

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #7

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Effective Date

NOTICE OF AN EMERGENCY RULE

WV Division of Environmental Protection
AGENCY: Office of Air Quality TITLE NUMBER: 45CSR35

CITE AUTHORITY: WV Code §§22-5-1 et seq.

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING FILED AS AN EMERGENCY: 45CSR35

TITLE OF RULE BEING FILED AS AN EMERGENCY: "Requirements for Determining Conformity of
General Federal Actions to Applicable Air Quality Implementation Plans (General Conformity)"

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 42ND DAY AFTER FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

9.20

Use additional sheets if necessary

Roger T. Hall
Signature

45CSR35

REQUIREMENTS FOR DETERMINING CONFORMITY OF GENERAL
FEDERAL ACTIONS TO APPLICABLE AIR QUALITY IMPLEMENTATION PLANS
(GENERAL CONFORMITY)

STATEMENT OF CIRCUMSTANCE

The purpose of this rule is to adopt the requirements of 40 CFR Part 93, Subpart B, "Determining Conformity of General Federal Actions to State or Federal Implementation Plans". The Federal rule was promulgated by the U. S. Environmental Protection Agency (USEPA) to implement Section 176(c) of the Clean Air Act (CAA), as amended (42 U.S.C. §§ 7401 et seq.) which requires that all federal actions conform to applicable implementation plans under the Clean Air Act. This rule sets forth policy, criteria, and procedures for demonstrating and assuring conformity of such activities to applicable implementation plans developed pursuant to Section 110 and Part D of the CAA. The rule generally applies to federal actions except: (1) Those covered by the transportation conformity rule [40 CFR part 93, Subpart A]; (2) Actions with associated emissions below specified de minimis levels; and (3) Certain other actions which are exempt or presumed to conform to state and federal air quality plans.

This rule is necessary for the State to fulfill its responsibility under the Clean Air Act, as amended, and with the exceptions noted, incorporates by reference, the federal counterpart rule (40 CFR Part 93, Subpart B). The Director recommends incorporation of these criteria, procedures and requirements by reference.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: 45CSR35 - Requirements for Determining Conformity of General Federal Actions to Applicable Air Quality Implementation Plans (General Conformity)

Type of Rule: X Legislative Interpretive Procedural

Agency: Office of Air Quality

Address: 1558 Washington Street, East
 Charleston, WV 25311-2599

1. Effect of Proposed Rule	Annual		Fiscal Year		
	Increase	Decrease	Current	Next	There-after
Estimated Total Cost	\$ 28,000	\$ ----	\$ -0-	\$ 28,000	\$ 30,000
Personal Services	25,000	----	-0-	25,000	27,000
Current Expense	3,000	----	-0-	3,000	3,000
Repairs and Alterations	----	----	-0-	----	----
Equipment	----	----	-0-	----	----
Other	----	----	-0-	----	----

2. Explanation of above estimates: The Office of Air Quality of DEP projects that the proposed rule will require 0.5 man-year of professional staff time and the commitment of a small portion of clerical support for DEP/OAQ administration. Some office expenses and travel will also be involved.

3. Objectives of these rules: This rule sets forth policy, criteria, and procedures for demonstrating and assuring conformity of such activities to all applicable implementation plans developed pursuant to Section 110 and part D of the CAA.

4. Explanation of overall economic impact of proposed rule.

A. Economic impact on state government.

See Note 2 above.

- B. Economic impact on political subdivisions; specific industries; specific groups of citizens.

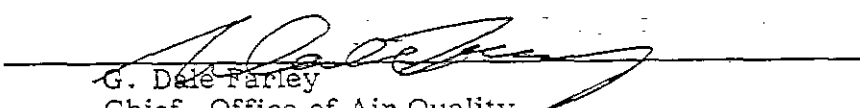
The proposed rule could negatively impact certain industries such as the construction industry and material suppliers as well as if certain political subdivisions of projects were cancelled under a finding of non-conformity. The economic impact of failure to comply with Clean Air Act Standards, however, could have far greater negative economic impact in these areas.

- C. Economic impact on citizens/public at large.

Minimal impacts should result with respect to the public at large.

Date: June 21, 1994

Signature of agency head or authorized representative:


G. Dale Farley
Chief, Office of Air Quality

DATE: October 6, 1994

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: G. Dale Farley
Chief, Office of Air Quality

EMERGENCY RULE TITLE: 45CSR35 - REQUIREMENTS FOR DETERMINING CONFORMITY OF GENERAL FEDERAL ACTIONS TO APPLICABLE AIR QUALITY IMPLEMENTATION PLANS (GENERAL CONFORMITY)

1. Date of filing: October 6, 1994

2. Statutory authority for promulgating the emergency rule: _____
WV Code §§22-5-1 et seq.

3. Date of filing of proposed legislative rule: August 12, 1994

4. Does the emergency rule adopt new language or does it amend or appeal a current legislative rule?

This is a new rule. The DEP filed and identical rule with the Secretary of State's Office and the LRMRC on August 12, 1994. The emergency rule is being filed to meet federal deadlines.

5. Has the same or similar emergency rule previously been filed and expired?
No

6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the immediate preservation of public peace, health, safety or welfare.

Not applicable

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

40 CFR §51.851 requires the State to adopt general conformity provisions
through a revision to the State Implementation Plan. This revision must be
submitted to USEPA by November 30, 1994.

8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

Not applicable

45 CSR 35

REQUIREMENTS FOR DETERMINING CONFORMITY OF GENERAL FEDERAL ACTIONS TO APPLICABLE AIR QUALITY IMPLEMENTATION PLANS (GENERAL CONFORMITY)

EMERGENCY LEGISLATIVE RULE

Summary

New Rule: The purpose of this rule is to adopt the requirements of 40 CFR Part 93, Subpart B, "Determining Conformity of General Federal Actions to State or Federal Implementation Plans". The federal rule was promulgated by the U.S. Environmental Protection Agency (USEPA) to implement Section 176(c) of the Clean Air Act (CAA), as amended (42 U.S.C. 7401 et seq.) which requires that all federal actions conform to applicable air quality implementation plans. This rule only applies to areas designated nonattainment or maintenance areas under the Clean Air Act, as amended.

The proposed rule was filed with Secretary of State, and with the Legislative Rule-Making Review Committee, as an agency-approved rule on August 12, 1994. The proposed emergency rule is identical to the rule as filed on that date. The State must submit the conformity provisions to the U.S. Environmental Protection Agency within 12 months after November 30, 1993 (40 CFR § 51.851). Hence, November 30, 1994 is the statutory deadline for submittal, which is the reason that the DEP is filing this rule as an emergency rule pursuant to W. Va. Code § 29A-3-15(f). This section states, in part, that an emergency exists when the promulgation of an emergency rule is necessary "to comply with a time limitation established by a federal statute or regulation".

This rule sets forth policy, criteria, and procedures for demonstrating and assuring conformity of such activities to all applicable implementation plans developed pursuant to Section 110 and Part D of the CAA. The rule generally applies to federal actions except: (1) Those required under the transportation conformity rule [40 CFR Part 93, Subpart A]; (2) Actions with associated emissions below specified de minimis levels; and (3) Certain other actions which are exempt or presumed to conform to applicable air quality implementation plans.

Some examples of federal actions requiring conformity determination include: Airport Construction/Modification grants; Leasing of Federal Land; Granting a Permit; Construction of Federal Office Buildings; Private Construction on Federal Land; Prescribed Burning; Reuse of Military Bases; and Water Treatment Plants.

45 CSR 35

**REQUIREMENTS FOR DETERMINING CONFORMITY OF GENERAL FEDERAL
ACTIONS TO APPLICABLE AIR QUALITY IMPLEMENTATION PLANS
(GENERAL CONFORMITY)**

EMERGENCY LEGISLATIVE RULE

Consultation with the EPAC

This rule was filed prior to the appointment of the Environmental Protection Advisory Council (EPAC). Therefore, no consultation with the EPAC has been possible.

TITLE 45
LEGISLATIVE RULE
BUREAU OF ENVIRONMENT
DIVISION OF ENVIRONMENTAL PROTECTION
OFFICE OF AIR QUALITY

SERIES 35

REQUIREMENTS FOR DETERMINING CONFORMITY OF GENERAL FEDERAL
ACTIONS TO APPLICABLE AIR QUALITY IMPLEMENTATION PLANS
(GENERAL CONFORMITY)

§45-35-1. General

1.1. Scope. - The purpose of this rule is to adopt the requirements of 40 CFR Part 93, Subpart B, "Determining Conformity of General Federal Actions to State or Federal Implementation Plans". The federal rule was promulgated by the U.S. Environmental Protection Agency (USEPA) to implement Section 176(c) of the Clean Air Act (CAA), as amended (42 U.S.C. 7401 et seq.) which requires that all federal actions conform to applicable air quality implementation plans. This rule applies only to areas designated nonattainment or maintenance areas under the Clean Air Act, as amended. This rule sets forth policy, criteria, and procedures for demonstrating and assuring conformity of such activities to all applicable implementation plans developed pursuant to Section 110 and Part D of the CAA. The rule generally applies to federal actions except: (1) Those required under the transportation conformity rule [40 CFR Part 93, Subpart A]; (2) Actions with associated emissions below specified de minimis levels; and (3) Certain other actions which are exempt or presumed to conform to applicable air quality implementation plans.

1.2. Authority. - W.Va. Code §§22-5-1 et seq.

1.3. Filing Date. -

1.4. Effective Date. -

1.5. Incorporation by Reference - Federal Counterpart Regulations - This rule is necessary for the State to fulfill its responsibility under the Clean Air Act, as amended, and, with the exceptions noted, incorporates by reference the federal counterpart rule [40 CFR Part 93, Subpart B] in accordance with the Director's recommendation.

1.6. Determination of Stringency - Federal Counterpart Regulations - The Director has determined that this rule is no more or no less stringent than the federal counterpart rule.

1.7. Constitutional Takings Determination - The Director has determined that this rule will not result in the constitutional taking of real property.

§45-35-2. Definitions

For the purpose of this rule, the following definitions shall be used:

2.1. Unless specified or added below, all terms used, but not defined, shall have the meaning given them or referred to by 40 CFR Part 93, Section 93.152, "Definitions".

2.2. "Applicable State Implementation Plan" (SIP), [also referred to as "applicable air quality implementation plan(s)", "applicable implementation plan(s)", or "applicable SIP"] specifically means the West Virginia State Implementation Plan, including the most current revisions approved by the United States Environmental Protection Agency (USEPA) and any Federal Implementation Plan implemented in the State of West Virginia pursuant to the Clean Air Act..

2.3. "Director" means the Director of the West Virginia Division of Environmental Protection or such other person to whom the Director has delegated authority or duties pursuant to W. Va. Code §22-1-6 or §22-1-8.

2.4. "Division of Environmental Protection" or "DEP" means the Division of Environmental Protection as defined in W. Va. Code §§22-1-1 et seq.

2.5. "State Governor" means the Governor of West Virginia or his or her designated representative.

2.6. "State and Local Air Quality Agency(ies)" and "State Agency" means the West Virginia Division of Environmental Protection, Office of Air Quality.

§45-35-3. Adoption of Criteria, Procedures and Requirements

3.1 The Director hereby adopts and incorporates by reference the provisions of

40 CFR Part 93, Subpart B, including associated criteria, procedures and requirements contained in 40 CFR Part 93, Subpart B, as of July 1, 1994, for the purpose of meeting the requirements of 40 CFR Part 51, Subpart W, Section 51.851.

§45-35-4. Requirements

4.1 No department, agency or instrumentality of the federal government shall engage in, support in any way or provide financial assistance for, license or permit, or approve any activity which does not conform to applicable implementation plans in West Virginia, as required and specified by 40 CFR Part 93, Subpart B.

§45-35-5. Severability

5.1 The provisions of this rule are severable and if any provisions or part thereof shall be held invalid, unconstitutional, or inapplicable to any person or circumstance; such invalidity, unconstitutionality, or inapplicability shall not affect or impair any of the remaining provisions, sections, or parts of this rule; or their application to any persons or circumstances.

REGULATION 35 ATTACHMENT

§ 51.850 Mitigation of air quality impacts.

(a) Any measures that are intended to mitigate air quality impacts must be identified and the process for implementation and enforcement of such measures must be described, including an implementation schedule containing explicit timelines for implementation.

(b) Prior to determining that a Federal action is in conformity, the Federal agency making the conformity determination must obtain written commitments from the appropriate persons or agencies to implement any mitigation measures which are identified as conditions for making conformity determinations.

(c) Persons or agencies voluntarily committing to mitigation measures to facilitate positive conformity determinations must comply with the obligations of such commitments.

(d) In instances where the Federal agency is licensing, permitting or otherwise approving the action of another governmental or private entity, approval by the Federal agency must be conditioned on the other entity meeting the mitigation measures set forth in the conformity determination.

(e) When necessary because of changed circumstances, mitigation measures may be modified so long as the new mitigation measures continue to support the conformity determination. Any proposed change in the mitigation measures is subject to the reporting requirements of § 51.856 and the public participation requirements of § 51.857.

(f) The implementation plan revision required in § 51.851 shall provide that written commitments to mitigation measures must be obtained prior to a positive conformity determination and that such commitments must be fulfilled.

(g) After a State revises its SIP to adopt its general conformity rules and EPA approves that SIP revision, any agreements, including mitigation measures, necessary for a conformity determination will be both State and federally enforceable. Enforceability through the applicable SIP will apply to all persons who agree to mitigate direct and indirect emissions associated with a Federal action for a conformity determination.

PART 93—DETERMINING CONFORMITY OF FEDERAL ACTIONS TO STATE OR FEDERAL IMPLEMENTATION PLANS

1. The authority citation for part 93 continues to read as follows:

Authority: 42 U.S.C. 7401-7671p.

2. Part 93 is amended by adding a new subpart B to read as follows:

Subpart B—Determining Conformity of General Federal Actions to State or Federal Implementation Plans

Sec.

93.150 Prohibition.

93.151 State implementation plan (SIP) revision.

93.152 Definitions.

93.153 Applicability.

93.154 Conformity analysis.

93.155 Reporting requirements.

93.156 Public participation.

93.157 Frequency of conformity determinations.

93.158 Criteria for determining conformity of general Federal actions.

93.159 Procedures for conformity determinations of general Federal actions.

93.160 Mitigation of air quality impacts.

Subpart B—Determining Conformity of General Federal Actions to State or Federal Implementation Plans

§ 93.150 Prohibition.

(a) No department, agency or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve any activity which does not conform to an applicable implementation plan.

(b) A Federal agency must make a determination that a Federal action conforms to the applicable implementation plan in accordance with the requirements of this subpart before the action is taken.

(c) Paragraph (b) of this section does not include Federal actions where:

(1) A National Environmental Policy Act (NEPA) analysis was completed as evidenced by a final environmental assessment (EA), environmental impact statement (EIS), or finding of no significant impact (FONSI) that was prepared prior to January 31, 1994; or

(2)(i) Prior to December 30, 1993, an environmental analysis was commenced or a contract was awarded to develop the specific environmental analysis;

(ii) Sufficient environmental analysis is completed by March 15, 1994 so that the Federal agency may determine that the Federal action is in conformity with the specific requirements and the purposes of the applicable SIP pursuant to the agency's affirmative obligation under section 176(c) of the Clean Air Act (Act); and

(iii) A written determination of conformity under section 176(c) of the Act has been made by the Federal agency responsible for the Federal action by March 15, 1994.

(d) Notwithstanding any provision of this subpart, a determination that an

action is in conformance with the applicable implementation plan does not exempt the action from any other requirements of the applicable implementation plan, the National Environmental Policy Act (NEPA), or the Clean Air Act (Act).

§ 93.151 State implementation plan (SIP) revision.

The Federal conformity rules under this subpart, in addition to any existing applicable State requirements, establish the conformity criteria and procedures necessary to meet the Act requirements until such time as the required conformity SIP revision is approved by EPA. A State's conformity provisions must contain criteria and procedures that are no less stringent than the requirements described in this subpart. A State may establish more stringent conformity criteria and procedures only if they apply equally to nonfederal as well as Federal entities. Following EPA approval of the State conformity provisions (or a portion thereof) in a revision to the applicable SIP, the approved (or approved portion of the) State criteria and procedures would govern conformity determinations and the Federal conformity regulations contained in this part would apply only for the portion, if any, of the State's conformity provisions that is not approved by EPA. In addition, any previously applicable SIP requirements relating to conformity remain enforceable until the State revises its SIP to specifically remove them from the SIP and that revision is approved by EPA.

§ 93.152 Definitions.

Terms used but not defined in this part shall have the meaning given them by the Act and EPA's regulations (40 CFR chapter I), in that order of priority.

Affected Federal land manager means the Federal agency or the Federal official charged with direct responsibility for management of an area designated as Class I under the Act (42 U.S.C. 7472) that is located within 100 km of the proposed Federal action.

Applicable implementation plan or applicable SIP means the portion (or portions) of the SIP or most recent revision thereof, which has been approved under section 110 of the Act, or promulgated under section 110(c) of the Act (Federal implementation plan), or promulgated or approved pursuant to regulations promulgated under section 301(d) of the Act and which implements the relevant requirements of the Act.

Areawide air quality modeling analysis means an assessment on a scale that includes the entire nonattainment

or maintenance area which uses an air quality dispersion model to determine the effects of emissions on air quality.

Cause or contribute to a new violation means a Federal action that:

(1) Causes a new violation of a national ambient air quality standard (NAAQS) at a location in a nonattainment or maintenance area which would otherwise not be in violation of the standard during the future period in question if the Federal action were not taken; or

(2) Contributes, in conjunction with other reasonably foreseeable actions, to a new violation of a NAAQS at a location in a nonattainment or maintenance area in a manner that would increase the frequency or severity of the new violation.

Caused by, as used in the terms "direct emissions" and "indirect emissions," means emissions that would not otherwise occur in the absence of the Federal action.

Criteria pollutant or standard means any pollutant for which there is established a NAAQS at 40 CFR part 50.

Direct emissions means those emissions of a criteria pollutant or its precursors that are caused or initiated by the Federal action and occur at the same time and place as the action.

Emergency means a situation where extremely quick action on the part of the Federal agencies involved is needed and where the timing of such Federal activities makes it impractical to meet the requirements of this subpart, such as natural disasters like hurricanes or earthquakes, civil disturbances such as terrorist acts and military mobilizations.

Emissions budgets are those portions of the applicable SIP's projected emission inventories that describe the levels of emissions (mobile, stationary, area, etc.) that provide for meeting reasonable further progress milestones, attainment, and/or maintenance for any criteria pollutant or its precursors.

Emissions offsets, for purposes of § 93.158, are emissions reductions which are quantifiable, consistent with the applicable SIP attainment and reasonable further progress demonstrations, surplus to reductions required by, and credited to, other applicable SIP provisions, enforceable at both the State and Federal levels, and permanent within the timeframe specified by the program.

Emissions that a Federal agency has a continuing program responsibility for means emissions that are specifically caused by an agency carrying out its authorities, and does not include emissions that occur due to subsequent activities, unless such activities are required by the Federal agency. When

an agency, in performing its normal program responsibilities, takes actions itself or imposes conditions that result in air pollutant emissions by a non-Federal entity taking subsequent actions, such emissions are covered by the meaning of a continuing program responsibility.

EPA means the Environmental Protection Agency.

Federal action means any activity engaged in by a department, agency, or instrumentality of the Federal government, or any activity that a department, agency or instrumentality of the Federal government supports in any way, provides financial assistance for, licenses, permits, or approves, other than activities related to transportation plans, programs, and projects developed, funded, or approved under title 23 U.S.C. or the Federal Transit Act (49 U.S.C. 1601 et seq.). Where the Federal action is a permit, license, or other approval for some aspect of a non-Federal undertaking, the relevant activity is the part, portion, or phase of the non-Federal undertaking that requires the Federal permit, license, or approval.

Federal agency means, for purposes of this subpart, a Federal department, agency, or instrumentality of the Federal government.

Increase the frequency or severity of any existing violation of any standard in any area means to cause a nonattainment area 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.

Indirect emissions means those emissions of a criteria pollutant or its precursors that:

(1) Are caused by the Federal action, but may occur later in time and/or may be further removed in distance from the action itself but are still reasonably foreseeable; and

(2) The Federal agency can practicably control and will maintain control over due to a continuing program responsibility of the Federal agency.

Local air quality modeling analysis means an assessment of localized impacts on a scale smaller than the entire nonattainment or maintenance area, including, for example, congested roadway intersections and highways or transit terminals, which uses an air quality dispersion model to determine the effects of emissions on air quality.

Maintenance area means an area with a maintenance plan approved under section 175A of the Act.

Maintenance plan means a revision to the applicable SIP, meeting the requirements of section 175A of the Act.

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. 1607.

Milestone has the meaning given in sections 182(g)(1) and 189(c)(1) of the Act.

National ambient air quality standards (NAAQS) are those standards established pursuant to section 109 of the Act and include standards for carbon monoxide (CO), lead (Pb), nitrogen dioxide (NO₂), ozone, particulate matter (PM-10), and sulfur dioxide (SO₂).

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

Nonattainment area means an area designated as nonattainment under section 107 of the Act and described in 40 CFR part 81.

Precursors of a criteria pollutant are:

(1) For ozone, nitrogen oxides (NO_x), unless an area is exempted from NO_x requirements under section 182(f) of the Act, and volatile organic compounds (VOC); and

(2) For PM-10, those pollutants described in the PM-10 nonattainment area applicable SIP as significant contributors to the PM-10 levels.

Reasonably foreseeable emissions are projected future indirect emissions that are identified at the time the conformity determination is made; the location of such emissions is known and the emissions are quantifiable, as described and documented by the Federal agency based on its own information and after reviewing any information presented to the Federal agency.

Regional water and/or wastewater projects include construction, operation, and maintenance of water or wastewater conveyances, water or wastewater treatment facilities, and water storage reservoirs which affect a large portion of a nonattainment or maintenance area.

Regionally significant action means a Federal action for which the direct and indirect emissions of any pollutant represent 10 percent or more of a nonattainment or maintenance area's emission inventory for that pollutant.

Total of direct and indirect emissions means the sum of direct and indirect emissions increases and decreases caused by the Federal action; i.e., the "net" emissions considering all direct and indirect emissions. The portion of emissions which are exempt or presumed to conform under § 93.153 (c),

(d), (e), or (f) are not included in the "total of direct and indirect emissions." The "total of direct and indirect emissions" includes emissions of criteria pollutants and emissions of precursors of criteria pollutants.

§ 93.153 Applicability.

(a) Conformity determinations for Federal actions related to transportation plans, programs, and projects developed, funded, or approved under title 23 U.S.C. or the Federal Transit Act (49 U.S.C. 1801 *et seq.*) must meet the procedures and criteria of 40 CFR part 51, subpart T, in lieu of the procedures set forth in this subpart.

(b) For Federal actions not covered by paragraph (a) of this section, a conformity determination is required for each pollutant where the total of direct and indirect emissions in a nonattainment or maintenance area caused by a Federal action would equal or exceed any of the rates in paragraphs (b)(1) or (2) of this section.

(1) For purposes of paragraph (b) of this section, the following rates apply in nonattainment areas (NAA's):

	Tons/year
Ozone (VOC's or NO _x):	
Serious NAA's	50
Severe NAA's	25
Extreme NAA's	10
Other ozone NAA's outside an ozone transport region	100
Marginal and moderate NAA's inside an ozone transport region:	
VOC	50
NO _x	100
Carbon monoxide:	
All NAA's	100
SO ₂ or NO ₂ :	
All NAA's	100
PM-10:	
Moderate NAA's	100
Serious NAA's	70
Pb:	
All NAA's	25

(2) For purposes of paragraph (b) of this section, the following rates apply in maintenance areas:

	Tons/year
Ozone (NO _x , SO ₂ or NO ₂):	
All Maintenance Areas	100
Ozone (VOC's):	
Maintenance areas inside an ozone transport region	50
Maintenance areas outside an ozone transport region	100
Carbon monoxide:	
All Maintenance Areas	100
PM-10:	
All Maintenance Areas	100
Pb:	
All Maintenance Areas	25

(c) The requirements of this subpart shall not apply to the following Federal actions:

(1) Actions where the total of direct and indirect emissions are below the emissions levels specified in paragraph (b) of this section:

(2) Actions which would result in no emissions increase or an increase in emissions that is clearly de minimis:

(i) Judicial and legislative proceedings;

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

(iii) Rulemaking and policy development and issuance.

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

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

(vi) Administrative actions such as personnel actions, organizational changes, debt management or collection, cash management, internal agency audits, program budget proposals, and matters relating to the administration and collection of taxes, duties and fees.

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

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

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

(x) Actions, such as the following, with respect to existing structures, properties, facilities and lands where future activities conducted will be similar in scope and operation to activities currently being conducted at the existing structures, properties, facilities, and lands; for example, relocation of personnel, disposition of federally-owned existing structures, properties, facilities, and lands, rent subsidies, operation and maintenance cost subsidies, the exercise of receivership or conservatorship authority, assistance in purchasing structures, and the production of coins and currency.

(xi) The granting of leases, licenses such as for exports and trade, permits,

and easements where activities conducted will be similar in scope and operation to activities currently being conducted.

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

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

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

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

(xvi) Actions by any of the Federal banking agencies or the Federal Reserve Banks, including actions regarding charters, applications, notices, licenses, the supervision or examination of depository institutions or depository institution holding companies, access to the discount window, or the provision of financial services to banking organizations or to any department, agency or instrumentality of the United States.

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

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

(xix) Actions (or portions thereof) associated with transfers of land, facilities, title, and real properties through an enforceable contract or lease agreement where the delivery of the deed is required to occur promptly after a specific, reasonable condition is met, such as promptly after the land is certified as meeting the requirements of CERCLA, and where the Federal agency does not retain continuing authority to control emissions associated with the lands, facilities, title, or real properties.

(xx) Transfers of real property, including land, facilities, and related personal property from a Federal entity to another Federal entity and assignments of real property, including land, facilities, and related personal property from a Federal entity to another Federal entity for subsequent deed to eligible applicants.

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

(3) Actions where the emissions are not reasonably foreseeable, such as the following:

(i) Initial Outer Continental Shelf lease sales which are made on a broad scale and are followed by exploration

and development plans on a project level.

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

(4) Actions which implement a decision to conduct or carry out a conforming program such as prescribed burning actions which are consistent with a conforming land management plan.

(d) Notwithstanding the other requirements of this subpart, a conformity determination is not required for the following Federal actions (or portion thereof):

(1) The portion of an action that includes major new or modified stationary sources that require a permit under the new source review (NSR) program (section 173 of the Act) or the prevention of significant deterioration program (title I, part C of the Act).

(2) Actions in response to emergencies or natural disasters such as hurricanes, earthquakes, etc., which are commenced on the order of hours or days after the emergency or disaster and, if applicable, which meet the requirements of paragraph (e) of this section.

(3) Research, investigations, studies, demonstrations, or training (other than those exempted under paragraph (c)(2) of this section), where no environmental detriment is incurred and/or, the particular action furthers air quality research, as determined by the State agency primarily responsible for the applicable SIP;

(4) Alteration and additions of existing structures as specifically required by new or existing applicable environmental legislation or environmental regulations (e.g., hush houses for aircraft engines and scrubbers for air emissions).

(5) Direct emissions from remedial and removal actions carried out under the Comprehensive Environmental Response, Compensation and Liability Act and associated regulations to the extent such emissions either comply with the substantive requirements of the PSD/NSR permitting program or are exempted from other environmental regulation under the provisions of CERCLA and applicable regulations issued under CERCLA.

(e) Federal actions which are part of a continuing response to an emergency or disaster under paragraph (d)(2) of this section and which are to be taken more than 6 months after the commencement of the response to the emergency or disaster under paragraph (d)(2) of this section are exempt from the requirements of this subpart only if:

(1) The Federal agency taking the actions makes a written determination that, for a specified period not to exceed an additional 6 months, it is impractical to prepare the conformity analyses which would otherwise be required and the actions cannot be delayed due to overriding concerns for public health and welfare, national security interests and foreign policy commitments; or

(2) For actions which are to be taken after those actions covered by paragraph (e)(1) of this section, the Federal agency makes a new determination as provided in paragraph (e)(1) of this section.

(f) Notwithstanding other requirements of this subpart, actions specified by individual Federal agencies that have met the criteria set forth in either paragraph (g)(1) or (g)(2) of this section and the procedures set forth in paragraph (h) of this section are presumed to conform, except as provided in paragraph (j) of this section.

(g) The Federal agency must meet the criteria for establishing activities that are presumed to conform by fulfilling the requirements set forth in either paragraph (g)(1) or (g)(2) of this section:

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

(i) Cause or contribute to any new violation of any standard in any area;

(ii) Interfere with provisions in the applicable SIP for maintenance of any standard;

(iii) Increase the frequency or severity of any existing violation of any standard in any area; or

(iv) Delay timely attainment of any standard or any required interim emission reductions or other milestones in any area including, where applicable, emission levels specified in the applicable SIP for purposes of:

(A) A demonstration of reasonable further progress;

(B) A demonstration of attainment; or

(C) A maintenance plan; or

(2) The Federal agency must provide documentation that the total of direct and indirect emissions from such future actions would be below the emission rates for a conformity determination that are established in paragraph (b) of this section, based, for example, on similar actions taken over recent years.

(h) In addition to meeting the criteria for establishing exemptions set forth in paragraphs (g)(1) or (g)(2) of this section, the following procedures must also be complied with to presume that activities will conform:

(1) The Federal agency must identify through publication in the Federal

Register its list of proposed activities that are presumed to conform and the basis for the presumptions;

(2) The Federal agency must notify the appropriate EPA Regional Office(s), State and local air quality agencies and, where applicable, the agency designated under section 174 of the Act and the MPO and provide at least 30 days for the public to comment on the list of proposed activities presumed to conform;

(3) The Federal agency must document its response to all the comments received and make the comments, response, and final list of activities available to the public upon request; and

(4) The Federal agency must publish the final list of such activities in the Federal Register.

(i) Notwithstanding the other requirements of this subpart, when the total of direct and indirect emissions of any pollutant from a Federal action does not equal or exceed the rates specified in paragraph (b) of this section, but represents 10 percent or more of a nonattainment or maintenance area's total emissions of that pollutant, the action is defined as a regionally significant action and the requirements of §§ 93.150 and §§ 93.155 through 93.160 shall apply for the Federal action.

(j) Where an action otherwise presumed to conform under paragraph (f) of this section is a regionally significant action or does not in fact meet one of the criteria in paragraph (g)(1) of this section, that action shall not be presumed to conform and the requirements of §§ 93.150 and §§ 93.155 through 93.160 shall apply for the Federal action.

(k) The provisions of this subpart shall apply in all nonattainment and maintenance areas.

§ 93.154 Conformity analysis.

Any Federal department, agency, or instrumentality of the Federal government taking an action subject to this subpart must make its own conformity determination consistent with the requirements of this subpart. In making its conformity determination, a Federal agency must consider comments from any interested parties. Where multiple Federal agencies have jurisdiction for various aspects of a project, a Federal agency may choose to adopt the analysis of another Federal agency or develop its own analysis in order to make its conformity determination.

§ 93.155 Reporting requirements.

(a) A Federal agency making a conformity determination under § 93.158 must provide to the appropriate EPA Regional Office(s), State and local air quality agencies and, where applicable, affected Federal land managers, the agency designated under section 174 of the Act and the MPO a 30 day notice which describes the proposed action and the Federal agency's draft conformity determination on the action.

(b) A Federal agency must notify the appropriate EPA Regional Office(s), State and local air quality agencies and, where applicable, affected Federal land managers, the agency designated under section 174 of the Clean Air Act and the MPO within 30 days after making a final conformity determination under § 93.158.

§ 93.155 Public participation.

(a) Upon request by any person regarding a specific Federal action, a Federal agency must make available for review its draft conformity determination under § 93.158 with supporting materials which describe the analytical methods and conclusions relied upon in making the applicability analysis and draft conformity determination.

(b) A Federal agency must make public its draft conformity determination under § 93.158 by placing a notice by prominent advertisement in a daily newspaper of general circulation in the area affected by the action and by providing 30 days for written public comment prior to taking any formal action on the draft determination. This comment period may be concurrent with any other public involvement, such as occurs in the NEPA process.

(c) A Federal agency must document its response to all the comments received on its draft conformity determination under § 93.158 and make the comments and responses available, upon request by any person regarding a specific Federal action, within 30 days of the final conformity determination.

(d) A Federal agency must make public its final conformity determination under § 93.158 for a Federal action by placing a notice by prominent advertisement in a daily newspaper of general circulation in the area affected by the action within 30 days of the final conformity determination.

§ 93.157 Frequency of conformity determinations.

(a) The conformity status of a Federal action automatically lapses 5 years from the date a final conformity

determination is reported under § 93.155, unless the Federal action has been completed or a continuous program has been commenced to implement that Federal action within a reasonable time.

(b) Ongoing Federal activities at a given site showing continuous progress are not new actions and do not require periodic redeterminations so long as such activities are within the scope of the final conformity determination reported under § 93.155.

(c) If, after the conformity determination is made, the Federal action is changed so that there is an increase in the total of direct and indirect emissions, above the levels in § 93.153(b), a new conformity determination is required.

§ 93.158 Criteria for determining conformity of general Federal actions.

(a) An action required under § 93.153 to have a conformity determination for a specific pollutant, will be determined to conform to the applicable SIP if, for each pollutant that exceeds the rates in § 93.153(b), or otherwise requires a conformity determination due to the total of direct and indirect emissions from the action, the action meets the requirements of paragraph (c) of this section, and meets any of the following requirements:

(1) For any criteria pollutant, the total of direct and indirect emissions from the action are specifically identified and accounted for in the applicable SIP's attainment or maintenance demonstration;

(2) For ozone or nitrogen dioxide, the total of direct and indirect emissions from the action are fully offset within the same nonattainment or maintenance area through a revision to the applicable SIP or a similarly enforceable measure that effects emission reductions so that there is no net increase in emissions of that pollutant;

(3) For any criteria pollutant, except ozone and nitrogen dioxide, the total of direct and indirect emissions from the action meet the requirements:

(i) Specified in paragraph (b) of this section, based on areawide air quality modeling analysis and local air quality modeling analysis; or

(ii) Meet the requirements of paragraph (a)(5) of this section and, for local air quality modeling analysis, the requirement of paragraph (b) of this section;

(4) For CO or PM-10—

(i) Where the State agency primarily responsible for the applicable SIP determines that an areawide air quality modeling analysis is not needed, the total of direct and indirect emissions

from the action meet the requirements specified in paragraph (b) of this section, based on local air quality modeling analysis; or

(ii) Where the State agency primarily responsible for the applicable SIP determines that an areawide air quality modeling analysis is appropriate and that a local air quality modeling analysis is not needed, the total of direct and indirect emissions from the action meet the requirements specified in paragraph (b) of this section, based on areawide modeling, or meet the requirements of paragraph (a)(5) of this section; or

(5) For ozone or nitrogen dioxide, and for purposes of paragraphs (a)(3)(ii) and (a)(4)(ii) of this section, each portion of the action or the action as a whole meets any of the following requirements:

(i) Where EPA has approved a revision to an area's attainment or maintenance demonstration after 1990 and the State makes a determination as provided in paragraph (a)(5)(i)(A) of this section or where the State makes a commitment as provided in paragraph (a)(5)(i)(B) of this section:

(A) The total of direct and indirect emissions from the action (or portion thereof) is determined and documented by the State agency primarily responsible for the applicable SIP to result in a level of emissions which, together with all other emissions in the nonattainment (or maintenance) area, would not exceed the emissions budgets specified in the applicable SIP;

(B) The total of direct and indirect emissions from the action (or portion thereof) is determined by the State agency responsible for the applicable SIP to result in a level of emissions which, together with all other emissions in the nonattainment (or maintenance) area, would exceed an emissions budget specified in the applicable SIP and the State Governor or the Governor's designee for SIP actions makes a written commitment to EPA which includes the following:

(1) A specific schedule for adoption and submittal of a revision to the SIP which would achieve the needed emission reductions prior to the time emissions from the Federal action would occur;

(2) Identification of specific measures for incorporation into the SIP which would result in a level of emissions which, together with all other emissions in the nonattainment or maintenance area, would not exceed any emissions budget specified in the applicable SIP;

(3) A demonstration that all existing applicable SIP requirements are being implemented in the area for the pollutants affected by the Federal action, and that local authority to

implement additional requirements has been fully pursued;

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

(5) Written documentation including all air quality analyses supporting the conformity determination;

(C) Where a Federal agency made a conformity determination based on a State commitment under paragraph (a)(5)(i)(B) of this section, such a State commitment is automatically deemed a call for a SIP revision by EPA under section 110(k)(5) of the Act, effective on the date of the Federal conformity determination and requiring response within 18 months or any shorter time within which the State commits to revise the applicable SIP;

(ii) The action (or portion thereof), as determined by the MPO, is specifically included in a current transportation plan and transportation improvement program which have been found to conform to the applicable SIP under 40 CFR part 51, subpart T, or 40 CFR part 93, subpart A;

(iii) The action (or portion thereof) fully offsets its emissions within the same nonattainment or maintenance area through a revision to the applicable SIP or an equally enforceable measure that effects emission reductions equal to or greater than the total of direct and indirect emissions from the action so that there is no net increase in emissions of that pollutant;

(iv) Where EPA has not approved a revision to the relevant SIP attainment or maintenance demonstration since 1990, the total of direct and indirect emissions from the action for the future years (described in § 93.159(d)) do not increase emissions with respect to the baseline emissions:

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

(1) Calendar year 1990;

(2) The calendar year that is the basis for the classification (or, where the classification is based on multiple years, the most representative year), if a classification is promulgated in 40 CFR part 81; or

(3) The year of the baseline inventory in the PM-10 applicable SIP;

(B) The baseline emissions are the total of direct and indirect emissions calculated for the future years (described in § 93.159(d)) using the historic activity levels (described in paragraph (a)(5)(iv)(A) of this section) and appropriate emission factors for the future years; or

(v) Where the action involves regional water and/or wastewater projects, such projects are sized to meet only the needs of population projections that are in the applicable SIP.

(b) The areawide and/or local air quality modeling analyses must:

(1) Meet the requirements in § 93.159; and

(2) Show that the action does not:

(i) Cause or contribute to any new violation of any standard in any area; or

(ii) Increase the frequency or severity of any existing violation of any standard in any area.

(c) Notwithstanding any other requirements of this section, an action subject to this subpart may not be determined to conform to the applicable SIP unless the total of direct and indirect emissions from the action is in compliance or consistent with all relevant requirements and milestones contained in the applicable SIP, such as elements identified as part of the reasonable further progress schedules, assumptions specified in the attainment or maintenance demonstration, prohibitions, numerical emission limits, and work practice requirements.

(d) Any analyses required under this section must be completed, and any mitigation requirements necessary for a finding of conformity must be identified before the determination of conformity is made.

§ 93.159. Procedures for conformity determinations of general Federal actions.

(a) The analyses required under this subpart must be based on the latest planning assumptions.

(1) All planning assumptions must be derived from the estimates of population, employment, travel, and congestion most recently approved by the MPO, or other agency authorized to make such estimates, where available.

(2) Any revisions to these estimates used as part of the conformity determination, including projected shifts in geographic location or level of population, employment, travel, and congestion, must be approved by the MPO or other agency authorized to make such estimates for the urban area.

(b) The analyses required under this subpart must be based on the latest and most accurate emission estimation techniques available as described below, unless such techniques are inappropriate. If such techniques are inappropriate and written approval of the EPA Regional Administrator is obtained for any modification or substitution, they may be modified or another technique substituted on a case-by-case basis or, where appropriate, on

a generic basis for a specific Federal agency program.

(1) For motor vehicle emissions, the most current version of the motor vehicle emissions model specified by EPA and available for use in the preparation or revision of SIPs in that State must be used for the conformity analysis as specified in paragraphs (b)(1)(i) and (ii) of this section:

(i) The EPA must publish in the Federal Register a notice of availability of any new motor vehicle emissions model; and

(ii) A grace period of 3 months shall apply during which the motor vehicle emissions model previously specified by EPA as the most current version may be used. Conformity analyses for which the analysis was begun during the grace period or no more than 3 years before the Federal Register notice of availability of the latest emission model may continue to use the previous version of the model specified by EPA.

(2) For non-motor vehicle sources, including stationary and area source emissions, the latest emission factors specified by EPA in the "Compilation of Air Pollutant Emission Factors (AP-42)"¹ must be used for the conformity analysis unless more accurate emission data are available, such as actual stack test data from stationary sources which are part of the conformity analysis.

(c) The air quality modeling analyses required under this subpart must be based on the applicable air quality models, data bases, and other requirements specified in the most recent version of the "Guideline on Air Quality Models (Revised)" (1986), including supplements (EPA publication no. 450/2-78-027R) 2, unless:

(1) The guideline techniques are inappropriate, in which case the model may be modified or another model substituted on a case-by-case basis or, where appropriate, on a generic basis for a specific Federal agency program; and

(2) Written approval of the EPA Regional Administrator is obtained for any modification or substitution.

(d) The analyses required under this subpart, except § 93.158(a)(1), must be based on the total of direct and indirect emissions from the action and must reflect emission scenarios that are expected to occur under each of the following cases:

(1) The Act mandated attainment year or, if applicable, the farthest year for which emissions are projected in the maintenance plan;

¹ Copies may be obtained from the Technical Support Division of OAQPS, EPA, MD-14, Research Triangle Park, NC 27711.

² See footnote 1 at § 93.159(b)(2).

(2) The year during which the total of direct and indirect emissions from the action is expected to be the greatest on an annual basis; and

(3) Any year for which the applicable SIP specifies an emissions budget.

§ 93.160 Mitigation of air quality impacts.

(a) Any measures that are intended to mitigate air quality impacts must be identified and the process for implementation and enforcement of such measures must be described, including an implementation schedule containing explicit timelines for implementation.

(b) Prior to determining that a Federal action is in conformity, the Federal agency making the conformity determination must obtain written commitments from the appropriate persons or agencies to implement any mitigation measures which are

identified as conditions for making conformity determinations.

(c) Persons or agencies voluntarily committing to mitigation measures to facilitate positive conformity determinations must comply with the obligations of such commitments.

(d) In instances where the Federal agency is licensing, permitting or otherwise approving the action of another governmental or private entity, approval by the Federal agency must be conditioned on the other entity meeting the mitigation measures set forth in the conformity determination.

(e) When necessary because of changed circumstances, mitigation measures may be modified so long as the new mitigation measures continue to support the conformity determination. Any proposed change in the mitigation measures is subject to the reporting requirements of § 93.156 and

the public participation requirements of § 93.157.

(f) The implementation plan revision required in § 93.151 shall provide that written commitments to mitigation measures must be obtained prior to a positive conformity determination and that such commitments must be fulfilled.

(g) After a State revises its SIP to adopt its general conformity rules and EPA approves that SIP revision, any agreements, including mitigation measures, necessary for a conformity determination will be both State and federally enforceable. Enforceability through the applicable SIP will apply to all persons who agree to mitigate direct and indirect emissions associated with a Federal action for a conformity determination.

(FR Doc. 93-28318 Filed 11-29-93; 8:45 am)
BILLING CODE 6560-60-P



KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

A. RENEE COE
Deputy Secretary of State

CATHERINE FREROTTE
Executive Assistant

Telephone: (304) 558-6000
Corporations: (304) 558-8000

WILLIAM H. HARRINGTON
Chief of Staff

JUDY COOPER
Director, Administrative Law

DONALD R. WILKES
Director, Corporations

(Plus all the volunteer
help we can get)

FAX: (304) 558-0900

STATE OF WEST VIRGINIA

SECRETARY OF STATE

Building 1, Suite 157-K
1900 Kanawha Blvd., East
Charleston, WV 25305-0770

November 16, 1994

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Nov 16 3 22 PM '94

FILED

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: DEP - Office of Air Quality

RULE: New Rule, Series 35, Requirements for Determining Conformity of General Federal Actions to Applicable Air Quality Implementation Plans (General Conformity)

DATE FILED AS AN EMERGENCY RULE: October 6, 1994

DECISION NO. 16-94

Following review under WV Code 29A-3-15a, it is the decision of the Secretary of State that the above emergency rule be approved. A copy of the complete decision with required findings is available from this office.


KEN HECHLER
Secretary of State



KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

A. RENEE COE
Deputy Secretary of State

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FAX: (304) 558-0900

STATE OF WEST VIRGINIA

SECRETARY OF STATE

Building 1, Suite 157-K
1900 Kanawha Blvd., East
Charleston, WV 25305-0770

EMERGENCY RULE DECISION (ERD 16-94)

AGENCY: DEP - Office of Air Quality
RULE: New Rule, Series 35, Requirements for Determining Conformity of General Federal Actions to Applicable Air Quality Implementation Plans (General Conformity)

FILED AS AN EMERGENCY RULE: October 6, 1994

- par. 1 The DEP - Office of Air Quality (OAQ) has filed the above new rule as an emergency rule.
- par. 2 West Virginia Code 29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [(29A-3-15a)(b)].
- par. 4 (A) Procedural Compliance: WV Code 29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the thirty-five day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.
- par. 6 The OAQ filed this emergency rule with supporting documents with the Secretary of State October 6, 1994 and with the LRMRC October 6, 1994.

par. 7 It is the determination of the Secretary of State that the OAQ has complied with the procedural requirements of WV Code §29A-3-15 for adoption of an emergency rule.

par. 8 (B) Statutory Authority -- WV Code 22-5-1 reads:

It is hereby declared to be the public policy of this state and the purpose of this article to achieve and maintain such levels of air quality as will protect human health and safety, and to the greatest degree practicable, prevent injury to plant and animal life and property, foster the comfort and convenience of the people, promote the economic and social development of this state and facilitate the enjoyment of the natural attractions of this state.

To these ends it is the purpose of this article to provide for a coordinated statewide program of air pollution prevention, abatement and control; to facilitate cooperation across jurisdictional lines in dealing with problems of air pollution not confined within single jurisdictions; and to provide a framework within which all values may be balanced in the public interest.

Further, it is the public policy of this state to fulfill its primary responsibility for assuring air quality pursuant to the "Federal Clean Air Act," as amended.

par. 9 It is the determination of the Secretary of State that the OAQ has not exceeded its statutory authority in promulgating this emergency rule.

par. 10 (C) Emergency -- WV Code 29A-3-15(g) defines "emergency" as follows:

(g) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.

par. 11 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 12 The facts and circumstances as presented by the OAQ are as follows:

The purpose of this rule is to adopt the requirements of 40 CFR Part 93, Subpart B, "Determining Conformity of General Federal Actions to State or Federal Implementation Plans." The federal rule was promulgated by the U.S. Environmental Protection Agency (USEPA) to implement Section 176(c) of the Clean Air Act (CAA), as amended (42 U.S.C. 7401 et seq.) which requires that all federal actions conform to applicable air quality implementation plans. This

rule only applies to areas designated nonattainment or maintenance areas under the Clean Air Act, as amended.

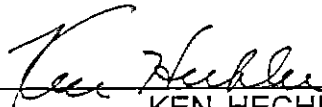
The proposed rule was filed with Secretary of State, and with the Legislative Rule-Making Review Committee, as an agency approved rule on August 12, 1994. The proposed emergency rule is identical to the rule as filed on that date. The State must submit the conformity provisions to the U.S. Environmental Protection Agency within 12 months after November 30, 1993 (40 CFR §51.851). Hence, November 30, 1994 is the statutory deadline for submittal, which is the reason that DEP is filing this rule as an emergency rule pursuant to W. Va. Code §29A-3-15(f). This section states, in part, that an emergency exists when the promulgation of an emergency rule is necessary "to comply with a time limitation established by a federal statute or regulation".

This rule sets forth policy, criteria and procedures for demonstrating and assuring conformity of such activities to all applicable implementation plans developed pursuant to Section 110 and Part D of the CAA. The rule generally applies to federal actions except: (!) Those required under the transportation conformity rule [40 CFR Part 93, Subpart A]; (2) Actions with associated emissions below specified de minimis levels; and (3) Certain other actions which are exempt or presumed to conform to applicable air quality implementation plans.

Some examples of federal actions requiring conformity determination include: Airport construction/modification grants; leasing of federal land; granting a permit; construction of federal land; prescribed burning; reuse of military bases; and water treatment plants.

par. 13 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(g). . . "to comply with a time limitation established by a federal statute or regulation."

par. 14 This decision shall be cited as Emergency Rule Decision 16-94 or ERD 16-94 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the DEP - Office of Air Quality, the Attorney General and the Legislative Rule Making Review Commission.



KEN HECHLER
Secretary of State

Entered _____

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOV 16 3 22 PM 1994

FILED



DIVISION OF ENVIRONMENTAL PROTECTION

GASTON CAPERTON
GOVERNOR

10 McJunkin Road
Nitro, WV 25143-2506

DAVID C. CALLAGHAN
DIRECTOR

July 28, 1994

Ms. Judy Cooper
Director, Administrative Law Division
Secretary of State's Office
Building 1, Suite 157K
Charleston, West Virginia 25305

RE: CSR-45-35 - Requirements for Determining Conformity
of General Federal Actions to Applicable Air
Quality Implementation Plans

Dear Ms. Cooper:

This is to advise you that I am giving approval for the filing of the above-captioned rule with your Office and the Legislative Rule-Making Review Committee as an agency-approved rule.

Your cooperation in this regard is very much appreciated. If you have any questions or require additional information, please feel free to contact Roger T. Hall at 759-0515.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "David C. Callaghan".

David C. Callaghan
Commissioner
Bureau of Environment

DCC;RTH:cc

Attachment



DEPARTMENT OF COMMERCE, LABOR & ENVIRONMENTAL RESOURCES
DIVISION OF ENVIRONMENTAL PROTECTION

1558 Washington Street, East
Charleston, WV 25311-2599

Gaston Caperton
Governor

John M. Ranson
Cabinet Secretary

David C. Callaghan
Director

Ann A. Spaner
Deputy Director

June 23, 1994

Ms. Jeanne Chandler
Librarian
Office of Air Quality
1558 Washington Street, East
Charleston, WV 25311

Dear Ms. Chandler:

On Friday, July 29, 1994, the West Virginia Division of Environmental Protection, Office of Air Quality, will hold a public hearing on proposed rules. For your convenience enclosed is a copy of the "Notice of Public Hearing". The hearing will be held in the Office of Air Quality's conference room located at 1558 Washington Street, East, Charleston beginning at 9:00 a.m. The hearings will be on the following proposed rules: 45CSR14, 45CSR15, 45CSR16, 45CSR19, 45CSR33, 45CSR34 and 45CSR35.

If you have any questions or comments, please contact the undersigned.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Dale Farley".

Dale Farley
Chief, Office of Air Quality

DF/tlm

Enclosures



DEPARTMENT OF COMMERCE, LABOR & ENVIRONMENTAL RESOURCES
DIVISION OF ENVIRONMENTAL PROTECTION

1558 Washington Street, East
Charleston, WV 25311-2599

Gaston Caperton
Governor

John M. Ranson
Cabinet Secretary

David C. Callaghan
Director

Ann A. Spaner
Deputy Director

June 22, 1994

Charleston Daily Mail
Legal Ad Department
1001 Virginia Street, East
Charleston, WV 25301

Dear Legal Ad Department:

Please publish the enclosed "Notice of Public Hearing" as soon as possible as a Class I legal advertisement. The publication must occur no later than Thursday June 29, 1994 excepting Sunday. If you have any questions regarding this matter, please contact Tammy Mowrer at 558-2275.

You may submit your invoice and a tear sheet to the attention of Ms. Nadine Sitton, 1558 Washington Street, East, Charleston, West Virginia 25311.

Sincerely yours,


Dale Farley
Chief, Office of Air Quality

DF/tlm

Enclosure



DIVISION OF ENVIRONMENTAL PROTECTION

GASTON CAPERTON
GOVERNOR

10 McJunkin Road
Nitro, WV 25143-2506

DAVID C. CALLAGHAN
DIRECTOR

September 30, 1994

Ms. Judy Cooper
Director, Administrative Law Division
Secretary of State's Office
Building 1, Suite 157K
Charleston, WV

Re: 45 CSR 35 - Requirements for Determining Conformity
of General Federal Actions to Applicable Air Quality
Implementation Plans (General Conformity)

Dear Ms. Cooper:

This is to advise you that I am granting approval for the filing of the above-captioned legislative rule as an emergency rule, with your office and with the Legislative Rule-Making Review Committee. A nearly identical draft rule was filed with your office on June 21, 1994. Following the requisite public comment period, a public hearing was held on July 29, 1994. Minor revisions were made to address public comments and the proposed rule was filed with your office, and with the Legislative Rule-Making Review Committee, as an agency-approved rule on August 12, 1994. The proposed emergency rule is identical to the rule as filed on that date.

The purpose of this rule is to comply with 40 CFR Part 51, Subpart W, which requires that states adopt general federal conformity requirements through a revision to the air-quality State Implementation Plan (SIP). The State must submit the conformity provisions to the U.S. Environmental Protection Agency within 12 months after November 30, 1993 (40 CFR § 51.851). Hence, November 30, 1994 is the statutory deadline for submittal, which is the reason that the DEP is filing this rule as an emergency rule.


W. Va. Code § 29A-3-15(f) specifies, in part, that an emergency exists when the promulgation of an emergency rule is necessary "to comply with a time limitation established by a federal statute or regulation". The public hearing requirement has been fulfilled through the hearing held on the draft rule. Therefore, our agency asserts that

Director's Office
Telephone: (304) 759-0515 Fax: (304) 759-0526

the necessary criteria for filing this action as an emergency rule have been met.

Your cooperation in this regard is very much appreciated. If you have any questions or require additional information, please feel free to contact Roger Hall at 759-0515.

Sincerely,



David C. Callaghan, Director
Division of Environmental Protection

Attachment