(i) During the first 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared a motor vehicle emissions budget adequate for transportation conformity purposes; or

(ii) If EPA has declared the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan inadequate for transportation conformity purposes, and there is no previously established motor vehicle emissions budget in the approved implementation plan or a previously submitted control strategy implementation plan revision or maintenance plan.

(g) Isolated rural nonattainment and maintenance areas. This paragraph applies to any nonattainment or maintenance area (or portion thereof) which does not have a metropolitan transportation plan or TIP and whose projects are not part of the emissions analysis of any MPO's metropolitan transportation plan or TIP. This paragraph does not apply to "donut" areas which are outside the metropolitan planning boundary and inside the nonattainment/maintenance area boundary.

(1) FHWA/FTA projects in all isolated rural nonattainment and maintenance areas must satisfy the requirements of Sections 11, 12, 13, 14(d), 17 and 18. Until EPA approves the control strategy implementation plan or maintenance plan for a rural CO nonattainment or maintenance area, FHWA/FTA projects must also satisfy the requirements of Section 17(b).

(2) Isolated rural nonattainment and maintenance areas are subject to the budget and/or emission reduction tests as described in paragraphs (c) (f) of this section, with the following modifications:

(i) When the requirements of Section 19 and 20 apply to isolated rural nonattainment and maintenance areas, references to "transportation plan" or "TIP" should be taken to mean those projects in the statewide transportation plan or statewide TIP which are in the rural nonattainment or maintenance area.

(ii) In isolated rural nonattainment and maintenance areas that are subject to Section 19, FHWA/FTA projects must be consistent with motor vehicle emissions budget(s) for the years in the timeframe of the attainment demonstration or maintenance plan. For years after the attainment year (if a maintenance plan has not been submitted) or after the last year of the maintenance plan, FHWA/FTA projects must satisfy one of the following requirements:

(A) Section 19;  
(B) Section 20 (including regional emissions analysis for NO<sub>x</sub> in all ozone nonattainment and maintenance areas, notwithstanding Section 20 (d)(2)); or  
(C) As demonstrated by the air quality dispersion model or other air quality modeling technique used in the attainment demonstration or maintenance plan, the FHWA/FTA project, in combination with all other regionally significant projects expected in the area in the timeframe of the statewide transportation plan, must not cause or contribute to any new violation of any standard in any areas; increase the frequency or severity of any existing violation of any standard in any area; or delay timely attainment of any standard or any required interim emission reductions or other milestones in any area. Control measures assumed in the analysis must be enforceable.

(iii) The choice of requirements in paragraph (g)(2)(ii) of this section and the methodology used to meet the requirements of paragraph (g)(2)(ii)(C) of this section must be determined through the interagency consultation process required in Section 6 (e)(1)(vii) through which the relevant recipients of title 23 U.S.C. or Federal Transit Laws funds, the local air quality agency, the State air quality agency, and the State department of transportation should reach consensus about the option and methodology selected. EPA and DOT must be consulted through this process as well. In the event of unresolved disputes, conflicts may be escalated to the Governor consistent with the procedure in Section 6 (d), which applies for any State air agency comments on a conformity determination.

4/11/98

Section 11—Criteria and Procedures: Latest Planning Assumptions.

(a) The conformity determination, with respect to all other applicable criteria in Sections 12 through 20, must be based upon the most recent planning assumptions in force at the time of the conformity determination. The conformity determination must satisfy the requirements of paragraphs (b) through (f) of this section.

(b) Assumptions must be derived from the estimates of current and future population, employment, travel, and congestion most recently developed by the MPO or other agency authorized to make such estimates and approved by the MPO. The conformity determination must also be based on the latest assumptions about current and future background concentrations.

(c) The conformity determination for each transportation plan and TIP must discuss how transit operating policies (including fares and service levels) and assumed transit ridership have changed since the previous conformity determination.

(d) The conformity determination must include reasonable assumptions about transit service and increases in transit fares and road and bridge tolls over time.

(e) The conformity determination must use the latest existing information regarding the effectiveness of the TCMs and other implementation plan measures which have already been implemented.

(f) Key assumptions shall be specified and included in the draft documents and supporting materials used for the interagency and public consultation required by Section 6.

4/11/98

Section 12—Criteria and Procedures: Latest Emissions Model.

(a) The conformity determination must be based on the latest emission estimation model available. This criterion is satisfied if the most current version of the motor vehicle emissions model specified by EPA for use in the preparation or revision of implementation plans in that State or area is used for the conformity analysis. Where EMFAC is the motor vehicle emissions model used in preparing or revising the applicable implementation plan, new versions must be approved by EPA before they are used in the conformity analysis.

(b) EPA will consult with DOT to establish a grace period following the specification of any new model.

(1) The grace period will be no less than three months and no more than 24 months after

notice of availability is published in the Federal Register.

(2) The length of the grace period will depend on the degree of change in the model and the scope of re-planning likely to be necessary by MPOs in order to assure conformity. If the grace period will be longer than three months, EPA will announce the appropriate grace period in the Federal Register.

(c) Transportation plan and TIP conformity analyses for which the emissions analysis was begun during the grace period or before the Federal Register notice of availability of the latest emission model may continue to use the previous version of the model. Conformity determinations for projects may also be based on the previous model if the analysis was begun during the grace period or before the Federal Register notice of availability, and if the final environmental document for the project is issued no more than three years after the issuance of the draft environmental document.

4/11/98

Section 13—Criteria and Procedures: Consultation.

~~THIS SECTION IS NOT APPLICABLE TO OR REQUIRED BY THE STATE OF DELAWARE.~~

~~For the Reader's information: Conformity must be determined according to the consultation procedures in this regulation and in the applicable implementation plan, and according to the public involvement procedures established in compliance with 23 CFR part 450. Until the implementation plan revision required by 40 CFR §51.390 is fully approved by EPA, the conformity determination must be made according to Section 6 (a)(2) and (c) and the requirements of 23 CFR part 450.~~

4/11/98

Section 14—Criteria and Procedures: Timely Implementation of TCMs.

(a) The transportation plan, TIP, or any FHWA/FTA project which is not from a conforming plan and TIP must provide for the timely implementation of TCMs from the applicable implementation plan.

(b) For transportation plans, this criterion is satisfied if the following two conditions are met:

(1) The transportation plan, in describing the envisioned future transportation system, provides for the timely completion or implementation of all TCMs in the applicable implementation plan which are eligible for funding under title 23 U.S.C. or the Federal Transit Laws, consistent with schedules included in the applicable implementation plan.

(2) Nothing in the transportation plan interferes with the implementation of any TCM in the applicable implementation plan.

(c) For TIPs, this criterion is satisfied if the following conditions are met:

(1) An examination of the specific steps and funding source(s) needed to fully implement each TCM indicates that TCMs which are eligible for funding under title 23 U.S.C. or the Federal Transit Laws are on or ahead of the schedule established in the applicable implementation plan, or, if such TCMs are behind the schedule established in the applicable implementation plan, the MPO and DOT have determined that past obstacles to implementation of the TCMs have been identified and have been or are being overcome, and that all State and local agencies with influence over approvals or funding for TCMs are giving maximum priority to approval or funding of TCMs over other projects within their control, including projects in locations outside the nonattainment or maintenance area.

(2) If TCMs in the applicable implementation plan have previously been programmed for Federal funding but the funds have not been obligated and the TCMs are behind the schedule in the implementation plan, then the TIP cannot be found to conform if the funds intended for those TCMs are reallocated to projects in the TIP other than TCMs, or if there are no other TCMs in the TIP, if the funds are reallocated to projects in the TIP other than projects which are eligible for Federal funding intended for air quality improvement projects, e.g., the Congestion Mitigation and Air Quality Improvement Program.

(3) Nothing in the TIP may interfere with the implementation of any TCM in the applicable implementation plan.

(d) For FHWA/FTA projects which are not from a conforming transportation plan and TIP, this criterion is satisfied if the project does not interfere with the implementation of any TCM in the applicable implementation plan.

4/11/98

Section 15 Criteria and Procedures: ~~Currently Conforming Transportation Plan and TIP.~~

~~There must be a currently conforming transportation plan and currently conforming TIP at the time of project approval.~~

~~(a) Only one conforming transportation plan or TIP may exist in an area at any time; conformity determinations of a previous transportation plan or TIP expire once the current plan or TIP is found to conform by DOT. The conformity determination on a transportation plan or TIP will also lapse if conformity is not determined according to the frequency requirements specified in Section 5.~~

~~(b) This criterion is not required to be satisfied at the time of project approval for a TGM specifically included in the applicable implementation plan, provided that all other relevant criteria of this regulation are satisfied.~~

4/11/98

Section 16 ~~Criteria and Procedures: Projects From a Plan and TIP.~~

~~(a) The project must come from a conforming plan and program. If this criterion is not satisfied, the project must satisfy all criteria in Table 1 for a project not from a conforming transportation plan and TIP. A project is considered to be from a conforming transportation plan if it meets the requirements of paragraph (b) of this section and from a conforming program if it meets the requirements of paragraph (c) of this section. Special provisions for TGMs in an applicable implementation plan are provided in paragraph (d) of this section.~~

~~(b) A project is considered to be from a conforming transportation plan if one of the following conditions applies:~~

~~(1) For projects which are required to be identified in the transportation plan in order to satisfy Section 7, the project is specifically included in the conforming transportation plan and the project's design concept and scope have not changed significantly from those which were described in the transportation plan, or in a manner which would significantly impact use of the facility; or~~

~~(2) For projects which are not required to be specifically identified in the transportation plan, the project is identified in the conforming transportation plan, or is consistent with the policies and purpose of the transportation plan and will not interfere with other projects specifically included in the transportation plan.~~

~~(c) A project is considered to be from a conforming program if the following conditions are met:~~

~~(1) The project is included in the conforming TIP and the design concept and scope of the project were adequate at the time of the TIP conformity determination to determine its contribution to the TIP's regional emissions, and the project design concept and scope have not changed significantly from those which were described in the TIP; and~~

~~(2) If the TIP describes a project design concept and scope which includes project level emissions mitigation or control measures, written commitments to implement such measures must be obtained from the project sponsor and/or operator as required by Section 26 (a) in order for the project to be considered from a conforming program. Any change in these mitigation or control measures that would significantly reduce their effectiveness constitutes a change in the design concept and scope of the project.~~

~~(d) TGMs. This criterion is not required to be satisfied for TGMs specifically included in an applicable implementation plan.~~

4/11/98

Section 17 ~~Criteria And Procedures: Localized CO and PM<sub>10</sub> Violations (Hot Spots)~~

~~(a) This paragraph applies at all times. The FHWA/FTA project must not cause or contribute to any new localized CO or PM<sub>10</sub> violations or increase the frequency or severity of any existing CO or PM<sub>10</sub> violations in CO and PM<sub>10</sub> nonattainment and maintenance areas. This criterion is satisfied if it is demonstrated that no new local violations will be created and the severity or number of existing violations will not be increased as a result of the project. The demonstration must be performed according to the consultation requirements of Section 6 (c)(1)(i) and the methodology requirements of Section 24.~~

~~(b) This paragraph applies for CO nonattainment areas as described in Section 10 (d)(1). Each FHWA/FTA project must eliminate or reduce the severity and number of localized CO violations in the area substantially affected by the project (in CO nonattainment areas). This criterion is satisfied with respect to existing localized CO violations if it is demonstrated that existing localized CO violations will be eliminated or reduced in severity and number as a result of the project. The demonstration must be performed according to the consultation requirements of Section 6 (c)(1)(i) and the methodology requirements of Section 24.~~

~~4/11/98~~

~~Section 18—Criteria And Procedures: Compliance with PM<sub>10</sub> Control Measures.~~

~~The FHWA/FTA project must comply with PM<sub>10</sub> control measures in the applicable implementation plan. This criterion is satisfied if the project level conformity determination contains a written commitment from the project sponsor to include in the final plans, specifications, and estimates for the project those control measures (for the purpose of limiting PM<sub>10</sub> emissions from the construction activities and/or normal use and operation associated with the project) that are contained in the applicable implementation plan.~~

~~4/11/98~~

~~Section 19—Criteria and Procedures: Motor Vehicle Emissions Budget~~

~~(a) The transportation plan, TIP, and project not from a conforming transportation plan and TIP must be consistent with the motor vehicle emissions budget(s) in the applicable implementation plan (or implementation plan submission). This criterion applies as described in Section 10 (c) (g). This criterion is satisfied if it is demonstrated that emissions of the pollutants or pollutant precursors described in paragraph (c) of this section are less than or equal to the motor vehicle emissions budget(s) established in the applicable implementation plan or implementation plan submission.~~

~~(b) Consistency with the motor vehicle emissions budget(s) must be demonstrated for each year for which the applicable (and/or submitted) implementation plan specifically establishes motor vehicle emissions budget(s), for the last year of the transportation plan's forecast period, and for any intermediate years as necessary so that the years for which consistency is demonstrated are no more than ten years apart, as follows:~~

~~(1) Until a maintenance plan is submitted:~~

~~(i) Emissions in each year (such as milestone years and the attainment year) for which the control strategy implementation plan revision establishes motor vehicle emissions budget(s) must be less than or equal to that year's motor vehicle emissions budget(s); and~~

~~(ii) Emissions in years for which no motor vehicle emissions budget(s) are specifically established must be less than or equal to the motor vehicle emissions budget(s) established for the most recent prior year. For example, emissions in years after the attainment year for which the implementation plan does not establish a budget must be less than or equal to the motor vehicle emissions budget(s) for the attainment year.~~

~~(2) When a maintenance plan has been submitted:~~

~~(i) Emissions must be less than or equal to the motor vehicle emissions budget(s) established for the last year of the maintenance plan, and for any other years for which the maintenance plan establishes motor vehicle emissions budgets. If the maintenance plan does not establish motor vehicle emissions budgets for any years other than the last year of the maintenance plan, the demonstration of consistency with the motor vehicle emissions budget(s) must be accompanied by a qualitative finding that there are no factors which would cause or contribute to a new violation or exacerbate an existing violation in the years before the last year of the maintenance plan. The interagency consultation process required by Section 6 shall determine what must be considered in order to make such a finding;~~

~~(ii) For years after the last year of the maintenance plan, emissions must be less than or equal to the maintenance plan's motor vehicle emissions budget(s) for the last year of the maintenance plan; and~~

~~(iii) If an approved control strategy implementation plan has established motor vehicle emissions budgets for years in the timeframe of the transportation plan, emissions in these years must be less than or equal to the control strategy implementation plan's motor vehicle emissions budget(s) for these years.~~

~~(c) Consistency with the motor vehicle emissions budget(s) must be demonstrated for each pollutant~~

or pollutant precursor in Section 3 (b) for which the area is in nonattainment or maintenance and for which the applicable implementation plan (or implementation plan submission) establishes a motor vehicle emissions budget.

(d) Consistency with the motor vehicle emissions budget(s) must be demonstrated by including emissions from the entire transportation system, including all regionally significant projects contained in the transportation plan and all other regionally significant highway and transit projects expected in the nonattainment or maintenance area in the timeframe of the transportation plan.

(1) Consistency with the motor vehicle emissions budget(s) must be demonstrated with a regional emissions analysis that meets the requirements of Sections 23 and 6 (c)(1)(i).

(2) The regional emissions analysis may be performed for any years in the timeframe of the transportation plan provided they are not more than ten years apart and provided the analysis is performed for the attainment year (if it is in the timeframe of the transportation plan) and the last year of the plan's forecast period. Emissions in years for which consistency with motor vehicle emissions budgets must be demonstrated, as required in paragraph (b) of this section, may be determined by interpolating between the years for which the regional emissions analysis is performed.

(e) Motor Vehicle emissions budgets in submitted control strategy implementation plan revisions and submitted maintenance plans.

(1) Consistency with the motor vehicle emissions budgets in submitted control strategy implementation plan revisions or maintenance plans must be demonstrated if EPA has declared the motor vehicle emissions budget(s) adequate for transportation conformity purposes, or beginning 45 days after the control strategy implementation plan revision or maintenance plan has been submitted (unless EPA has declared the motor vehicle emissions budget(s) inadequate for transportation conformity purposes). However, submitted implementation plans do not supersede the motor vehicle emissions budgets in approved implementation plans for the period of years addressed by the approved implementation plan.

(2) If EPA has declared an implementation plan submission's motor vehicle emissions budget(s) inadequate for transportation conformity purposes, the inadequate budget(s) shall not be used to satisfy the requirements of this section. Consistency with the previously established motor vehicle emissions budget(s) must be demonstrated. If there are no previous approved implementation plans or implementation plan submissions with motor vehicle emissions budgets, the emission reduction tests required by Section 20 must be satisfied.

(3) If EPA declares an implementation plan submission's motor vehicle emissions budget(s) inadequate for transportation conformity purposes more than 45 days after its submission to EPA, and conformity of a transportation plan or TIP has already been determined by DOT using the budget(s), the conformity determination will remain valid. Projects included in that transportation plan or TIP could still satisfy Sections 15 and 16, which require a currently conforming transportation plan and TIP to be in place at the time of a project's conformity determination and that projects come from a conforming transportation plan and TIP.

(4) EPA will not find a motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan to be adequate for transportation conformity purposes unless the following minimum criteria are satisfied:

(i) The submitted control strategy implementation plan revision or maintenance plan was endorsed by the Governor (or his or her designee) and was subject to a State public hearing;

(ii) Before the control strategy implementation plan or maintenance plan was submitted to EPA, consultation among federal, State, and local agencies occurred; full implementation plan documentation was provided to EPA; and EPA's stated concerns, if any, were addressed;

(iii) The motor vehicle emissions budget(s) is clearly identified and precisely quantified;

(iv) The motor vehicle emissions budget(s), when considered together with all other emissions sources, is consistent with applicable requirements for reasonable further progress, attainment, or maintenance (whichever is relevant to the given implementation plan submission);

(v) The motor vehicle emissions budget(s) is consistent with and clearly related to the emissions inventory and the control measures in the submitted control strategy implementation plan revision or maintenance plan; and

(vi) Revisions to previously submitted control strategy implementation plans or maintenance plans explain and document any changes to previously submitted budgets and control measures; impacts on point and area source emissions; any changes to established safety margins (see Section 2 for

definition); and reasons for the changes (including the basis for any changes related to emission factors or estimates of vehicle miles traveled).

(5) Before determining the adequacy of a submitted motor vehicle emissions budget, EPA will review the State's compilation of public comments and response to comments that are required to be submitted with any implementation plan. EPA will document its consideration of such comments and responses in a letter to the State indicating the adequacy of the submitted motor vehicle emissions budget.

(6) When the motor vehicle emissions budget(s) used to satisfy the requirements of this section are established by an implementation plan submittal that has not yet been approved or disapproved by EPA, the MPO and DOT's conformity determinations will be deemed to be a statement that the MPO and DOT are not aware of any information that would indicate that emissions consistent with the motor vehicle emissions budget will cause or contribute to any new violation of any standard; increase the frequency or severity of any existing violation of any standard; or delay timely attainment of any standard or any required interim emission reductions or other milestones.

4/11/98

Section 20—Criteria and Procedures: Emission Reductions in Areas without Motor Vehicle Emissions Budgets.

(a) The transportation plan, TIP, and project not from a conforming transportation plan and TIP must contribute to emissions reductions. This criterion applies as described in Section 10 (c) (g). It applies to the net effect of the action (transportation plan, TIP, or project not from a conforming transportation plan and TIP) on motor vehicle emissions from the entire transportation system.

(b) This criterion may be met in moderate and above ozone nonattainment areas that are subject to the reasonable further progress requirements of Clean Air Act § 182(b)(1) and in moderate with design value greater than 12.7 ppm and serious CO nonattainment areas if a regional emissions analysis that satisfies the requirements of Section 23 and paragraphs (e) through (h) of this section demonstrates that for each analysis year and for each of the pollutants described in paragraph (d) of this section:

(1) The emissions predicted in the "Action" scenario are less than the emissions predicted in the "Baseline" scenario, and this can be reasonably expected to be true in the periods between the analysis years; and

(2) The emissions predicted in the "Action" scenario are lower than 1990 emissions by any nonzero amount.

(c) This criterion may be met in PM<sub>10</sub> and NO<sub>2</sub> nonattainment areas; marginal and below ozone nonattainment areas and other ozone nonattainment areas that are not subject to the reasonable further progress requirements of Clean Air Act § 182(b)(1); and moderate with design value less than 12.7 ppm and below CO nonattainment areas if a regional emissions analysis that satisfies the requirements of Section 23 and paragraphs (e) through (h) of this section demonstrates that for each analysis year and for each of the pollutants described in paragraph (d) of this section, one of the following requirements is met:

(1) The emissions predicted in the "Action" scenario are less than the emissions predicted in the "Baseline" scenario, and this can be reasonably expected to be true in the periods between the analysis years; or

(2) The emissions predicted in the "Action" scenario are not greater than baseline emissions. Baseline emissions are those estimated to have occurred during calendar year 1990, unless the conformity implementation plan revision required by 40 CFR §51.390 defines the baseline emissions for a PM<sub>10</sub> area to be those occurring in a different calendar year for which a baseline emissions inventory was developed for the purpose of developing a control strategy implementation plan.

(d) Pollutants. The regional emissions analysis must be performed for the following pollutants:

(1) VOC in ozone areas;

(2) NO<sub>x</sub> in ozone areas, unless the EPA Administrator determines that additional reductions of NO<sub>x</sub> would not contribute to attainment;

(3) CO in CO areas;

(4) PM<sub>10</sub> in PM<sub>10</sub> areas;

(5) Transportation-related precursors of PM<sub>10</sub> in PM<sub>10</sub> nonattainment and maintenance areas if the EPA Regional Administrator or the director of the State air agency has made a finding that such precursor

emissions from within the area are a significant contributor to the PM<sub>10</sub> nonattainment problem and has so notified the MPO and DOT; and

~~(6) NOx in NO<sub>2</sub> areas.~~

~~(e) Analysis years. The regional emissions analysis must be performed for analysis years that are no more than ten years apart. The first analysis year must be no more than five years beyond the year in which the conformity determination is being made. The last year of transportation plan's forecast period must also be an analysis year.~~

~~(f) "Baseline" scenario. The regional emissions analysis required by paragraphs (b) and (c) of this section must estimate the emissions that would result from the "Baseline" scenario in each analysis year. The "Baseline" scenario must be defined for each of the analysis years. The "Baseline" scenario is the future transportation system that will result from current programs, including the following (except that exempt projects listed in Section 27 and projects exempt from regional emissions analysis as listed in Section 28 need not be explicitly considered):~~

~~(1) All in-place regionally significant highway and transit facilities, services and activities;~~

~~(2) All ongoing travel demand management or transportation system management activities;~~

and

~~(3) Completion of all regionally significant projects, regardless of funding source, which are currently under construction or are undergoing right of way acquisition (except for hardship acquisition and protective buying); come from the first year of the previously conforming transportation plan and/or TIP; or have completed the NEPA process.~~

~~(g) "Action" scenario. The regional emissions analysis required by paragraphs (b) and (c) of this section must estimate the emissions that would result from the "Action" scenario in each analysis year. The "Action" scenario must be defined for each of the analysis years. The "Action" scenario is the transportation system that would result from the implementation of the proposed action (transportation plan, TIP, or project not from a conforming transportation plan and TIP) and all other expected regionally significant projects in the nonattainment area. The "Action" scenario must include the following (except that exempt projects listed in Section 27 and projects exempt from regional emissions analysis as listed in Section 28 need not be explicitly considered):~~

~~(1) All facilities, services, and activities in the "Baseline" scenario;~~

~~(2) Completion of all TCMs and regionally significant projects (including facilities, services, and activities) specifically identified in the proposed transportation plan which will be operational or in effect in the analysis year, except that regulatory TCMs may not be assumed to begin at a future time unless the regulation is already adopted by the enforcing jurisdiction or the TCM is identified in the applicable implementation plan;~~

~~(3) All travel demand management programs and transportation system management activities known to the MPO, but not included in the applicable implementation plan or utilizing any Federal funding or approval, which have been fully adopted and/or funded by the enforcing jurisdiction or sponsoring agency since the last conformity determination;~~

~~(4) The incremental effects of any travel demand management programs and transportation system management activities known to the MPO, but not included in the applicable implementation plan or utilizing any Federal funding or approval, which were adopted and/or funded prior to the date of the last conformity determination, but which have been modified since then to be more stringent or effective;~~

~~(5) Completion of all expected regionally significant highway and transit projects which are not from a conforming transportation plan and TIP; and~~

~~(6) Completion of all expected regionally significant non-FHWA/FTA highway and transit projects that have clear funding sources and commitments leading toward their implementation and completion by the analysis year.~~

~~(h) Projects not from a conforming transportation plan and TIP. For the regional emissions analysis required by paragraphs (b) and (c) of this section, if the project which is not from a conforming transportation plan and TIP is a modification of a project currently in the plan or TIP, the 'Baseline' scenario must include the project with its original design concept and scope, and the 'Action' scenario must include the project with its new design concept and scope.~~

4/11/98

Section 21—Consequences of Control Strategy Implementation Plan Failures

(a) Disapprovals.

(1) If EPA disapproves any submitted control strategy implementation plan revision (with or without a protective finding), the conformity status of the transportation plan and TIP shall lapse on the date that highway sanctions as a result of the disapproval are imposed on the nonattainment area under § 179(b)(1) of the Clean Air Act. No new transportation plan, TIP, or project may be found to conform until another control strategy implementation plan revision fulfilling the same Clean Air Act requirements is submitted and conformity to this submission is determined.

(2) If EPA disapproves a submitted control strategy implementation plan revision without making a protective finding, then beginning 120 days after such disapproval, only projects in the first three years of the currently conforming transportation plan and TIP may be found to conform. This means that beginning 120 days after disapproval without a protective finding, no transportation plan, TIP, or project not in the first three years of the currently conforming plan and TIP may be found to conform until another control strategy implementation plan revision fulfilling the same Clean Air Act requirements is submitted and conformity to this submission is determined. During the first 120 days following EPA's disapproval without a protective finding, transportation plan, TIP, and project conformity determinations shall be made using the motor vehicle emissions budget(s) in the disapproved control strategy implementation plan, unless another control strategy implementation plan revision has been submitted and its motor vehicle emissions budget(s) applies for transportation conformity purposes, pursuant to Section 10.

(3) In disapproving a control strategy implementation plan revision, EPA would give a protective finding where a submitted plan contains adopted control measures or written commitments to adopt enforceable control measures that fully satisfy the emissions reductions requirements relevant to the statutory provision for which the implementation plan revision was submitted, such as reasonable further progress or attainment.

(b) Failure to submit and incompleteness. In areas where EPA notifies the State, MPO, and DOT of the State's failure to submit a control strategy implementation plan or submission of an incomplete control strategy implementation plan revision (either of which initiates the sanction process under Clean Air Act § 179 or § 110(m)), the conformity status of the transportation plan and TIP shall lapse on the date that highway sanctions are imposed on the nonattainment area for such failure under § 179(b)(1) of the Clean Air Act, unless the failure has been remedied and acknowledged by a letter from the EPA Regional Administrator.

(c) Federal implementation plans. If EPA promulgates a Federal implementation plan that contains motor vehicle emissions budget(s) as a result of a State failure, the conformity lapse imposed by this section because of that State failure is removed.

4/11/98

Section 22 Requirements for Adoption or Approval of Projects by Recipients of Funds Designated Under Title 23 U.S.C. or the Federal Transit Laws

(a) Except as provided in paragraph (b) of this section, no recipient of Federal funds designated under title 23 U.S.C. or the Federal Transit Laws shall adopt or approve a regionally significant highway or transit project, regardless of funding source, unless the recipient finds that the requirements of one of the following paragraphs are met:

(1) The project was included in the first three years of the most recently conforming transportation plan and TIP (or the conformity determination's regional emissions analyses), even if conformity status is currently lapsed; and the project's design concept and scope has not changed significantly from those analyses; or

(2) There is a currently conforming transportation plan and TIP, and a new regional emissions analysis including the project and the currently conforming transportation plan and TIP demonstrates that the transportation plan and TIP would still conform if the project were implemented (consistent with the requirements of Sections 19 and/or Section 20 for a project not from a conforming transportation plan and TIP).

(b) In isolated rural nonattainment and maintenance areas subject to Section 10 (g), no recipient of Federal funds designated under title 23 U.S.C. or the Federal Transit Laws shall adopt or approve a regionally significant highway or transit project, regardless of funding source, unless the recipient finds that the requirements of one of the following paragraphs are met:

(1) The project was included in the regional emissions analysis supporting the most recent conformity determination for the portion of the statewide transportation plan and TIP which are in the nonattainment or maintenance area, and the project's design concept and scope has not changed significantly; or

(2) A new regional emissions analysis including the project and all other regionally significant projects expected in the nonattainment or maintenance area demonstrates that those projects in the statewide transportation plan and statewide TIP which are in the nonattainment or maintenance area would still conform if the project were implemented (consistent with the requirements of Sections 19 and/or 20 for projects not from a conforming transportation plan and TIP).

4/11/98

Section 23- Procedures for Determining Regional Transportation Related Emissions.

(a) General requirements.

(1) The regional emissions analysis required by Sections 19 and 20 for the transportation plan, TIP, or project not from a conforming plan and TIP must include all regionally significant projects expected in the nonattainment or maintenance area. The analysis shall include FHWA/FTA projects proposed in the transportation plan and TIP and all other regionally significant projects which are disclosed to the MPO as required by Section 6. Projects which are not regionally significant are not required to be explicitly modeled, but vehicle miles traveled (VMT) from such projects must be estimated in accordance with reasonable professional practice. The effects of TGMs and similar projects that are not regionally significant may also be estimated in accordance with reasonable professional practice.

(2) The emissions analysis may not include for emissions reduction credit any TGMs or other measures in the applicable implementation plan which have been delayed beyond the scheduled date(s) until such time as their implementation has been assured. If the measure has been partially implemented and it can be demonstrated that it is providing quantifiable emission reduction benefits, the emissions analysis may include that emissions reduction credit.

(3) Emissions reduction credit from projects, programs, or activities which require a regulatory action in order to be implemented may not be included in the emissions analysis unless:

- (i) The regulatory action is already adopted by the enforcing jurisdiction;
- (ii) The project, program, or activity is included in the applicable implementation plan;
- (iii) The control strategy implementation plan submission or maintenance plan submission that establishes the motor vehicle emissions budget(s) for the purposes of Section 19 contains a written commitment to the project, program, or activity by the agency with authority to implement it; or
- (iv) EPA has approved an opt in to a Federally enforced program, EPA has promulgated the program (if the control program is a Federal responsibility, such as vehicle tailpipe standards), or the Clean Air Act requires the program without need for individual State action and without any discretionary authority for EPA to set its stringency, delay its effective date, or not implement the program.

(4) Emissions reduction credit from control measures that are not included in the transportation plan and TIP and that do not require a regulatory action in order to be implemented may not be included in the emissions analysis unless the conformity determination includes written commitments to implementation from the appropriate entities.

(i) Persons or entities voluntarily committing to control measures must comply with the obligations of such commitments.

(ii) The conformity implementation plan revision required in CFR 40 §51.390 of this chapter must provide that written commitments to control measures that are not included in the transportation plan and TIP must be obtained prior to a conformity determination and that such commitments must be fulfilled.

(5) A regional emissions analysis for the purpose of satisfying the requirements of Section 20 must make the same assumptions in both the "Baseline" and "Action" scenarios regarding control measures that are external to the transportation system itself, such as vehicle tailpipe or evaporative emission standards, limits on gasoline volatility, vehicle inspection and maintenance programs, and oxygenated or reformulated gasoline or diesel fuel.

(6) The ambient temperatures used for the regional emissions analysis shall be consistent with those used to establish the emissions budget in the applicable implementation plan. All other factors, for example the fraction of travel in a hot stabilized engine mode, must be consistent with the applicable

implementation plan, unless modified after interagency consultation according to Section 6 (c)(1)(i) to incorporate additional or more geographically specific information or represent a logically estimated trend in such factors beyond the period considered in the applicable implementation plan.

(7) Reasonable methods shall be used to estimate nonattainment or maintenance area VMT on off network roadways within the urban transportation planning area, and on roadways outside the urban transportation planning area.

(b) Regional emissions analysis in serious, severe, and extreme ozone nonattainment areas and serious CO nonattainment areas must meet the requirements of paragraphs (b)(1) through (3) of this section if their metropolitan planning area contains an urbanized area population over 200,000.

(1) By January 1, 1997, estimates of regional transportation related emissions used to support conformity determinations must be made at a minimum using network based travel models according to procedures and methods that are available and in practice and supported by current and available documentation. These procedures, methods, and practices are available from DOT and will be updated periodically. Agencies must discuss these modeling procedures and practices through the interagency consultation process, as required by Section 6 (c)(1)(i). Network based travel models must at a minimum satisfy the following requirements:

(i) Network based travel models must be validated against observed counts (peak and off peak, if possible) for a base year that is not more than 10 years prior to the date of the conformity determination. Model forecasts must be analyzed for reasonableness and compared to historical trends and other factors, and the results must be documented;

(ii) Land use, population, employment, and other network based travel model assumptions must be documented and based on the best available information;

(iii) Scenarios of land development and use must be consistent with the future transportation system alternatives for which emissions are being estimated. The distribution of employment and residences for different transportation options must be reasonable;

(iv) A capacity sensitive assignment methodology must be used, and emissions estimates must be based on a methodology which differentiates between peak and off peak link volumes and speeds and uses speeds based on final assigned volumes;

(v) Zone to zone travel impedances used to distribute trips between origin and destination pairs must be in reasonable agreement with the travel times that are estimated from final assigned traffic volumes. Where use of transit currently is anticipated to be a significant factor in satisfying transportation demand, these times should also be used for modeling mode splits; and

(vi) Network based travel models must be reasonably sensitive to changes in the time(s), cost(s), and other factors affecting travel choices.

(2) Reasonable methods in accordance with good practice must be used to estimate traffic speeds and delays in a manner that is sensitive to the estimated volume of travel on each roadway segment represented in the network based travel model.

(3) Highway Performance Monitoring System (HPMS) estimates of vehicle miles traveled (VMT) shall be considered the primary measure of VMT within the portion of the nonattainment or maintenance area and for the functional classes of roadways included in HPMS, for urban areas which are sampled on a separate urban area basis. For areas with network based travel models, a factor (or factors) may be developed to reconcile and calibrate the network based travel model estimates of VMT in the base year of its validation to the HPMS estimates for the same period. These factors may then be applied to model estimates of future VMT. In this factoring process, consideration will be given to differences between HPMS and network based travel models, such as differences in the facility coverage of the HPMS and the modeled network description. Locally developed count based programs and other departures from these procedures are permitted subject to the interagency consultation procedures of Section 6 (c)(1)(i).

(c) In all areas not otherwise subject to paragraph (b) of this section, regional emissions analyses must use those procedures described in paragraph (b) of this section if the use of those procedures has been the previous practice of the MPO. Otherwise, areas not subject to paragraph (b) of this section may estimate regional emissions using any appropriate methods that account for VMT growth by, for example, extrapolating historical VMT or projecting future VMT by considering growth in population and historical growth trends for VMT per person. These methods must also consider future economic activity, transit alternatives, and transportation system policies.

(d) ~~PM<sub>10</sub>~~ from construction related fugitive dust.

(1) For areas in which the implementation plan does not identify construction related fugitive

~~PM<sub>10</sub> as a contributor to the nonattainment problem, the fugitive PM<sub>10</sub> emissions associated with highway and transit project construction are not required to be considered in the regional emissions analysis.~~

~~(2) In PM<sub>10</sub> nonattainment and maintenance areas with implementation plans which identify construction-related fugitive PM<sub>10</sub> as a contributor to the nonattainment problem, the regional PM<sub>10</sub> emissions analysis shall consider construction-related fugitive PM<sub>10</sub> and shall account for the level of construction activity, the fugitive PM<sub>10</sub> control measures in the applicable implementation plan, and the dust producing capacity of the proposed activities.~~

~~(e) Reliance on previous regional emissions analysis.~~

~~(1) The TIP may be demonstrated to satisfy the requirements of Sections 19 or 20 without new regional emissions analysis if the regional emissions analysis already performed for the plan also applies to the TIP. This requires a demonstration that:~~

~~(i) The TIP contains all projects which must be started in the TIP's timeframe in order to achieve the highway and transit system envisioned by the transportation plan;~~

~~(ii) All TIP projects which are regionally significant are included in the transportation plan with design concept and scope adequate to determine their contribution to the transportation plan's regional emissions at the time of the transportation plan's conformity determination; and~~

~~(iii) The design concept and scope of each regionally significant project in the TIP is not significantly different from that described in the transportation plan.~~

~~(2) A project which is not from a conforming transportation plan and a conforming TIP may be demonstrated to satisfy the requirements of Sections 19 or 20 without additional regional emissions analysis if allocating funds to the project will not delay the implementation of projects in the transportation plan or TIP which are necessary to achieve the highway and transit system envisioned by the transportation plan, and if the project is either:~~

~~(i) not regionally significant; or~~

~~(ii) included in the conforming transportation plan (even if it is not specifically included in the latest conforming TIP) with design concept and scope adequate to determine its contribution to the transportation plan's regional emissions at the time of the transportation plan's conformity determination, and the design concept and scope of the project is not significantly different from that described in the transportation plan.~~

4/11/98

#### Section 24—Procedures for Determining Localized CO and PM<sub>10</sub> Concentrations (Hot Spot Analysis)

(a) CO hot spot analysis.

(1) The demonstrations required by Section 17 must be based on quantitative analysis using the applicable air quality models, data bases, and other requirements specified in 40 CFR part 51 Appendix W ("Guideline on Air Quality Models (Revised)" (1988), supplement A (1987) and supplement B (1993), EPA publication no. 450/2-78-027R). These procedures shall be used in the following cases, unless different procedures developed through the interagency consultation process required in Section 6 and approved by the EPA Regional Administrator are used:

(i) For projects in or affecting locations, areas, or categories of sites which are identified in the applicable implementation plan as sites of violation or possible violation;

(ii) For projects affecting intersections that are at Level of Service D, E, or F, or those that will change to Level of Service D, E, or F because of increased traffic volumes related to the project;

(iii) For any project affecting one or more of the top three intersections in the nonattainment or maintenance area with highest traffic volumes, as identified in the applicable implementation plan; and

(iv) For any project affecting one or more of the top three intersections in the nonattainment or maintenance area with the worst level of service, as identified in the applicable implementation plan.

(2) In cases other than those described in paragraph (a)(1) of this section, the demonstrations required by Section 17 may be based on either:

(i) Quantitative methods that represent reasonable and common professional practice; or

(ii) ~~A qualitative consideration of local factors, if this can provide a clear demonstration that the requirements of Section 17 are met.~~

(b) ~~PM<sub>10</sub> hot spot analysis.~~

(1) ~~The hot spot demonstration required by Section 17 must be based on quantitative analysis methods for the following types of projects:~~

(i) ~~Projects which are located at sites at which violations have been verified by monitoring;~~

(ii) ~~Projects which are located at sites which have vehicle and roadway emission and dispersion characteristics that are essentially identical to those of sites with verified violations (including sites near one at which a violation has been monitored); and~~

(iii) ~~New or expanded bus and rail terminals and transfer points which increase the number of diesel vehicles congregating at a single location.~~

(2) ~~Where quantitative analysis methods are not required, the demonstration required by Section 17 may be based on a qualitative consideration of local factors.~~

(3) ~~The identification of the sites described in paragraph (b)(1)(i) and (ii) of this section, and other cases where quantitative methods are appropriate, shall be determined through the interagency consultation process required in Section 6. DOT may choose to make a categorical conformity determination on bus and rail terminals or transfer points based on appropriate modeling of various terminal sizes, configurations, and activity levels.~~

(4) ~~The requirements for quantitative analysis contained in paragraph (b) of this section will not take effect until EPA releases modeling guidance on this subject and announces in the Federal Register that these requirements are in effect.~~

(c) ~~General requirements.~~

(1) ~~Estimated pollutant concentrations must be based on the total emissions burden which may result from the implementation of the project, summed together with future background concentrations. The total concentration must be estimated and analyzed at appropriate receptor locations in the area substantially affected by the project.~~

(2) ~~Hot spot analyses must include the entire project, and may be performed only after the major design features which will significantly impact concentrations have been identified. The future background concentration should be estimated by multiplying current background by the ratio of future to current traffic and the ratio of future to current emission factors.~~

(3) ~~Hot spot analysis assumptions must be consistent with those in the regional emissions analysis for those inputs which are required for both analyses.~~

(4) ~~PM<sub>10</sub> or CO mitigation or control measures shall be assumed in the hot spot analysis only where there are written commitments from the project sponsor and/or operator to implement such measures, as required by Section 26 (a).~~

(5) ~~CO and PM<sub>10</sub> hot spot analyses are not required to consider construction related activities which cause temporary increases in emissions. Each site which is affected by construction related activities shall be considered separately, using established "Guideline" methods. Temporary increases are defined as those which occur only during the construction phase and last five years or less at any individual site.~~

4/11/98

~~Section 25 Using the Motor Vehicle Emissions Budget in the Applicable Implementation Plan (or Implementation Plan Submission)~~

(a) ~~In interpreting an applicable implementation plan (or implementation plan submission) with respect to its motor vehicle emissions budget(s), the MPO and DOT may not infer additions to the budget(s) that are not explicitly intended by the implementation plan (or submission). Unless the implementation plan explicitly quantifies the amount by which motor vehicle emissions could be higher while still allowing a demonstration of compliance with the milestone, attainment, or maintenance requirement and explicitly states an intent that some or all of this additional amount should be available to the MPO and DOT in the emissions budget for conformity purposes, the MPO may not interpret the budget to be higher than the implementation plan's estimate of future emissions. This applies in particular to applicable implementation plans (or submissions) which demonstrate that after~~

implementation of control measures in the implementation plan:

(1) Emissions from all sources will be less than the total emissions that would be consistent with a required demonstration of an emissions reduction milestone;

(2) Emissions from all sources will result in achieving attainment prior to the attainment deadline and/or ambient concentrations in the attainment deadline year will be lower than needed to demonstrate attainment; or

(3) Emissions will be lower than needed to provide for continued maintenance.

(b) If an applicable implementation plan submitted before November 24, 1993, demonstrates that emissions from all sources will be less than the total emissions that would be consistent with attainment and quantifies that "safety margin," the State may submit an implementation plan revision which assigns some or all of this safety margin to highway and transit mobile sources for the purposes of conformity. Such an implementation plan revision, once it is endorsed by the Governor and has been subject to a public hearing, may be used for the purposes of transportation conformity before it is approved by EPA.

(c) A conformity demonstration shall not trade emissions among budgets which the applicable implementation plan (or implementation plan submission) allocates for different pollutants or precursors, or among budgets allocated to motor vehicles and other sources, unless the implementation plan establishes appropriate mechanisms for such trades.

(d) If the applicable implementation plan (or implementation plan submission) estimates future emissions by geographic subarea of the nonattainment area, the MPO and DOT are not required to consider this to establish subarea budgets, unless the applicable implementation plan (or implementation plan submission) explicitly indicates an intent to create such subarea budgets for the purposes of conformity.

(e) If a nonattainment area includes more than one MPO, the implementation plan may establish motor vehicle emissions budgets for each MPO, or else the MPOs must collectively make a conformity determination for the entire nonattainment area.

4/11/98

#### Section 26—Enforceability of Design Concept and Scope and Project Level Mitigation and Control Measures

(a) Prior to determining that a transportation project is in conformity, the MPO, other recipient of funds designated under title 23 U.S.C. or the Federal Transit Laws, FHWA, or FTA must obtain from the project sponsor and/or operator written commitments to implement in the construction of the project and operation of the resulting facility or service any project level mitigation or control measures which are identified as conditions for NEPA process completion with respect to local PM<sub>10</sub> or CO impacts. Before a conformity determination is made, written commitments must also be obtained for project level mitigation or control measures which are conditions for making conformity determinations for a transportation plan or TIP and are included in the project design concept and scope which is used in the regional emissions analysis required by Sections 19 and 20 or used in the project-level hot spot analysis required by Section 17.

(b) Project sponsors voluntarily committing to mitigation measures to facilitate positive conformity determinations must comply with the obligations of such commitments.

(c) The implementation plan revision required in 40 CFR §51.390 shall provide that written commitments to mitigation measures must be obtained prior to a positive conformity determination, and that project sponsors must comply with such commitments.

(d) If the MPO or project sponsor believes the mitigation or control measure is no longer necessary for conformity, the project sponsor or operator may be relieved of its obligation to implement the mitigation or control measure if it can demonstrate that the applicable hot spot requirements of Section 17, emission budget requirements of Section 19, and emission reduction requirements of Section 20 are satisfied without the mitigation or control measure, and so notifies the agencies involved in the interagency consultation process required under Section 6. The MPO and DOT must find that the transportation plan and TIP still satisfy the applicable requirements of Sections 19 and/or 20, and that the project still satisfies the requirements of Section 17, and therefore that the conformity determinations for the transportation plan, TIP, and project are still valid. This finding is subject to the applicable public consultation requirements in Section 6 (e) for conformity determinations for projects.

4/11/98

## Section 27—Exempt Projects

Notwithstanding the other requirements of this regulation, highway and transit projects of the types listed in Table 2 are exempt from the requirement to determine conformity. Such projects may proceed toward implementation even in the absence of a conforming transportation plan and TIP. A particular action of the type listed in Table 2 is not exempt if the MPO in consultation with other agencies (see Section 6 (c)(1)(iii)), the EPA, and the FHWA (in the case of a highway project) or the FTA (in the case of a transit project) concur that it has potentially adverse emissions impacts for any reason. States and MPOs must ensure that exempt projects do not interfere with TCM implementation.

Table 2.— Exempt Projects

### SAFETY

Railroad/highway crossing.  
Hazard elimination program.  
Safer non Federal aid system roads.  
Shoulder improvements.  
Increasing sight distance.  
Safety improvement program.  
Traffic control devices and operating assistance other than signalization projects.  
Railroad/highway crossing warning devices.  
Guardrails, median barriers, crash cushions.  
Pavement resurfacing and/or rehabilitation.  
Pavement marking demonstration.  
Emergency relief (23 U.S.C. 125).  
Fencing.  
Skid treatments.  
Safety roadside rest areas.  
Adding medians.  
Truck climbing lanes outside the urbanized area.  
Lighting improvements.  
Widening narrow pavements or reconstructing bridges (no additional travel lanes).  
Emergency truck pullovers.

### MASS TRANSIT

Operating assistance to transit agencies.  
Purchase of support vehicles.  
Rehabilitation of transit vehicles<sup>4</sup>.  
Purchase of office, shop, and operating equipment for existing facilities.  
Purchase of operating equipment for vehicles (e.g., radios, fareboxes, lifts, etc.).  
Construction or renovation of power, signal, and communications systems.  
Construction of small passenger shelters and information kiosks.  
Reconstruction or renovation of transit buildings and structures (e.g., rail or bus buildings, storage and maintenance facilities, stations, terminals, and ancillary structures).  
Rehabilitation or reconstruction of track structures, track, and trackbed in existing rights of way.  
Purchase of new buses and rail cars to replace existing vehicles or for minor expansions of the fleet<sup>4</sup>.  
Construction of new bus or rail storage/maintenance facilities categorically excluded in 23 CFR part 771.

### AIR QUALITY

Continuation of ride sharing and van pooling promotion activities at current levels.  
Bicycle and pedestrian facilities.

## OTHER

Specific activities which do not involve or lead directly to construction, such as:

- Planning and technical studies.
- Grants for training and research programs.
- Planning activities conducted pursuant to titles 23 and 49 U.S.C.
- Federal aid systems revisions.

Engineering to assess social, economic, and environmental effects of the proposed action or alternatives to that action.

Noise attenuation.

Emergency or hardship advance land acquisitions (23 CFR 712.204(d)).

Acquisition of scenic easements.

Plantings, landscaping, etc.

Sign removal.

Directional and informational signs.

Transportation enhancement activities (except rehabilitation and operation of historic transportation buildings, structures, or facilities).

Repair of damage caused by natural disasters, civil unrest, or terrorist acts, except projects involving substantial functional, locational or capacity changes.

<sup>4</sup>In PM<sub>10</sub> nonattainment or maintenance areas, such projects are exempt only if they are in compliance with control measures in the applicable implementation plan.

4/11/98

### Section 28— Projects Exempt from Regional Emissions Analyses

Notwithstanding the other requirements of this regulation, highway and transit projects of the types listed in Table 3 are exempt from regional emissions analysis requirements. The local effects of these projects with respect to CO or PM<sub>10</sub> concentrations must be considered to determine if a hot spot analysis is required prior to making a project-level conformity determination. These projects may then proceed to the project development process even in the absence of a conforming transportation plan and TIP. A particular action of the type listed in Table 3 is not exempt from regional emissions analysis if the MPO in consultation with other agencies (see Section 6 (e)(1)(iii)), the EPA, and the FHWA (in the case of a highway project) or the FTA (in the case of a transit project) concur that it has potential regional impacts for any reason.

Table 3.— Projects Exempt from Regional Emissions Analyses

- Intersection channelization projects.
- Intersection signalization projects at individual intersections.
- Interchange reconfiguration projects.
- Changes in vertical and horizontal alignment.
- Truck size and weight inspection stations.
- Bus terminals and transfer points.

4/11/98

### Section 29— Traffic Signal Synchronization Projects

Traffic signal synchronization projects may be approved, funded, and implemented without satisfying the requirements of this regulation. However, all subsequent regional emissions analyses required by Section 19 and 20 for transportation plans, TIPs, or projects not from a conforming plan and TIP must include such regionally significant traffic signal synchronization projects.