

**WEST VIRGINIA  
SECRETARY OF STATE  
JOE MANCHIN, III  
ADMINISTRATIVE LAW DIVISION**

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OFFICE WEST VIRGINIA  
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Form #6

**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE RULE AUTHORIZED  
BY THE WEST VIRGINIA LEGISLATURE**

AGENCY: WV DEP - Division of Air Quality TITLE NUMBER: 45

AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 36

TITLE OF RULE BEING AMENDED: "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)."

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: \_\_\_\_\_

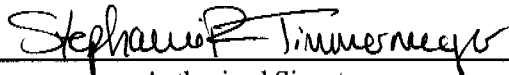
TITLE OF RULE BEING PROPOSED: \_\_\_\_\_

THE ABOVE RULE HAS BEEN AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.

AUTHORIZATION IS CITED IN (house or senate bill number) HB 4193

SECTION § 64-3-1(f), PASSED ON March 12, 2004

THIS RULE IS FILED WITH THE SECRETARY OF STATE. THIS RULE BECOMES EFFECTIVE ON THE  
FOLLOWING DATE: June 1, 2004



Authorized Signature  
Stephanie R. Timmermeyer  
Cabinet Secretary

**TITLE 45  
LEGISLATIVE RULE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
DIVISION OF AIR QUALITY**

2004 APR 30 P 1:58

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 LAWS, TO APPLICABLE  
AIR QUALITY IMPLEMENTATION PLANS  
(TRANSPORTATION CONFORMITY)**

**§45-36-1. General.**

1.1. Scope. -- 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." 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, and by metropolitan planning organizations (MPOs) or other recipients of funds under Title 23 U.S.C. or the Federal Transit Laws (49 U.S.C. Chapter 53). This 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 CAA. The Secretary hereby adopts these requirements by reference.

1.2. Authority. -- W.Va. Code §22-5-4.

1.3. Filing Date. -- April 30, 2004.

1.4. Effective Date. -- June 1, 2004.

1.5. Incorporation by Reference -- Federal Counterpart Regulation. The Secretary has determined that a federal counterpart regulation exists, and in accordance with the 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.**

2.1. "Applicable State Implementation Plan" or "Applicable Air Quality Implementation Plan," specifically means the West Virginia State Implementation Plan (SIP) including the most current revisions approved by the USEPA and any Federal Implementation Plan implemented in the state of West Virginia.

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.

2.3. "Party" or "parties" means the 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.

2.4. "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.

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

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

#### **§45-36-4. Adoption of Policies, Criteria, and Procedures.**

4.1. Policies, Criteria and Procedures. -- The Secretary hereby adopts and incorporates by reference the provisions of 40 CFR Part 93, Subpart A, including associated policies, criteria, and procedures contained in 40 CFR Part 93, Subpart A, 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.

#### **§45-36-5. Consultation.**

5.1. 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. Inconsistency Between Rules.**

## 45CSR36

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.