





**BUREAU OF ENVIRONMENT**  
10 McJunkin Road  
Nitro, WV 25143-2506

CECIL H. UNDERWOOD  
GOVERNOR

MICHAEL P. MIANO  
COMMISSIONER

January 4, 1999

Ms. Judy Cooper  
Director  
Administrative Law Division  
Capitol Complex  
Charleston, WV 25305

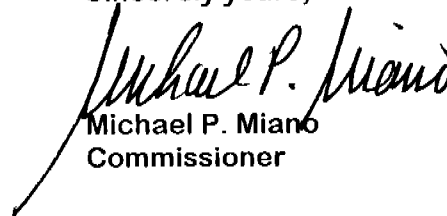
RE: 45CSR36 - "Requirements for Determining Conformity of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit Laws, to Applicable Air Quality Implementation Plans (Transportation Conformity)"

Dear Ms. Cooper:

This is to advise that I am giving approval to file the above-referenced agency-approved rule with your Office and the Legislative Rule-Making Review Committee as Notice of Rule Modification of a Proposed Rule.

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

Sincerely yours,

  
Michael P. Miano  
Commissioner

MPM:cc

Attachment

cc: John Johnston  
Karen Watson  
Carrie Chambers

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

FILED  
JAN 5 9 54 AM '99  
OFFICE OF THE SECRETARY OF STATE

SERIES 36  
REQUIREMENTS FOR DETERMINING CONFORMITY OF  
TRANSPORTATION PLANS, PROGRAMS, AND PROJECTS DEVELOPED,  
FUNDED OR APPROVED UNDER TITLE 23 U.S.C. OR THE FEDERAL TRANSIT  
~~ACT~~LAWS, TO APPLICABLE AIR QUALITY IMPLEMENTATION PLANS  
(TRANSPORTATION CONFORMITY)

**§45-36-1. General.**

1.1. Scope. -- The purpose of this rule is to adopt by reference the requirements of 40 CFR Part 93, "~~Determining the Conformity of Federal Actions to State or Federal Implementation Plans~~"; Subpart A, "Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. ~~Or~~ the Federal Transit ~~Act~~Laws". This rule sets forth policy, criteria, and procedures for demonstrating and assuring conformity of such transportation-related activities to applicable air quality implementation plans developed pursuant to Section 110 and Part D of the Clean Air Act, as amended (42 U.S.C. 7401 et seq.). ~~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.); and the related requirements of 23 U.S.C. Section 109(j), with respect to the conformity of transportation plans, programs, and projects which are developed, funded, or approved by the United States Department of Transportation (DOT), and by metropolitan planning organizations (MPOs) or other recipients of funds under Title 23 U.S.C. or the Federal Transit Act (49 U.S.C. 1601 et seq.). This rule sets forth policy, criteria, and procedures for demonstrating and assuring conformity of such activities to applicable air quality implementation plans developed pursuant to Section 110 and Part D of the CAA.~~

1.2. Authority. -- W.Va. Code ~~§22-1-3 and §§22-5-1~~§22-5-1 et seq.

1.3. Filing Date. --- April 28, 1995.

1.4. Effective Date. --May 1, 1995.

1.5. Incorporation by Reference -- Federal Counterpart Regulations - The Director has determined that a federal counterpart regulation exists, and in accordance with the Director's recommendation, with limited exception, this rule incorporates by reference 40 CFR Part 93, Subpart A, effective July 1, 1997, as amended by the Federal Register through June 1, 1998.

**§45-36-2. 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 §93.101, "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.

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

2.5. "Party" or "Parties" means the agencies and organizations expressly listed in the individual Memorandums of Understanding referred to in Section 7 of this rule.

2.6. "Person" means any and all persons, natural or artificial, including any municipal, public or private corporation organized or existing under the laws of this or any other state or country, and any firm, partnership, or association of whatever nature.

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

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

**§45-36-3. Adoption of Criteria, Procedures and Requirements.**

3.1. The Director hereby adopts and incorporates by reference, ~~with the exceptions noted in Section 5 of this rule, the all provisions of 40 CFR Part 93, Subpart A, "Conformity to State or Federal Implementation Plans of 40 CFR Part 93, Subpart A Transportation Plans, including associated criteria Programs, and Projects Developed, procedures and requirements contained in 40 CFR Part 93, Subpart A, as in effect on December 27~~ Funded or Approved Under Title 23 U.S.C. or the Federal Transit Laws" effective July 1, 1997, as amended by the 1993 for the purpose of meeting requirements of 40 CFR Part 51 Subpart T, Section 51.396 Federal Register through June 1, 1998, with the exception of 40CFR§93.102(d).

**§45-36-4. Requirements.**

4.1. All transportation plans, programs, and projects developed, funded or approved in West

Virginia, under Title 23 U.S.C. or the Federal Transit Act Laws, must conform to applicable air quality implementation plans in West Virginia. Any agency or organization charged with the responsibility to make transportation conformity determinations shall do so pursuant to the provisions of 40 CFR Part 93, Subpart A and this rule; and ~~will~~shall use the consultation procedures specified ~~below~~in Section 5.

**§45-36-5. Consultation.**

5.1. The consultation requirements of 40 CFR Part 93, Subpart A, Section 93.105 are hereby addressed and fulfilled by state-specific consultation agreements (Memorandums of Understanding) mutually established by and among the W. Va. Division of Environmental Protection (WVDEP), the W. Va. Department of Transportation (WVDOT), and the appropriate Metropolitan Planning Organizations (~~MPO's~~MPOs), which agreements are included in Appendix A and are hereby incorporated by reference into this rule. ~~These agreements address and comply with the requirements of 40 CFR Part 93, Subpart A, Section 93.105.~~

~~§45-36-6. Severability.~~

~~6.1. The provisions of this rule and associated memorandums of understanding 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 and associated memorandums of understanding, or their application to any persons or circumstances.~~

ANALYSIS OF PROPOSED LEGISLATIVE RULE

**Agency:** Office of Air Quality

**Subject:** Requirements for Determining Conformity of Transportation Plans, Programs and Projects Developed, Funded or Approved Under Title 23 U.S.C. or The Federal Transit Laws, to Applicable Air Quality Implementation Plans (Transportation Conformity)

**CSR Cite:** 45CSR36

**Counsel:** JAA

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PERTINENT DATES

Filed for public comment: June 16, 1998  
Public comment period ended: July 21, 1998  
Filed following public comment period: July 31, 1998  
Filed LRMRC: July 31, 1998  
Filed as emergency: n/a

**Fiscal Impact:** None.

ABSTRACT

This rule is being updated to incorporate the new Code of Federal Regulations references located in Sections 1 & 3. The rule provides the procedures required to assure that transportation related activities meet the applicable federal air quality implementation plans as required under the Clean Air Act. The rule also has incorporated, in its appendix, five Memorandums of Understanding [MOU] with the DEP, the state Department of Transportation and other parties to establish guidelines to assure that federal Clean Air Act requirements are met and providing procedures for resolving interagency conflicts.

OFFICE OF LEGISLATIVE  
SERVICES  
STATE

DEC 2 9 16 AM '98

FILED

## AUTHORITY

Statutory authority: W.Va. Code, §22-5-4 provides:

(a) The director is authorized...

(4) To promulgate legislative rules in accordance with the provisions of chapter twenty-nine-a of this code not inconsistent with the provisions of this article, relating to the control of air pollution: Provided, That no rule of the director shall specify a particular manufacturer of equipment nor a single specific type of construction nor a particular method of compliance except as specifically required by the "Federal Clean Air Act," as amended, nor shall any such rule apply to any aspect of an employer-employee relationship: Provided, however, That no legislative rule or program of the director hereafter adopted shall be any more stringent than any federal rule or program except to the limited extent that the director first makes a specific written finding for any such departure that there exists scientifically supportable evidence for such rule or program reflecting factors unique to West Virginia or some area thereof....

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## ANALYSIS

### I. HAS THE AGENCY EXCEEDED THE SCOPE OF ITS STATUTORY AUTHORITY IN APPROVING THE PROPOSED LEGISLATIVE RULE?

Possibly. By incorporating the MOUs into the rule, the agency is giving statutory status to requirements contained in the MOUs. The EPA does require the coordination of agencies represented by the MOUs, but to codify these MOUs in the rule may go beyond the normal parameters of appropriate agency regulation and authority.

II. IS THE PROPOSED LEGISLATIVE RULE IN CONFORMITY WITH THE INTENT OF THE STATUTE WHICH THE RULE IS INTENDED TO IMPLEMENT, EXTEND, APPLY, INTERPRET OR MAKE SPECIFIC?

Yes.

III. DOES THE PROPOSED LEGISLATIVE RULE CONFLICT WITH OTHER CODE PROVISIONS OR WITH ANY OTHER RULE ADOPTED BY THE SAME OR A DIFFERENT AGENCY?

No.

IV. IS THE PROPOSED LEGISLATIVE RULE NECESSARY TO FULLY ACCOMPLISH THE OBJECTIVES OF THE STATUTE UNDER WHICH THE PROPOSED RULE WAS PROMULGATED?

Yes.

V. IS THE PROPOSED LEGISLATIVE RULE REASONABLE, ESPECIALLY AS IT AFFECTS THE CONVENIENCE OF THE GENERAL PUBLIC OR OF PERSONS AFFECTED BY IT?

Yes.

VI. CAN THE PROPOSED LEGISLATIVE RULE BE MADE LESS COMPLEX OR MORE READILY UNDERSTANDABLE BY THE GENERAL PUBLIC?

No.

VII. WAS THE PROPOSED LEGISLATIVE RULE PROMULGATED IN COMPLIANCE WITH THE REQUIREMENTS OF CHAPTER 29A, ARTICLE 3 AND WITH ANY REQUIREMENTS IMPOSED BY ANY OTHER PROVISION OF THE CODE?

Yes.

VIII. OTHER.

Counsel recommends deletion of the severability clause.

Counsel also recommends removal of the Memorandums of Understanding from the rule. By placing these MOUs in the rule, it gives them the force and effect of law and precludes meeting any new federal requirements specified in the MOUs without amendment to the rule.





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**WEST VIRGINIA LEGISLATURE**  
**Legislative Rule-Making Review Committee**

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

*State Capitol - Room MB-49*  
*Charleston, West Virginia 25305*  
*Phone: (304) 347-4840*  
*Fax: (304) 347-4919*

*email: tanders@mail.wvnet.edu*

*Senator Mike Ross, Co-Chairman*  
*Delegate Mark Hunt, Co-Chairman*  
*Debra A. Graham, Counsel*

December 15, 1998

*Joseph A. Altizer, Associate Counsel*  
*Rita Pauley, Associate Counsel*  
*Teri Anderson, Administrative Assistant*

NOTICE OF ACTION TAKEN BY LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

TO: Ken Hechler, Secretary of State, State Register

TO: John H. Johnston  
Office of Air Quality  
1558 Washington St., East  
Charleston, WV 25311

FROM: Legislative Rule-Making Review Committee

Proposed Rule: **Transportation Conformity, 45CSR36**

The Legislative Rule-Making Review Committee recommends that the West Virginia Legislature:

1. Authorize the agency to promulgate the Legislative Rule
  - (a) as originally filed
  - (b) as modified by the agency
2. Authorize the agency to promulgate part of the Legislative rule; a statement of reasons for such recommendation is attached.
3. Authorize the agency to promulgate the Legislative rule with certain amendments; amendments and a statement of reasons for such recommendation is attached.
4. Authorize the agency to promulgate the Legislative rule as modified with certain amendments; amendments and a statement of reasons for such recommendation is attached.

45-36

Leep

H. B. 2527

1 Bill-DEP,

2 (By Delegates Hunt, Linch, Compton, Faircloth,  
3 Jenkins and Riggs)

4 [Introduced February 1, 1999; referred to the  
5 Committee on the Judiciary.]  
6  
7  
8  
9

10 A BILL to amend and reenact section one, article three,  
11 chapter sixty-four of the code of West Virginia, one  
12 thousand nine hundred thirty-one, as amended, relating  
13 to authorizing the division of environmental  
14 protection to promulgate a legislative rule relating  
15 to requirements for determining conformity of  
16 transportation plans, programs and projects developed,  
17 funded or approved under title 23 U.S.C. or the  
18 federal transit laws to applicable air quality  
19 implementation plans (transportation conformity).

20 *Be it enacted by the Legislature of West Virginia:*

21 That section one, article three, chapter sixty-four of  
22 the code of West Virginia, one thousand nine hundred  
23 thirty-one, as amended, be amended and reenacted, to read

2521

1 as follows:

2 **ARTICLE 3. AUTHORIZATION FOR BUREAU OF ENVIRONMENT TO**  
3 **PROMULGATE LEGISLATIVE RULES.**

4 **§64-3-1. Division of environmental protection.**

5 (a) The legislative rule filed in the state register  
6 on the first day of August, one thousand nine hundred  
7 ninety-seven, authorized under the authority of section  
8 seven, article five, chapter twenty-two, of this code,  
9 relating to the division of environmental protection (acid  
10 rain provisions and permits, 45 CSR 33), is authorized.

11 (b) The legislative rule filed in the state register  
12 on the first day of August, one thousand nine hundred  
13 ninety-seven, authorized under the authority of section  
14 seven, article five, chapter twenty-two of this code,  
15 relating to the division of environmental protection  
16 (emission standards for hazardous air pollutants pursuant  
17 to 40 CFR Part 63, 45 CSR 34), is authorized.

18 (c) The legislative rule filed in the state register  
19 on the first day of August, one thousand nine hundred  
20 ninety-seven, authorized under the authority of section  
21 six, article eighteen, chapter twenty-two of this code,  
22 relating to the division of environmental protection  
23 (hazardous waste management, 33 CSR 20), is authorized.

1           (d) The legislative rule filed in the state register  
2 on the fourteenth day of August, one thousand nine hundred  
3 ninety-seven, authorized under the authority of section  
4 four, article five, chapter twenty-two, of this code,  
5 relating to the division of environmental protection (to  
6 prevent and control particulate air pollution from  
7 manufacturing process operations, 45 CSR 7) is authorized.

8           (e) The legislative rule filed in the state register  
9 on the first day of August, one thousand nine hundred  
10 ninety-seven, authorized under the authority of section  
11 four, article five, chapter twenty-two, of this code,  
12 modified by the division of environmental protection to  
13 meet the objections of the legislative rule-making review  
14 committee and refiled in the state register on the seventh  
15 day of January, one thousand nine hundred ninety-eight,  
16 relating to the division of environmental protection (to  
17 prevent and control of emissions from municipal solid waste  
18 landfills, 45 CSR 23), is authorized.

19           (f) The legislative rule filed in the state register  
20 on the first day of August, one thousand nine hundred  
21 ninety-seven, authorized under the authority of section  
22 seven, article one, chapter twenty-two of this code,  
23 modified by the division of environmental protection to

1 meet the objections of the legislative rule-making review  
2 committee and refiled in the state register on the second  
3 day of December, one thousand nine hundred ninety-  
4 seven, relating to the division of environmental protection  
5 (to prevent and control air pollution from hazardous waste  
6 treatment, storage or disposal facilities, 45 CSR 25), is  
7 authorized.

8 (g) The legislative rule filed in the state register  
9 on the first day of August, one thousand nine hundred  
10 ninety-seven, authorized under the authority of section  
11 three, article one, chapter twenty-two of this code,  
12 modified by the division of environmental protection to  
13 meet the objections of the legislative rule-making review  
14 committee and refiled in the state register on the fifth  
15 day of January, one thousand nine hundred ninety-eight,  
16 relating to the division of environmental protection  
17 (surface mining and reclamation regulations, 38 CSR 2), is  
18 authorized.

19 (h) The legislative rule filed in the state register  
20 on the thirty-first day of July, one thousand nine hundred  
21 ninety-eight, authorized under the authority of section  
22 four, article five, chapter twenty-two, of this code,  
23 modified by the division of environmental protection to

1 meet the objections of the legislative rule-making review  
2 committee and refiled in the state register on the fifth  
3 day of January, one thousand nine hundred ninety-nine,  
4 relating to the division of environmental protection  
5 (requirements for determining conformity of transportation  
6 plans, programs and projects developed, funded or approved  
7 under title 23 U.S.C. or the federal transit laws to  
8 applicable air quality implementation plans (transportation  
9 conformity), 45 CSR 36), is authorized.

10

11 NOTE: The purpose of this bill is to authorize the  
12 Division of Environmental Protection to promulgate a  
13 legislative rule relating to Requirements for Determining  
14 Conformity of Transportation Plans, Programs and Projects  
15 Developed, Funded or Approved Under Title 23 U.S.C. or the  
16 Federal Transit Laws to Applicable Air Quality  
17 Implementation Plans (Transportation Conformity).

18

19 Strike-throughs indicate language that would be  
20 stricken from the present law, and underscoring indicates  
21 new language that would be added.