



# DEPARTMENT OF ENVIRONMENTAL PROTECTION

## BRIEFING DOCUMENT

**Rule Title:** 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)

**A. AUTHORITY:** W.Va. Code §22-5-4

**B. SUMMARY OF RULE:**

This rule establishes and adopts the requirements of 40 CFR Part 93, 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 Laws". This rule codifies general 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 Clean Air Act (CAA), as amended (42 U.S.C. 7401 et seq.). This rule adopts by reference the transportation conformity requirements of 40 CFR Part 93, Subpart A promulgated by the United States Environmental Protection Agency (U.S. EPA) as of June 1, 2003. All transportation plans, programs, and projects developed, funded or approved in West Virginia, under Title 23 U.S.C. or the Federal Transit Laws, must conform to applicable air quality implementation plans in West Virginia. Any agency, organization or party responsible for making transportation conformity determinations or is involved in transportation conformity-related activities shall do so pursuant to the provisions of 40 CFR Part 93, Subpart A and this rule. The federal regulation could negatively impact certain industries such as the construction industry and material suppliers as well as political subdivisions if transportation projects were cancelled under a finding of non-conformity.

**C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:**

40 CFR §51.390 requires that states adopt criteria and procedures for making transportation conformity determinations that are consistent with federal transportation conformity rule 40 CFR Part 93, Subpart A. Promulgation of this rule by the Legislature is necessary for the State to fulfill its responsibilities under the CAA, as amended. Revisions to the rule include general rule updates, incorporation by reference rule structure and language clarification; revised definitions and language which provide for Memorandums

**Briefing Document**

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of Understanding to be approved under the State Implementation Plan submitted to U.S. EPA as required by 40 CFR §51.390.

**D. FEDERAL COUNTERPART REGULATIONS - INCORPORATION BY REFERENCE/DETERMINATION OF STRINGENCY:**

A federal counterpart to this proposed rule exists. In accordance with the Secretary's recommendation, and with limited exception, the Division of Air Quality proposes that the rule incorporate by reference the federal counterparts. Because the proposed rule incorporates by reference the federal counterpart, no determination of stringency is required.

**E. CONSTITUTIONAL TAKINGS DETERMINATION:**

In accordance with W.Va. Code §§22-1A-1 and 3(c), the Secretary has determined that this rule will not result in taking of private property within the meaning of the Constitutions of West Virginia and the United States of America.

**F. CONSULTATION WITH THE ENVIRONMENTAL PROTECTION ADVISORY COUNCIL:**

At its June 3, 2003 meeting, the Environmental Protection Advisory Council reviewed and discussed this proposed rule. The Council's comments are contained in the attached minutes.



**Advisory Council Meeting  
Minutes  
June 3, 2003**

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Attendees:

Rick Roberts, Advisory Council Member	John Benedict, WVDEP
Larry Harris, Advisory Council Member	Lucy Pontiveros, WVDEP
Bill Raney, Advisory Council Member	Jim Mason, WVDEP
Lisa Dooley, Advisory Council Member	Allyn Turner, WVDEP
Jackie Hallinan, Advisory Council Member	Bill Brannon, WVDEP
Stephanie R. Timmermeyer, WVDEP	Mike Dorsey, WVDEP
Joseph M. Dawley, WVDEP	Mike Zeto, WVDEP
Karen G. Watson, WVDEP	Pam Nixon, WVDEP
Jessica Greathouse, WVDEP	Lewis Halstead, WVDEP
Cathy Marcum, Tinney Law Firm	Charlie Sturey, WVDEP

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The meeting was called to order at 9:15 a.m. by Joseph M. Dawley, General Counsel for the West Virginia Department of Environmental Protection.

**PRESENTATION OF PROPOSED RULES FOR THE 2004 LEGISLATIVE SESSION**

**Division of Air Quality**

John Benedict, Director of DAQ presented the following rules:

45CSR1 - No<sub>x</sub> Trading Program as a means of control and reduction of nitrogen oxides from non-electric generating units.

Bill Raney inquired about 45CSR1 and wanted to know how this rule had been lost in the shuffle during the 2003 session? Jim Mason explained that the delay was from a legislative clerical error.

Jackie Hallinan asked what would happen if there were additional clerical errors like what happened during this legislative session? John Benedict responded it would not present a serious problem, he thought the agency could work the matter out with the EPA

45CSR15- Emission standards for hazardous air pollutants pursuant to 40 CFR Part 61.

- 45CSR 16 - Standards of performance for new stationary sources pursuant to 40 CFR part 60
- 45CSR25 - To prevent and control air pollution from hazardous waste treatment, storage, or disposal facilities
- 45CSR34 - Emission standards for hazardous air pollutants for sources categories pursuant to 40 CFR Part 63
- 45CSR36 - Requirements for determining conformity of transportation plans, program, 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)

Rick Roberts questioned how the rule relates to “political subdivisions?” John Benedict explained that DAQ prepares emission budgets and works with Metropolitan Planning Organizations. He also said that the Memorandums of Understanding (MOU) with these organizations will no longer be appended to rule 45CSR36.

Rick Roberts also asked if the rule only addresses emissions from vehicles? John Benedict answered yes.

**General Air Rule Questions:**

Larry Harris asked if the rules include emission limits? John responded the rules incorporate by reference the emission limitations contained in federal regulations.

Bill Raney asked if the air rules contained anything different from the federal counterpart regulations? John responded they do not.

Although not a Rulemaking issue, Larry Harris stated that he had recently reviewed a agency letter regarding Longview Power and its proposed SO<sub>2</sub> emissions and inquired on the environmental impacts of this facility.

John Benedict said that the facility is going to be a “state of the art” facility and there will be a 95-98% reduction in emissions.

*Division of Water and Waste Management*

Bill Brannon, Assistant Director, presented the following rule:

47CSR26 - Water pollution control permit fee schedules.

Rick Roberts asked if the 50% increase in fees would be used to provide direct assistance to municipalities or would it be used only for agency paperwork?

Bill Brannon responded that the 50% fee increase will provide additional support for municipalities which otherwise is not currently available and that there will probably be a mixture of direct assistance and paperwork provided by the two additional FTE's paid for by the 50% fee increase.

Lisa Dooley stated she shares many of the same concerns that Mr. Roberts expressed and that she believes municipalities have to pass along fee increases to the public and for that reason her organization may not support the rule.

Bill Raney wanted to know if this was the first time this was proposed? Bill Brannon informed him that this was the first official time that the fee increase was proposed.

Bill Raney along with Lisa Dooley and Jackie Hallinan believe that rule information should be sent to them sooner so they can get this information to their constituents for comments.

Mike Dorsey, Assistant Director presented the following rules:

33CSR20 - Hazardous Waste Management

No comments by the advisory committee.

33CSR1 - Solid Waste Management Rule

Lisa Dooley wanted to know if the only change being made to Class D Permits are to limit expansion of the facilities. Mike Dorsey replied that the changes do limit the siting of these facilities.

Jackie Hallinan asked what recourse a person would have to object to the

cost of a background investigation. Mike Dorsey replied the person could appeal to the Environmental Quality Board.

Lisa Dooley wanted Mike Dorsey to describe the sewage sludge provisions. Mike said the revisions recognize that there other types of sludge that are as beneficial as sewage sludge.

**Division of Mining and Reclamation**

Lewis Halstead, Assistant Director presented the following rule:

47CSR30 - WV/NPDES Rules for Coal Mining Facilities

Bill Raney wanted to know the number of Inspectors and Inspectible units.

DEP will provide Mr. Raney with this information.

38CSR2 - West Virginia Surface Mining Reclamation Rule

Rick Roberts asked if the revisions would relax the compaction requirements in all cases or just for the forestry use.

Bill Raney asked what is going to happen to the incidental coal provision

Lewis Halstead responded it will be available for government financed projects. Other projects will have to get a full permit.

Bill Raney asked why is the agency revising the forestry requirement? Is there a problem with the existing requirements?

Lewis Halstead responded the agency is trying to improve forestry land use.

Bill Raney also asked why companies are being required to use these new forestry provisions when they are using alternative materials?

Lewis Halstead responded the faster the company established a canopy of trees the better, it would be.

Bill Raney also request concern about the maximum bond on contemporaneous reclamation and why is it necessary. Bill Raney stated OSM does not have a contemporaneous reclamation standard. Charlie Sturey responded OSM never

approved the deletion of this language and so the agency proposes to keep it in the rule.

Bill Raney asked about the proposed changes in inspection frequency for revoked permits?

Lewis Halstead responded OSM has certain criteria for inspections to identify if there are any health & safety issues. He also said that the rule tracks the federal counterpart regulation with regard to public notice procedures.

Larry Harris made a general comment about valley fills, he was opposed to filling in the headwaters on streams, especially trout streams.

Larry Harris asked if we have any idea of the number of streams impacted?

Lewis Halstead responded the recent Environmental Impact Statement (EIS) stated there are currently 724 miles impacted by valley fills.

Larry Harris wanted to know if DEP is monitoring to see what impacts there are downstream waters and express that there are long range-cumulative affects on such waters.

Rick Roberts asked about OSM's role in the program.

Lewis Halstead said OSM has alternate oversight program and referred to a court ruling that said the state could not implement it's rules until OSM approves them.

### **Other Business**

Bill Raney inquired if the agency was suppose to be doing a annual report for the council. Secretary Timmermeyer stated that a report is required and that the DEP would assist the council with its efforts.

Bill Raney also asked if there is a way to keep the council informed of amendments to the rules made later in the process.

Joe Dawley responded that the agency would try to keep the council informed of any amendments at its quarterly meetings.

Jackie Hallinan stated that the DEP has had numerous leaders in the past - she feels that DEP could utilize the advisory council members more.

□  
APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: 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)"

Type of Rule:  Legislative     Interpretive     Procedural

Agency: Division of Air Quality

Address: 7012 MacCorkle Avenue, SE

Charleston, WV 25304-2943

1. Effect of Proposed rule:

	ANNUAL		FISCAL YEAR		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
<b>ESTIMATED TOTAL COST</b>	\$ 0	\$ 0	\$ 0	\$ 0	\$ 0
<b>PERSONAL SERVICES</b>	0	0	0	0	0
<b>CURRENT EXPENSE</b>	0	0	0	0	0
<b>REPAIRS &amp; ALTERATIONS</b>	0	0	0	0	0
<b>EQUIPMENT</b>	0	0	0	0	0
<b>OTHER</b>	0	0	0	0	0

2. Explanation of Above Estimates:

This revision to the rule is not expected to increase costs significantly over current rule expenses.

3. Objectives of These Rules:

Objectives of these rules: This rule adopts the requirements of 40 CFR Part 93, 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 Laws" promulgated as of June 1, 2003. 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 Clean Air Act (CAA), as amended (42 U.S.C. 7401 et seq.).

Rule Title: \_\_\_\_\_

4. Explanation of Overall Economic Impact of Proposed Rule:

A. Economic Impact on State Government:

See section 2.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific Groups of Citizens:

The continued adoption of the federal Transportation Conformity regulations as state rules, as required by the Clean Air Act, would not necessarily impose additional impacts beyond the federal requirements. In fact, the revised federal rule allows more flexibility and should be less burdensome than present requirements

C. Economic Impact on Citizens/Public at Large.

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

Date: \_\_\_\_\_

June 11, 2003

Signature of Agency Head or Authorized Representative: \_\_\_\_\_

[Handwritten Signature]

FILED

TITLE 45

2003 JUN 11 P 3:08

LEGISLATIVE RULE

~~DIVISION~~ DEPARTMENT OF ENVIRONMENTAL PROTECTION  
~~OFFICE~~ DIVISION OF AIR QUALITY OFFICE WEST VIRGINIA  
 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 This rule establishes and adopts~~ 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 or the Federal Transit Act Laws." ~~The federal rule 40 CFR Part 93, Subpart A~~ 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.) Laws (49 U.S.C. Chapter 53). This rule ~~sets forth~~ codifies general 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. The Secretary hereby adopts these requirements by reference.

1.2. Authority. -- W.Va. Code §22-1-3 and §§22-5-1 et seq §22-5-4.

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

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

1.5. Incorporation by Reference -- Federal Counterpart Regulations. The ~~Director~~ Secretary has determined that a federal counterpart regulation exists, and in accordance with the ~~Director's~~ Secretary's recommendation, with limited exception, this rule incorporates by reference 40 CFR Part 93, Subpart A, effective July 1, 2002, as amended by the Federal Register through June 1, 2003.

1.6. Former Rules. -- This legislative rule amends 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 Act, to Applicable Air Quality Implementation Plans (Transportation Conformity)" which was filed April 28, 1995 and became effective May 1, 1995.

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

2.2. "Memorandum of Understanding" or "MOU" means a signed, mutual and binding agreement between specific parties which details procedures for meeting the interagency consultation (Federal, State and local), resolution of conflicts, and public consultation requirements set forth in 40 CFR §93.105 and section 5 of this rule.

~~2.5. 2.3. "Party" or "parties" means the agencies and organizations expressly listed in the individual Memorandums of Understanding referred to in Section 7 of this rule West Virginia Department of Environmental Protection, the West Virginia Department of Transportation, the Boone-Clay-Kanawha-Putnam Regional Intergovernmental Council, the KYOVA Interstate Planning Commission, and the Wood-Washington-Wirt Interstate Planning Commission, as identified in an MOU.~~

2.6. 2.4. "Person" means any and all persons, natural or artificial, including the state of West Virginia or any other state, the United States of America, any municipal, statutory, 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.

2.5. "Secretary" means the Secretary of the Department of Environmental Protection or such other person to whom the Secretary has delegated authority or duties pursuant to W.Va. Code §22-1-6 or §22-1-8.

~~2.7. 2.5. "State Governor" or "Governor" means the Governor of West Virginia or his or her designated representative.~~

~~2.8. 2.6. "State and Local Air Quality Agency(ies)" or "State Air Agency" means the West Virginia Division Department of Environmental Protection, Office Division of Air Quality.~~

2.7. Other words and phrases used in this rule, unless otherwise indicated, shall have the meaning ascribed to them in 40 CFR §93.101. Words and phrases not defined therein shall have the meaning given to them in the federal Clean Air Act.

### §45-36-3. Requirements.

3.1. All transportation plans, programs, and projects developed, funded or approved in West Virginia, under Title 23 U.S.C. or the Federal Transit Laws, must conform to applicable air quality implementation plans in West Virginia. Any agency, organization or party responsible for making transportation conformity determinations or that is involved in transportation conformity-related activities shall do so pursuant to the provisions of 40 CFR Part 93, Subpart A and this rule. All such agencies, organizations or parties shall follow the consultation procedures set forth in section 5.

### §45-36-3: §45-36-4. Adoption of Policies, Criteria, and Procedures and Requirements.

~~3.1. 4.1. Policies, Criteria and Procedures. --~~  
 The ~~Director~~ Secretary hereby adopts and incorporates by reference; ~~with the exceptions noted in Section 5 of this rule,~~ the provisions of 40 CFR Part 93, Subpart A, including associated policies, criteria, and procedures and requirements contained in 40 CFR Part 93, Subpart A, ~~as in effect on December 27, 1993 for the purpose of meeting the requirements of 40 CFR Part 51 Subpart T, Section 51.396 effective July 1, 2002, as amended by the Federal Register through June 1, 2003, for the purpose of meeting the transportation conformity requirements of 40 CFR §51.390, except that 40 CFR §93.105(e) is amended to provide that information shall be available to the public in accordance with 40 CFR §51.102, W.Va. Code §§22-5-1 et seq. and 29B-1-1 et seq.~~

**~~§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, 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 use the consultation procedures specified below:~~

**~~§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), 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. The interagency consultation, resolution of conflict, and public consultation procedures set forth in 40 CFR §93.105 shall be established, detailed and fulfilled using Memorandums of Understanding, as appropriate. The specific parties identified in a MOU shall mutually agree to adopt, implement and abide by such procedures. As required by 40 CFR §93.105(a), these mutually agreed and established procedures (MOUs) shall be included in any SIP revision submitted to USEPA under 40 CFR §51.390.

**~~§45-36-6. Severability:~~**

~~—6.1. 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:~~

**~~§45-36-6. Inconsistency Between Rules.~~**

6.1. In the event of any inconsistency between this rule and any other rule of the West Virginia Department of Environmental Protection, such inconsistency shall be resolved by the determination of the Secretary and such determination shall be based upon the application of the more stringent provision, term, condition, method or rule.