



STATE OF DELAWARE  
**DEPARTMENT OF NATURAL RESOURCES  
AND ENVIRONMENTAL CONTROL**  
89 KINGS HIGHWAY  
DOVER, DELAWARE 19901

Office of the  
Secretary

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**Secretary's Order No. 2007-A-0042**

**Re: Approval of Final Regulation, 7 DE Admin Code 1132-Transportation Conformity, which Amends *Regulation 32 in Delaware Regulations Governing the Control of Air Pollution* in Order to Reflect Changes in Federal Law**

Date of Issuance: October 15, 2007

Effective Date: November 11, 2007

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") under 29 *Del. C.* §§8001 *et seq.* and 7 *Del. C.* §6010(c), the following findings, reasons and conclusions are entered as an Order of the Secretary in the above-referenced matter.

On August 10, 2005, the federal transportation conformity requirements were amended by the Federal Safe, Accountable, Flexible, and Efficient Transportation Equity Act. One change in the law allows the States to streamline their requirements for a State Implementation Plan's ("SIP") conformity to the federal law and regulations, as required under the federal *Clean Air Act*, 42 *U.S.C.* §§7401 *et seq.*, and regulations promulgated by the United States Environmental Protection Agency ("EPA"). Under the amendment, the States are no longer required to address all of the federal conformity rule provisions in their SIPs. Instead, a SIP may only address the following federal regulations: 1) 40 *CFR* 93.105, which addresses the consultation procedures; 2) 40 *CFR* 93.122(a)(4)(ii), which requires that SIPs have written commitments to control measures prior to a conformity determination if the control measures are not included in an Metropolitan

Planning Organization (“MPO”) plan and Transportation Improvement Plan (“TIP”), and that such commitments be fulfilled; and 3) *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.

The proposed amendment to current Regulation 32 in the *Delaware Regulations Governing the Control of Air Pollution* will first restate and reformat the regulation to current numbering and style required for Delaware regulations. Second, the proposed amendment will reflect the inclusion of the Salisbury/Wicomico MPO as a new member of the Delaware Interagency Transportation Conformity Consultation Workgroup. This change is supported by the shift in the federal regulations that placed Delmar, Delaware into the Salisbury/Wicomico MPO. The remaining changes streamline the current state regulations consistent with the change in federal law. As a result of the proposed amendments, the current Regulation 32’s approximately sixty pages of regulations will be reduced to eighteen pages. The overall implementation and practice of transportation conformity will not change as the federal conformity rule applies for any provision not addressed in this Regulation.

The Department’s technical experts within the Division of Air and Waste Management, Air Quality Management Section drafted the proposed regulation and a public hearing was held on September 24, 2007. No person appeared at the hearing or submitted written comments.

Based upon the public record, the Department’s Senior Hearing Officer, Robert P. Haynes, recommended in a Report dated October 12, 2007 that the Department approve the proposed regulation as a final regulation. I agree with the recommendation and the Report and hereby approve the proposed regulation 1132 as a final regulation, which amends and replaces the current Regulation 32. The final regulation is as published in

the September 2007 *Delaware Register of Regulations*, and is set forth in Appendix A of the Report attached hereto.

In conclusion, the following findings and conclusions are entered:

1. The Department, acting through this Order of the Secretary hereby approves proposed amendments to current Regulation 32, which will become Regulation 1132 to *Delaware Regulations Governing the Control of Air Pollution*.

2. The Department shall have this Order published in the *Delaware Register of Regulations* and in newspapers in the same manner as the notice of the proposed regulation.

s/John A. Hughes  
John A. Hughes,  
Secretary

## HEARING OFFICER'S REPORT

TO: The Honorable John A. Hughes  
Secretary, Department of Natural Resources and Environmental Control

FROM: Robert P. Haynes, Esquire  
Senior Hearing Officer, Office of the Secretary  
Department of Natural Resources and Environmental Control

RE: Proposed Regulation, *7 DE Admin. Code 1132*, "Transportation Conformity" to amend *Regulation 32* in *Delaware Regulations Governing the Control of Air Pollution*

DATE: October 12, 2007

### I. BACKGROUND AND PROCEDURAL HISTORY

This report considers a proposed amendment to a regulation entitled "Transportation Conformity," which the Department of Natural Resources and Environmental Control ("Department") proposes to replace the current *Regulation 32* in *Delaware Regulations Governing the Control of Air Pollution*. The proposed regulation would be *Regulation 1132 in Delaware Regulations Governing Control of Air Pollution* and codified at *7 DE Admin Code 1132* if adopted.

On July 16, 2007, the Department issued Start Action Notice ("SAN") 2007-16, which opened a rulemaking proceeding to develop a regulation to reflect changes made to the federal regulation of Delaware's administration of the federal Clean Air Act ("CAA") and the United State Environmental Protection Agency's ("EPA") regulations. The Department's Division of Air and Waste Management, Air Quality Management Section ("AQMS"), drafted a proposed regulation, which was published September 1, 2007 in the *Delaware Register of Regulations*, and the proposed regulation is set forth in Appendix A. The Department held a public hearing on September 24, 2007 in the Department's

Dover offices, and the public comment period ended on September 30, 2007. No person attended the public hearing and no written public comments were received within the public comment period.

## **II. SUMMARY OF PUBLIC HEARING**

The public hearing record contains a verbatim transcript of the September 24, 2007 public hearing, and documents marked as Exhibits (“Ex”). AQMS supported the proposed regulation at the public hearing by the proposed regulation’s project leader, Phil Wheeler, who introduced into the record the Department’s exhibits.

## **III. DISCUSSION AND REASONS**

The Department developed the proposed regulation in order to reflect the changes made to the governing federal law. On August 10, 2005, the Federal Safe, Accountable, Flexible, and Efficient Transportation Equity Act-A Legacy for Users (“SAFTEA-LU”) was enacted into law. This law enabled the States to streamline their requirements for adopting and maintaining a full transportation conformity rule. Instead of a full rule, the States may only adopt the portions concerning the consultation process and commitments relative to the transportation control measures. The States and the Metropolitan Planning Organizations (“MPO”) are still subject to the federal transportation conformity rules so the proposed amendment will not alter the overall implementation and practice of transportation conformity under federal law and regulations, as required under the federal *Clean Air Act, 42 U.S.C. §§7401 et seq.*, and regulations promulgated by the United States Environmental Protection Agency (“EPA”).

The proposed amendment to current *Regulation 32* in the *Delaware Regulations Governing the Control of Air Pollution* will first restate and reformat the regulation to

current numbering and style required for Delaware regulations. Second, the proposed amendment will reflect the inclusion of the Salisbury/Wicomico MPO as a new member of the Delaware Interagency Transportation Conformity Consultation Workgroup. This change is supported by the shift in the federal regulations that placed Delmar, Delaware into the Salisbury/Wicomico MPO. The remaining changes reflect Delaware's election to streamline the current state regulations consistent with the change in federal law, which now only requires that a SIP may only address the following federal regulations: 1) *40 CFR 93.105*, which addresses the consultation procedures; 2) *40 CFR 93.122(a)(4)(ii)*, which requires that SIPs have written commitments to control measures prior to a conformity determination if the control measures are not included in a MPO's plan and Transportation Improvement Plan ("TIP"), and that such commitments be fulfilled; and 3) *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. The proposed amendment reflects these federal regulations and the reduction in regulations consistent with the federal streamlining is a reasonable basis for the amendment of current *Regulation 32*.

As a result of the proposed amendments, the current Regulation 32's approximately sixty pages of regulations will be reduced to eighteen pages.

#### **IV. RECOMMENDED FINDINGS AND CONCLUSIONS**

Based on the record developed, I find and conclude that the record supports approval of the proposed regulation, as set forth in Appendix A hereto, as a final

regulation. In conclusion, I recommend the Secretary adopt the following findings and conclusions as an Order of the Department:

1. The Department, acting through this Order of the Secretary and *29 Del C. §10118(d)*, hereby approves the final regulation in Appendix A to the Report, which is the same as the proposed regulation;

2. The Department shall have this Order published in the *Delaware Register of Regulations* and in newspapers in the same manner as the notice of the proposed regulation; and

3. The Department shall provide notice to the persons affected by the Order, as determined by the Department, including all those who submitted comments to the Department, who otherwise participated in the public hearing, and who requested to receive notice of all actions on proposed regulations.

[s/Robert P. Haynes](#)

Robert P. Haynes, Esquire  
Senior Hearing Officer

## APPENDIX A

### REGULATION NO. 1132– TRANSPORTATION CONFORMITY

#### 1.0 Purpose.

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

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

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

#### 2.0 Definitions.

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

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

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

**“Control strategy implementation plan revision”** means the implementation plan which contains specific strategies for controlling the emissions of and reducing ambient levels of pollutants in order to satisfy CAA requirements for demonstrations of reasonable further progress and attainment (including implementation plan revisions submitted to satisfy CAA Sections 172(c), 182(b)(1), 182(c)(2)(A), 182(c)(2)(B), 187(a)(7), 187(g), 189(a)(1)(B), 189(b)(1)(A), and 189(d); Sections 192(a) and 192(b), for nitrogen dioxide; and any other applicable CAA provision requiring a demonstration of reasonable further progress or attainment).

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

**“Department”** means the Delaware Department of Natural Resources and

## Environmental Control

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

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

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

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

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

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

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

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

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

- (1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;
- (2) Have independent utility or significance, i.e., be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and

(3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

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

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

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

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

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

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

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

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

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

**“Regionally significant project”** means a transportation project (other than an exempt

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

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

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

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

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

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

**“Transportation control measure (TCM)”** means any measure that is specifically identified and committed to in the applicable implementation plan, including a substitute or additional TCM that is incorporated into the applicable SIP through the process established in CAA section 176(c)(8), that is either one of the types listed in CAA section 108, or any other measure for the purpose of reducing emissions or

concentrations of air pollutants from transportation sources by reducing vehicle use or changing traffic flow or congestion conditions.

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

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

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

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

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

### **3.0 Consultation.**

#### **3.1. General.**

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

### 3.2. Interagency consultation procedures: General factors.

#### 3.2.1. Agency representation, roles and responsibilities.

3.2.1.1. Representatives of WILMAPCO, the Dover/Kent County MPO, the Salisbury/Wicomico MPO, the Department and 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 40 CFR Part 51 and 93.

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

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

3.2.1.4. It shall be the role and responsibility of each lead agency in an interagency consultation process, as specified in 3.2.1.2, to confer with all other agencies identified under 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 3.2, where required, assure policy-level contact with those agencies, and, (except for actions subject to 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 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.

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

3.2.1.5.1. The Department shall be responsible for developing:

3.2.1.5.1.1. emissions inventories,

3.2.1.5.1.2. emissions budgets,

3.2.1.5.1.3. air quality modeling,

3.2.1.5.1.4. attainment demonstrations,

3.2.1.5.1.5. control strategy implementation plan revisions,

3.2.1.5.1.6. updated motor vehicle emissions factors, and

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

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

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

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

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 DelDOT for use in air quality analysis to determine conformity of transportation plans, TIPs, and projects,-

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

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

3.2.1.5.3. DelDOT shall be responsible for:

3.2.1.5.3.1. developing Statewide transportation plans and TIPs,

3.2.1.5.3.2. providing technical comments on motor vehicle emissions inputs,

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

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

3.2.1.5.3.5. providing timely travel demand forecasting and on-

road mobile source emission inventories, and

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

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

3.2.1.5.5. FHWA and FTA shall be responsible for:

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

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

3.2.1.5.6. EPA shall be responsible for:

3.2.1.5.6.1. reviewing and approving updated motor vehicle emissions factors, and-

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

### 3.2.2. Consultation Process Work Group - procedures

3.2.2.1. As described herein, various agencies have the primary responsibility as lead agency for the preparation, development, 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.

3.2.2.2. Regular consultation on major activities such as the development of an implementation plan revision, the development of a transportation plan, the development of a TIP, or any determination of conformity of transportation plans or TIPs, shall include meetings of the Work Group on a regular scheduled basis as shall be determined by the consensus of the work group, but no less than on a semi-annual basis, until an attainment demonstration is approved by EPA.

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

3.2.2.3.1. The schedule for all formal meetings;

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

3.2.2.3.3. The status and schedule of all Standing Committee and/or Sub-Committee activities;

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

3.2.2.4. The Work Group may establish Standing Sub-Committees or Sub-Committees of limited duration when the Work Group determines that such are necessary to accomplish specific objectives or tasks.

3.2.2.5. As described in this section, various agencies have the primary obligation for the preparation, development, performance 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.

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

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

### 3.3. Interagency consultation procedures: Specific processes

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

- 3.3.1.1. Evaluating and choosing each model (or models) and associated methods and
- 3.3.1.2. Determining and providing written notification to the affected agencies (i.e., by letter from the Chairman to be included in the documentation)\_which minor arterials and other transportation projects should be considered “regionally significant” for the purposes of regional emissions analysis (in addition to those functionally classified as principal arterial or higher or fixed guide\_way systems or extensions that offer an alternative to regional highway travel), and which projects should be considered to have a significant change in design concept and scope from the transportation plan or TIP, to be initiated by DelDOT and conducted in accordance with 3.2.2;
- 3.3.1.3. Evaluating whether projects otherwise exempt should be treated as non-exempt in cases where potential adverse emissions impacts may exist for any reason, to be initiated by DelDOT and conducted in accordance with 3.2.2;
- 3.3.1.4. Making a determination, whether past obstacles to implementation of TCMs which are behind the schedule established in the applicable implementation plan have been identified and are being overcome, and whether State and local agencies with influence over approvals or funding for TCMs are giving maximum priority to approval or funding for TCMs, to be initiated by DelDOT and conducted in accordance with 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;
- 3.3.1.5. Making a determination whether a project should be included in the regional emissions analysis supporting the TIP's conformity determination, even if the project is not strictly included in the TIP for the purposes of MPO project selection or endorsement, and whether the project's design concept and scope have not changed significantly from those which were included in the regional emissions analysis, or in a manner which would significantly impact use of the facility, to be initiated by DelDOT and conducted in accordance with 3.2.2.

Identifying projects located at sites in PM<sub>2.5</sub> nonattainment areas which have vehicle and roadway emission and dispersion characteristics which are essentially identical to those at sites which have violations verified by monitoring, and therefore require quantitative PM<sub>10</sub> hot-spot analysis, to be initiated by DelDOT and conducted in accordance with 3.2.2;

- 3.3.1.6. Notification of transportation plan or TIP revisions or amendments which merely add or delete exempt projects listed in 40 CFR §93.126, to be initiated by WILMAPCO, the Salisbury/Wicomico MPO, the Dover/Kent County MPO, or DelDOT in their respective areas, and conducted in accordance with 3.2.2, other than the requirement that such notice be provided prior to final action;
  - 3.3.1.7. Determining what existing or forecast of vehicle miles traveled (VMT) to use in establishing or tracking emissions budgets, developing transportation plans, TIPs, or applicable implementation plans, or making conformity determinations, to be initiated by DelDOT and conducted in accordance with 3.2.2;
  - 3.3.1.8. Determining what constitutes "reasonable professional practice" for the purpose of funding projects and performing emission analysis within the context thereof, to be initiated by DelDOT and conducted in accordance with 3.2.2.
  - 3.3.1.9. Determining whether the project sponsor or MPO has demonstrated that the requirements of 40 CFR §93.118, and 40 CFR §93.124 are satisfied without a particular mitigation or control measure, as provided in 40 CFR §93.125, to be initiated by the Department and conducted in accordance with 3.2.2;
  - 3.3.1.10. Any decision made under 3.3.1 shall be conveyed in writing to all member agencies.
- 3.3.2. An interagency consultation process in accordance with 3.2 shall be undertaken for the following:
- 3.3.2.1. Evaluating events which will require new conformity determinations to be initiated by WILMAPCO, the Salisbury/Wicomico MPO, the Dover/Kent County MPO, or DelDOT in their respective areas, and conducted in accordance with 3.2.2;
  - 3.3.2.2. Consulting on emissions analysis for transportation activities which cross the borders of MPOs, or nonattainment areas, to be initiated by WILMAPCO, the Salisbury/Wicomico MPO, the Dover/Kent County MPO, or DelDOT in their respective areas, and conducted in accordance with 3.2.2.
- 3.3.3. Where the metropolitan planning area does not include the entire nonattainment or maintenance area, an interagency consultation process in

accordance 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, the Salisbury/Wicomico MPO or the Dover/Kent County MPO in their respective areas, and conducted in accordance with 3.2.2.

### 3.3.4. Regionally significant project - policy and procedures

3.3.4.1. An interagency consultation process in accordance with 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.

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.

3.3.4.3. In the case of any such regionally significant project that has not been disclosed to the MPO and other interested agencies participating in the consultation process in a timely manner, such regionally significant project shall not be considered to be included in the regional emissions analysis supporting the currently conforming TIP's

conformity determination and not to be consistent with the motor vehicle emissions budget in the applicable implementation plan.

3.3.5. An interagency consultation process in accordance with 3.2 involving the MPO and other recipients of funds designated under title 23 U.S.C. or the Federal Transit Act shall be undertaken for developing assumptions regarding the location and design concept and scope of projects which are disclosed to the MPO as required by 3.3.4 but whose sponsors have not yet decided these features, in sufficient detail to perform the regional emissions analysis according to the requirements of 40 CFR §93.122, to be initiated by DelDOT and conducted in accordance with 3.2.2.

3.3.6. An interagency consultation process in accordance with 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 DelDOT and conducted in accordance with 3.2.

#### 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 DelDOT in their respective areas, but FHWA/FTA will make an independent determination.

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

3.4.1 The completed air quality conformity determination, necessary supporting documentation and the TIP will be submitted to the FHWA Division Office and the FTA Regional Office. The FHWA Division Office will forward a copy of the conformity determination and TIP (including both highway and transit projects) to the EPA Regional Office for review and comment. EPA will respond in writing, to the FTA Regional Office and FHWA Division Office, as soon as possible but not later than 30 days from the date of the FHWA transmittal.

3.4.2. EPA comments will be resolved by FHWA and FTA, in concert with EPA, with WILMAPCO, the Dover/Kent County MPO, the Salisbury/Wicomico MPO or DelDOT in their respective areas, as necessary.

3.4.3. FHWA and FTA will jointly prepare correspondence to make the conformity finding. Joint conformity findings will be addressed to WILMAPCO (with a copy to DelDOT), to the Dover/Kent County MPO (with a copy to DelDOT), the Salisbury/Wicomico MPO (with a copy to

DelDOT) or to DelDOT in their respective areas, with copies to EPA and FTA. The findings of FTA and FHWA together constitute the DOT conformity findings.

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

3.4.5. In the event that WILMAPCO, the Dover/Kent County MPO, the Salisbury/Wicomico MPO or DelDOT 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 DelDOT in their respective areas, and will, in turn, require a new DOT conformity finding.

3.4.6. TIP amendments from non-attainment areas that require a new or revised conformity determination (i.e., addition of new exempt projects or scope changes to existing exempt projects in the TIP) require an FHWA/FTA conformity determination prior to being added to the TIP and STIP.

### 3.5. Department concurrence.

3.5.1. It is the responsibility of the Department to evaluate a complete conformity determination made by WILMAPCO, the Dover/Kent County MPO, the Salisbury/Wicomico MPO or DelDOT 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. 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 DelDOT, in their respective areas, may proceed with the final determination.

3.5.2. Any conflict among State agencies or between State agencies and WILMAPCO, the Dover/Kent County MPO or the Salisbury/Wicomico MPO shall be escalated to the Governor if the conflict cannot be resolved by the heads of the involved agencies within 30 days of the Department finding of non-concurrence. In the first instance, such agencies shall make every effort to resolve any difference, including personal meetings between the heads of such agencies or their policy-level representatives, to the extent

possible.

- 3.5.3. The Governor may delegate the role of hearing any such appeal under this subsection and of deciding whether to concur in the conformity determination to another official or agency within the State, but not to the head or staff of the Department, DelDOT, a State transportation commission or board, any agency that has responsibility for only one of these functions, WILMAPCO, the Dover/Kent County MPO or the Salisbury/Wicomico MPO.

### 3.6: Public consultation procedures.

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

## **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.