

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
OFFICE OF AIR RESOURCES**

NOTICE OF PUBLIC COMMENT PERIOD

IN RE: Proposed Air Pollution Control Regulation No. 49

The Director of the Rhode Island Department of Environmental Management (DEM) proposes to promulgate Air Pollution Control Regulation No. 49, "Transportation Conformity" and gives notice of intent to receive public comment on the proposed regulation and to afford interested parties an opportunity to submit data, views, or arguments in writing on the proposed regulation. A public hearing on the proposed regulation will be held if DEM receives a request for a hearing. If a public hearing is held, a notice will be published announcing the date, time and place of such hearing.

DEM, Office of Air Resources, is proposing to adopt Air Pollution Control (APC) Regulation No. 49 "Transportation Conformity". This regulation, if adopted, will be submitted to EPA to be incorporated into the State Implementation Plan (SIP).

DEM, RIDOT, RIPTA, and Statewide Planning, in their capacity as the state's Metropolitan Planning Organization (MPO), together with their federal counterpart agencies: the Environmental Protection Agency (EPA), the Federal Highway Administration (FHWA), and the Federal Transit Administration (FTA), must fulfill responsibilities under the federal Clean Air Act (CAA), to ensure that federal funding and approval are given to transportation plans, programs and projects that are consistent with the air quality goals established by Rhode Island's State Implementation Plan (SIP). Conformity, to the purpose of the SIP, means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment of the NAAQS. The federal transportation conformity rule (40 CFR part 93) sets forth policy, criteria, and procedures for demonstrating and assuring conformity of transportation activities. This proposed regulation is intended to formally incorporate procedures followed to complete this process.

The purpose of this regulation is to fulfill the requirement in 40 CFR 51.390(b) to establish a SIP revision that includes the following three sections of the federal transportation conformity rule:

- 40 CFR 93.105, which addresses consultation procedures;
- 40 CFR 93.122(a)(4)(ii), which states that conformity SIPs must require that written commitments to control measures be obtained prior to a conformity determination if the control measures are not included in a MPO's transportation plan and transportation improvement program (TIP); and that such a commitment be fulfilled; and
- 40 CFR 93.125(c), which states that conformity SIPs must require that written commitments to mitigation measures be obtained prior to a project-level conformity determination, and that project sponsors comply with such commitments.

Once this state regulation is approved by EPA into the Rhode Island SIP, it has full legal effect. Conformity determinations will be governed by these criteria and procedures as well as any applicable portions of the federal conformity rules that are not addressed by the state rule.

Copies of the proposed regulations can be obtained at the DEM website, <http://www.dem.ri.gov>. (Click on the Regulations link on the left hand side of the page and go to the Proposed Regulations section). Copies are also available at DEM's Office of Air Resources 235 Promenade St., Providence, RI. Any additional requests can be made by contacting the Office of Air Resources at 222-2808, weekdays, 8:30 AM- 4:00 PM.

DEM has complied with the requirements of R.I. Gen. Laws Section 42-35-3 by considering alternative approaches to the proposed regulations and has determined that there is no alternative approach that would be as effective and less burdensome. DEM has also determined that the proposed regulation does not overlap or duplicate any other state regulation. DEM has complied with the requirements of R.I. Gen. Laws Section 42-35-3.3, 42-35.1-3 and 42-35.1-4 by preparing an Economic Impact Statement and a Regulatory Flexibility Analysis and providing these to the Governor's Office, the Department of Administration and the Economic Development Corporation.

DEM encourages the submission of written comments. Written comments, to be considered part of the administrative record must be submitted during the public comment period. Written comments may be mailed or e-mailed to the Office of Air Resources and received no later than 4:00 PM, 22 August 2011, at which time the public comment period will close. The mailing address for comments is:

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Office of Air Resources
235 Promenade Street
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Signed this 15th day of July, 2011

Douglas L. McVay, Acting Chief
Office of Air Resources

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
OFFICE OF AIR RESOURCES**

AIR POLLUTION CONTROL REGULATION NO. 49

TRANSPORTATION CONFORMITY



Effective xxx

AUTHORITY: These regulations are authorized pursuant to R.I. Gen. Laws §§ 42-17.1-2(s) and 23-23, as amended, and have been promulgated pursuant to the procedures set forth in the R.I. Administrative Procedures Act, R.I. Gen. Laws Chapter 42-35.

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RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

**OFFICE OF AIR RESOURCES
AIR POLLUTION CONTROL REGULATION NO. 49**

TRANSPORTATION CONFORMITY

49.1 Definitions

Unless otherwise expressly defined in this section, the terms used in this regulation shall be defined by reference to the Rhode Island Air Pollution Control General Definitions Regulation. Terms used but not defined in this regulation or the Rhode Island Air Pollution Control General Definitions Regulation shall have the meaning given them by the CAA, titles 23 and 49 U.S.C., other Environmental Protection Agency (EPA) regulations, or other DOT regulations, in that order of priority.

As used in this regulation, the following terms shall, where the context permits, be construed as follows:

- 49.1.1 **“Applicable implementation plan”** is defined in section 302(q) of the CAA and means the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under section 110, or promulgated under section 110(c), or promulgated or approved pursuant to regulations promulgated under section 301(d) and which implements the relevant requirements of the CAA.
- 49.1.2 **“CAA”** means the Clean Air Act, as amended (42 U.S.C. 7401 *et seq.*).
- 49.1.3 **“Control strategy implementation plan revision”** is the implementation plan which contains specific strategies for controlling the emissions of and reducing ambient levels of pollutants in order to satisfy CAA requirements for demonstrations of reasonable further progress and attainment (including implementation plan revisions submitted to satisfy CAA sections 172(c), 182(b)(1), 182(c)(2)(A), 182(c)(2)(B), 187(a)(7), 187(g), 189(a)(1)(B), 189(b)(1)(A), and 189(d); sections 192(a) and 192(b), for nitrogen dioxide; and any other applicable CAA provision requiring a demonstration of reasonable further progress or attainment).
- 49.1.4 **“Design concept”** means the type of facility identified by the project, e.g., freeway, expressway, arterial highway, grade-separated highway, reserved right-of-way rail transit, mixed-traffic rail transit, exclusive busway, etc.
- 49.1.5 **“Design Scope”** means the design aspects which will affect the proposed facility's impact on regional emissions, usually as they relate to vehicle or person carrying capacity and control, e.g., number of lanes or tracks to be

constructed or added, length of project, signalization, access control including approximate number and location of interchanges, preferential treatment for high-occupancy vehicles, etc.

- 49.1.6 **“DOT”** means the United States Department of Transportation.
- 49.1.7 **“Donut areas”** are geographic areas outside a metropolitan planning area boundary, but inside the boundary of a nonattainment or maintenance area that contains any part of a metropolitan area(s). These areas are not isolated rural nonattainment and maintenance areas.
- 49.1.8 **“Exempt projects”** are projects of the type listed in 40 CFR 93.126 "Table 2, Exempt Projects" or 40 CFR 93.127 "Table 3, Projects Exempt From Regional Emissions Analyses".
- 49.1.9 **“FHWA”** means the Federal Highway Administration of DOT.
- 49.1.10 **“FHWA/FTA project”**, for the purpose of this subpart, is any highway or transit project which is proposed to receive funding assistance and approval through the Federal-Aid Highway program or the Federal mass transit program, or requires Federal Highway Administration (FHWA) or Federal Transit Administration (FTA) approval for some aspect of the project, such as connection to an interstate highway or deviation from applicable design standards on the interstate system.
- 49.1.11 **“FTA”** means the Federal Transit Administration of DOT.
- 49.1.12 **“Final document or decision”** means the document or decision prepared after consideration of and responding to comments received, if any, during the interagency consultation process and, if applicable, the public comment process.
- 49.1.13 **“Highway project”** is an undertaking to implement or modify a highway facility or highway-related program. Such an undertaking consists of all required phases necessary for implementation. For analytical purposes, it must be defined sufficiently to:
- (a) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;
 - (b) Have independent utility or significance, i.e., be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and
 - (c) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

- 49.1.14 **“Hot-spot analysis”** is an estimation of likely future localized CO, PM₁₀, and/or PM_{2.5} pollutant concentrations and a comparison of those concentrations to the national ambient air quality standards. Hot-spot analysis assesses impacts on a scale smaller than the entire nonattainment or maintenance area, including, for example, congested roadway intersections and highways or transit terminals, and uses an air quality dispersion model to determine the effects of emissions on air quality.
- 49.1.15 **“Isolated rural nonattainment and maintenance areas”** are areas that do not contain or are not part of any metropolitan planning area as designated under the transportation planning regulations. Isolated rural areas do not have federally required metropolitan transportation plans or TIPs and do not have projects that are part of the emissions analysis of any MPO's metropolitan transportation plan or TIP. Projects in such areas are instead included in statewide transportation improvement programs. These areas are not donut areas.
- 49.1.16 **“Maintenance area”** means any geographic region of the United States previously designated nonattainment pursuant to the CAA Amendments of 1990 and subsequently redesignated to attainment subject to the requirement to develop a maintenance plan under section 175A of the CAA, as amended.
- 49.1.17 **“Maintenance plan”** means an implementation plan under section 175A of the CAA, as amended.
- 49.1.18 **“Metropolitan planning organization (MPO)”** means the State Planning Council and its staff in the Department of Administration, Division of Planning.
- 49.1.19 **“Milestone”** has the meaning given in CAA sections 182(g)(1) and 189(c) for serious and above ozone nonattainment areas and PM₁₀ nonattainment areas, respectively. For all other nonattainment areas, a milestone consists of an emissions level and the date on which that level is to be achieved as required by the applicable CAA provision for reasonable further progress towards attainment.
- 49.1.20 **“Motor vehicle emissions budget”** is that portion of the total allowable emissions defined in the submitted or approved control strategy implementation plan revision or maintenance plan for a certain date for the purpose of meeting reasonable further progress milestones or demonstrating attainment or maintenance of the NAAQS, for any criteria pollutant or its precursors, allocated to highway and transit vehicle use and emissions.

- 49.1.21 **“National ambient air quality standards (NAAQS)”** are those standards established pursuant to section 109 of the CAA.
- 49.1.22 **“NEPA”** means the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*).
- 49.1.23 **“NEPA process completion”**, for the purposes of this subpart, with respect to FHWA or FTA, means the point at which there is a specific action to make a determination that a project is categorically excluded, to make a Finding of No Significant Impact, or to issue a record of decision on a Final Environmental Impact Statement under NEPA.
- 49.1.24 **“Nonattainment area”** means any geographic region of the United States which has been designated as nonattainment under section 107 of the CAA for any pollutant for which a national ambient air quality standard exists.
- 49.1.25 **“Project”** means a highway project or transit project.
- 49.1.26 **“Regionally significant project”** means a transportation project (other than an exempt project) that is on a facility which serves regional transportation needs (such as access to and from the area outside of the region, major activity centers in the region, major planned developments such as new retail malls, sports complexes, etc., or transportation terminals as well as most terminals themselves) and would normally be included in the modeling of a metropolitan area’s transportation network, including at a minimum all principal arterial highways and all fixed guideway transit facilities that offer an alternative to regional highway travel.
- 49.1.27 **“RIDOT”** means the Rhode Island Department of Transportation
- 49.1.28 **“RIPTA”** means the Rhode Island Public Transit Authority
- 49.1.29 **“Transit”** is mass transportation by bus, rail, or other conveyance which provides general or special service to the public on a regular and continuing basis. It does not include school buses or charter or sightseeing services.
- 49.1.30 **“Transit project”** is an undertaking to implement or modify a transit facility or transit-related program; purchase transit vehicles or equipment; or provide financial assistance for transit operations. It does not include actions that are solely within the jurisdiction of RIPTA, such as changes in routes, schedules, or fares. It may consist of several phases. For analytical purposes, it must be defined inclusively enough to:

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

49.1.31 **“Transportation control measure (TCM)”** is any measure that is specifically identified and committed to in the applicable implementation plan, including a substitute or additional TCM that is incorporated into the applicable implementation plan through the process established in CAA section 176(c)(8), that is either one of the types listed in CAA section 108, or any other measure for the purpose of reducing emissions or concentrations of air pollutants from transportation sources by reducing vehicle use or changing traffic flow or congestion conditions. Notwithstanding the first sentence of this definition, vehicle technology-based, fuel-based, and maintenance-based measures which control the emissions from vehicles under fixed traffic conditions are not TCMs for the purposes of this subpart.

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

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

49.1.34 **“Transportation project”** is a highway project or a transit project.

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

49.2 Applicability

49.2.1 Action applicability.

- (a) Except as provided for in 49.2.3 or 40 CFR 93.126, conformity determinations are required for:
 - (1) The adoption, acceptance, approval or support of transportation plans and transportation plan amendments developed pursuant to 23 CFR 450 or 49 CFR 613 by the MPO or RIDOT;
 - (2) The adoption, acceptance, approval or support of TIPs and TIP amendments developed pursuant to 23 CFR 450 or 49 CFR 613 by the MPO or RIDOT; and
 - (3) The approval, funding, or implementation of FHWA/FTA projects.
- (b) Conformity determinations are not required under this subpart for individual projects which are not FHWA/FTA projects. However, 40 CFR 93.121 applies to such projects if they are regionally significant.

49.2.2 Geographic applicability.

- (a) The provisions of this regulation shall apply in all nonattainment and maintenance areas for transportation-related criteria pollutants for which the area is designated nonattainment or has a maintenance plan.
- (b) The provisions of this regulation apply with respect to emissions of the following criteria pollutants: ozone, carbon monoxide (CO), nitrogen dioxide (NO₂), particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM₁₀); and particles with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers (PM_{2.5}).
- (c) The provisions of this regulation also apply with respect to emissions of the following precursor pollutants:
 - (1) Volatile organic compounds (VOC) and nitrogen oxides (NO_x) in ozone areas;
 - (2) NO_x in NO₂ areas;
 - (3) VOC and/or NO_x in PM₁₀ areas if the EPA Regional Administrator or the Chief of the Office of Air Resources has made a finding that transportation-related emissions of one or both of these precursors within the nonattainment area are a significant contributor to the PM₁₀ nonattainment problem and has so notified the MPO,

RIDOT, RIPTA, and DOT, or if the applicable implementation plan (or implementation plan submission) establishes an approved (or adequate) budget for such emissions as part of the reasonable further progress, attainment or maintenance strategy;

- (4) NO_x in PM_{2.5} areas, unless both the EPA Regional Administrator and the Chief of the Office of Air Resources have made a finding that transportation-related emissions of NO_x within the nonattainment area are not a significant contributor to the PM_{2.5} nonattainment problem and has so notified the MPO, RIDOT, RIPTA, and DOT, or the applicable implementation plan (or implementation plan submission) does not establish an approved (or adequate) budget for such emissions as part of the reasonable further progress, attainment or maintenance strategy; and
- (5) VOC, sulfur dioxide (SO₂) and/or ammonia (NH₃) in PM_{2.5} areas either if the EPA Regional Administrator or the Chief of the Office of Air Resources has made a finding that transportation-related emissions of any of these precursors within the nonattainment area are a significant contributor to the PM_{2.5} nonattainment problem and has so notified the MPO, RIDOT, RIPTA, and DOT, or if the applicable implementation plan (or implementation plan submission) establishes an approved (or adequate) budget for such emissions as part of the reasonable further progress, attainment or maintenance strategy.

- (d) The provisions of this subpart apply to PM_{2.5} nonattainment and maintenance areas with respect to PM_{2.5} from re-entrained road dust if the EPA Regional Administrator or the Chief of the Office of Air Resources has made a finding that re-entrained road dust emissions within the area are a significant contributor to the PM_{2.5} nonattainment problem and has so notified the MPO, RIDOT, RIPTA, and DOT, or if the applicable implementation plan (or implementation plan submission) includes re-entrained road dust in the approved (or adequate) budget as part of the reasonable further progress, attainment or maintenance strategy. Re-entrained road dust emissions are produced by travel on paved and unpaved roads (including emissions from anti-skid and deicing materials).
- (e) The provisions of this regulation apply to maintenance areas through the last year of a maintenance area's approved CAA section 175A(b) maintenance plan, unless the applicable implementation plan specifies that the provisions of this subpart shall apply for more than 20 years.

49.2.3 Limitations. In order to receive any FHWA/FTA approval or funding actions, including NEPA approvals, for a project phase subject to this subpart, a currently conforming transportation plan and TIP must be in place at the time of project

approval as described in 40 CFR 93.114, except as provided by 40 CFR 93.114(b).

49.2.4 Grace period for new nonattainment areas. For areas or portions of areas which have been continuously designated attainment or not designated for any NAAQS for ozone, CO, PM₁₀, PM_{2.5} or NO₂ since 1990 and are subsequently redesignated to nonattainment or designated nonattainment for any NAAQS for any of these pollutants, the provisions of this subpart shall not apply with respect to that NAAQS for 12 months following the effective date of final designation to nonattainment for each NAAQS for such pollutant.

49.3 Consultation

49.3.1 This rule provides procedures for federal, state, and local interagency consultation, public consultation and resolution of conflicts. Such consultation procedures shall be undertaken by the MPO, RIDOT, RIPTA, and DOT with the Department and EPA before making conformity determinations and by the Department and EPA with the MPO, RIDOT, RIPTA, and DOT in developing applicable implementation plans.

49.3.2 Interagency consultation procedures: General factors.

- (a) The MPO, the Department and RIDOT shall undertake an interagency consultation process in accordance with this section with each other and with local or regional offices of EPA, FHWA, and FTA on the development of the applicable implementation plan, the transportation plan, the TIP, and associated conformity determinations. RIPTA shall be provided the opportunity to participate and may participate if they choose.
- (b) The Department shall be the lead agency responsible for preparing the final document or decision and for assuring the adequacy of the interagency consultation process with respect to the development of the applicable implementation plan and the list of TCMs in the approved applicable implementation plan. The MPO shall be the lead agency responsible for preparing the final document or decision and for assuring the adequacy of the interagency consultation process with respect to the transportation plan, the TIP, any amendments or revisions thereto, and any conformity determinations.
- (c) In addition to the lead agencies identified in subsection 49.3.2(b), other agencies entitled to participate in any interagency consultation process under this rule include the RIDOT, RIPTA, the Federal Highway Administration, Rhode Island Division, the Federal Transit Administration Region I office and EPA.

- (d) It shall be the role and responsibility of each lead agency in an interagency consultation process, as specified in subsection 49.3.2(b), to confer with all other agencies identified under subsection 49.3.2(c) with an interest in the document to be developed, provide all appropriate information to those agencies needed for meaningful input, solicit early and continuing input from those agencies, conduct the consultation process described in the applicable paragraphs of 40 CFR 93.105, where required, assure policy-level contact with those agencies and prior to taking any action, consider the views of each such agency and respond to those views in a timely, substantive written manner prior to any final decision on such document, and assure that such views and written response are made part of the record of any decision or action. It shall be the role and responsibility of each agency specified in subsection 49.3.2(c), when not fulfilling the role and responsibilities of a lead agency, to confer with the lead agency and other participants in the consultation process, review and comment as appropriate (including comments in writing) on all proposed and final documents and decisions in a timely manner, attend consultation and decision meetings, assure policy-level contact with other participants, provide input on any area of substantive expertise or responsibility (including planning assumptions, modeling, information on status of TCM implementation, and interpretation of regulatory or other requirements), and provide technical assistance to the lead agency or consultation process in accordance with this paragraph when requested.

49.3.3 Specific roles, responsibilities, and organizational level of various participants in the interagency consultation process shall be as follows

- (a) The Department shall be responsible for developing emissions inventories, emissions budgets, air quality modeling, coordinating with the MPO for traffic related modeling, applicable implementation plan demonstrations, including emissions budgets as necessary and any applicable implementation plan TCMs.
- (b) The MPO shall be responsible for developing transportation plans and TIPs; evaluating TCM transportation impacts; developing transportation and socioeconomic data and planning assumptions for use in emissions analysis to determine conformity of transportation plans, TIPs, and projects; determining regionally significant projects, convening air quality technical review meetings on specific projects when requested by other agencies or as needed, identifying system- or facility-based or other programmatic TCMs; providing technical and policy input on emissions budgets; performing transportation modeling and regional emissions analyses and documenting timely implementation of TCMs needed for conformity assessments.

- (c) RIDOT shall be responsible for providing technical input on proposed revisions to motor vehicle emissions factors, distributing draft and final project environmental documents to other agencies, and identifying regionally significant highway and rail projects and project changes in the TIP and Long Range Transportation Plan.
- (d) RIPTA shall be responsible for identifying regionally significant bus transit projects and project changes in the TIP and Long Range Transportation Plan.
- (e) FHWA and FTA shall be responsible for assuring timely action on final findings of conformity, after consultation with other agencies as provided in this section, providing guidance on the transportation planning process to agencies in interagency consultation.
- (f) EPA shall be responsible for reviewing, finding adequate, and approving updated motor vehicle emissions budgets and providing guidance on conformity criteria and procedures to agencies in interagency consultation.

49.3.4 It shall be the affirmative responsibility of the agency with the responsibility for preparing the final document or decision subject to the interagency consultation process to initiate the process by notifying other participants, convene consultation meetings early in the process of decision on the final document, appoint the conveners of technical meetings, and assure that all relevant documents and information are supplied to all participants in the consultation process in a timely manner.

49.3.5 Regular consultation on major activities such as the development of an applicable implementation plan, the development of a transportation plan, the development of a TIP, or any determination of air quality conformity on transportation plans or TIPs, shall include meetings at regular, scheduled intervals no less frequently than semiannually, unless the consensus of the group determines that a meeting is not warranted and shall be attended by representatives of each agency. In addition, technical meetings shall be convened as necessary.

49.3.6 Each lead agency in the consultation process required under this section (that is, the agency with the responsibility for preparing the final document subject to the interagency consultation process) shall confer with all other agencies identified under 49.3.2(c) with an interest in the document to be developed, provide all appropriate information to those agencies needed for meaningful input, and, prior to taking any action, consider the views of each such agency and respond to those views in a timely, substantive written manner prior to any final decision on such document. Such views and written response shall be made part of the record of any decision or action.

49.3.7 The Department will prepare a list of any TCMs in the approved applicable implementation plan and provide this list to the interagency consultation process in accordance with 49.3.2.

49.3.8 Interagency consultation procedures: Specific processes.

- (a) An interagency consultation process in accordance with paragraph 49.3.2 involving the *Air Quality Working Group*, comprised of the MPO, the Department, RIDOT, RIPTA, EPA, FHWA, and FTA shall be undertaken for the following:
 - (1) Evaluating and choosing a model (or models) and associated methods and assumptions to be used in hot-spot analyses and regional emissions analyses to be conducted in accordance with paragraph 49.3.2.
 - (2) Determining which transportation projects should be considered "regionally significant" for the purposes of regional emissions analysis (in addition to those functionally classified as principal arterial or higher or fixed guideway systems or extensions that offer an alternative to regional highway travel), and which projects should be considered to have a significant change in design concept and scope from the transportation plan or TIP, to be conducted in accordance with paragraph 49.3.2;
 - (3) Evaluating whether projects otherwise exempted from meeting the requirements of 40 CFR 93 (i.e. projects described in 40 CFR 93.126 and 93.127) should be treated as non-exempt in cases where potential adverse emissions impacts may exist for any reason, to be conducted in accordance with paragraph 49.3.2;
 - (4) Making a determination, as required by 40 CFR 93.113(c)(1), whether past obstacles to implementation of TCMs which are behind the schedule established in the applicable implementation plan have been identified and are being overcome, and whether State and local agencies with influence over approvals or funding for TCMs are giving maximum priority to approval or funding for TCMs, to be conducted in accordance with paragraph 49.3.2. This consultation process shall also consider whether delays in TCM implementation necessitate revisions to the applicable implementation plan to remove TCMs or substitute TCMs or other emission reduction measures;
 - (5) Notification of transportation plan or TIP revisions or amendments which merely add or delete exempt projects listed in 40 CFR

93.126 or 40 CFR 93.127, to be conducted in accordance with paragraph 49.3.2;

- (6) Choosing conformity tests and methodologies for isolated rural nonattainment and maintenance areas, as required by 40 CFR 93.109(n)(2)(iii) to be conducted in accordance with paragraph 49.3.2.
 - (7) During preparation of the transportation plan and TIP, the MPO will request that participants of the interagency consultation process identify all non-FHWA/FTA transportation projects and their design concept and scope, including those where detailed design features have not yet been decided, and determine which ones meet the definition of regionally significant for regional emissions modeling. Any recipient of federal funding, as defined in 40 CFR 93.101, is required to disclose to the MPO information regarding all non-FHWA/FTA regionally significant projects and any changes to these plans shall be immediately disclosed.
- (b) An interagency consultation process in accordance with paragraph 49.3.2 involving the MPO, the Department, RIDOT, and RIPTA shall be undertaken for the following:
- (1) Evaluating events which will trigger new conformity determinations in addition to those triggering events established in 40 CFR 93.104, to be conducted in accordance with paragraph 49.3.2; and
 - (2) Consulting on emissions analysis for transportation activities which cross the borders of MPOs or nonattainment areas or air basins, to be conducted in accordance with paragraph 49.3.2.
 - (3) Cooperative planning and analysis for purposes of determining conformity of all projects outside the metropolitan area and within the nonattainment or maintenance area, to be conducted in accordance with paragraph 49.3.2.
 - (4) Assurance that plans for construction of regionally significant projects which are not FHWA/FTA projects (including projects for which alternative locations, design concept and scope, or the no-build option are still being considered), including all those by recipients of funds designated under title 23 U.S.C. or the Federal Transit Act are disclosed to the MPO on a regular basis, and to assure that any changes to those plans are immediately disclosed.

- (5) A process in accordance with paragraph 49.3.2 involving the MPO and other recipients of funds designated under title 23 U.S.C. or the Federal Transit Act shall be undertaken for assuming the location and design concept and scope of projects that are disclosed to the MPO as required by 49.3.8(d) of this section but whose sponsors have not yet decided these features, in sufficient detail to perform the regional emissions analysis according to the requirements of 40 CFR 93.122, to be conducted in accordance with paragraph 49.3.2.
- (6) Designing, scheduling, and funding of research and data collection efforts and regional transportation model development by the MPO (e.g., household/ travel transportation surveys), to be conducted in accordance with paragraph 49.3.2.
- (7) Transportation Plan or TIP revisions or amendments that add or delete exempt projects as listed in 40CFR93.126 Table 2 or 40CFR93.127 Table 3.
- (c) If a Plan or TIP amendment project or action is deemed exempt under the EPA Air Quality Conformity Rule (40 CFR Parts 51 & 93), the MPO will issue a letter to the Department stating such, and ask the department for their concurrence.
- (d) The MPO will provide final documents (including the applicable implementation plan, transportation plans, TIPs, plan/TIP amendments and conformity determinations) and supporting information to each agency after approval or adoption. This process is applicable to all agencies including the MPO, RIDOT, RIPTA, the Department, FHWA, FTA and EPA.

49.3.9 Resolving conflicts.

- (a) The Department shall refer any conflict between the Department and the MPO concerning a proposed determination of conformity (or other policy decision under this rule) to the Governor if the conflict cannot be resolved by the heads of the involved agencies. The agencies shall make every effort to resolve any differences, including personal meetings between the heads of such agencies or their policy-level representatives, to the extent possible.
- (b) The Department has 14 calendar days to appeal a proposed determination of conformity (or other policy decision under this rule) to the Governor after the MPO has notified the Department of the resolution of all comments on such proposed determination of conformity or policy decision. Such 14-day period shall commence when the MPO has

confirmed receipt by the director of the Department of the resolution of the comments of the Department. If the Department appeals to the Governor, the final conformity determination must have the concurrence of the Governor. The Department must provide notice of any appeal under this subsection to the MPO. If the Department does not appeal to the Governor within 14 days, the MPO may proceed with the final conformity determination.

- (c) The Governor may delegate the role of hearing any such appeal under this subsection and of deciding whether to concur in the conformity determination to another official or agency within the State, but not to the head or staff of the Department, RIDOT, any agency that has responsibility for only one of these functions, or the MPO.

49.3.10 Public Consultation Procedures

The MPO will follow its adopted public involvement procedures, which were developed in accordance with the requirements for public involvement in 23 CFR 450, when making conformity determinations on transportation plans, programs, and projects.

These procedures establish a proactive public involvement process which provides opportunity for public review and comment by, at a minimum, providing reasonable public access to technical and policy information considered by the MPO at the beginning of the public comment period and prior to taking formal action on a conformity determination for the Long Range Transportation Plan and TIP, consistent with these requirements and those of 23 CFR 450.

Meetings of the Air Quality Working Group are open to the public. Any charges imposed for public inspection and copying are consistent with the fee schedule contained in 49 CFR 7.43. The Air Quality Working Group shall also provide opportunity for public involvement in conformity determinations for projects where otherwise required by law.

Additionally, the MPO will address in writing all public comments that plans for regionally significant non-FHWA/FTA projects are not properly reflected in the emissions analysis.

49.4 Commitments for Regional Emissions Analysis

In accordance with 40 CFR 93.122(a)(4)(ii), the MPO will not include emissions reduction credits from control measures that are not included in the transportation plan or transportation improvement program and that do not require a regulatory action in the regional emissions analysis used in the conformity determination unless the MPO or FHWA/FTA obtains written commitments, as defined in 40 CFR 93.101, from the

appropriate entities to implement those control measures. The written commitments to implement those control measures must be fulfilled by the appropriate entities.

49.5 Commitments for Project-Level Mitigation and Control Measures

In accordance with 40 CFR 93.125(c), prior to making a project-level conformity determination for a transportation project, FHWA/FTA must obtain from the project sponsor and/or operator a written commitment, as defined in 40 CFR 93.101, to implement any project-level mitigation or control measure in the construction or operation of the project identified as a condition for NEPA process completion. The written commitment to implement such a project-level mitigation or control measure must be fulfilled by the appropriate entity. Prior to making a conformity determination for the transportation plan or TIP, the project sponsor will ensure any project level mitigation or control measures for which a written commitment has been made are included in the project design concept and scope and are appropriately identified in the regional emissions analysis used in the conformity analysis. Written commitments must be obtained before such mitigation or control measures are used in a project-level hot-spot conformity analysis for a project-level determination.

49.6 Purpose

The purpose of this regulation is to fulfill the requirement in 40 CFR 51.390(b) to establish a SIP revision that includes the following three sections of the federal transportation conformity rule:

- 40 CFR 93.105, which addresses consultation procedures;
- 40 CFR 93.122(a)(4)(ii), which states that conformity SIPs must require that written commitments to control measures be obtained prior to a conformity determination if the control measures are not included in a metropolitan planning organization's (MPO's) transportation plan and transportation improvement program (TIP); and that such a commitment be fulfilled; and
- 40 CFR 93.125(c), which states that conformity SIPs must require that written commitments to mitigation measures be obtained prior to a project-level conformity determination, and that project sponsors comply with such commitments.

Once this state regulation is approved by EPA into the Rhode Island implementation plan, it has full legal effect. Conformity determinations will be governed by these criteria and procedures as well as any applicable portions of the federal conformity rules that are not addressed by the state rule.

49.7 Authority

These regulations are authorized pursuant to R.I. Gen. Law §§ 42-17.1-2(s) and 23-23, as amended, and have been promulgated pursuant to the procedures set forth in the R.I. Administrative Procedures Act, R.I. Gen. Laws Chapter 42-35

49.8 Application

The terms and provisions of this regulation shall be liberally construed to permit the Department to effectuate the purposes of state law, goals and policies.

49.9 Severability

If any provision of this regulation or the application thereof to any person or circumstance, is held invalid by a court of competent jurisdiction, the validity of the remainder of the regulation shall not be affected thereby.

49.10 Effective Date

The foregoing regulation, "Transportation Conformity", after due notice, is hereby adopted and filed with the Secretary of State this xxx day of xxx, 2011 to become effective twenty (20) days thereafter, in accordance with the provisions of Chapters 23-23, 42-35, 42-17.1, 42-17.6, of the General Laws of Rhode Island of 1956, as amended.

Janet Coit, Director
Department of Environmental Management

Notice Given on:

Public Hearing held:

Filing Date:

Effective Date:

State of Rhode Island
Department of Environmental Management
Office of Air Resources

FACT SHEET

In re: Proposed Air Pollution Control Regulation No. 49 "Transportation Conformity"

Introduction

The Department of Environmental Management (DEM), Office of Air Resources, is proposing to adopt Air Pollution Control (APC) Regulation No. 49 "Transportation Conformity". This regulation, if adopted, will be submitted to EPA to be incorporated into the State Implementation Plan (SIP).

Overview

DEM, RIDOT, RIPTA, and Statewide Planning, in their capacity as the state's Metropolitan Planning Organization (MPO), together with their federal counterpart agencies: the Environmental Protection Agency (EPA), the Federal Highway Administration (FHWA), and the Federal Transit Administration (FTA), must fulfill responsibilities under the federal Clean Air Act (CAA), to ensure that federal funding and approval are given to transportation plans, programs and projects that are consistent with the air quality goals established by Rhode Island's State Implementation Plan (SIP). Conformity, to the purpose of the SIP, means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment of the NAAQS. The transportation conformity rule (40 CFR part 93) sets forth policy, criteria, and procedures for demonstrating and assuring conformity of transportation activities. This proposed regulation is intended to formally incorporate procedures followed to complete this process.

Description of Proposed Regulation

The purpose of this regulation is to fulfill the requirement in 40 CFR 51.390(b) to establish a SIP revision that includes the following three sections of the federal transportation conformity rule:

- 40 CFR 93.105, which addresses consultation procedures;
- 40 CFR 93.122(a)(4)(ii), which states that conformity SIPs must require that written commitments to control measures be obtained prior to a conformity determination if the control measures are not included in a MPO's transportation plan and transportation improvement program (TIP); and that such a commitment be fulfilled; and
- 40 CFR 93.125(c), which states that conformity SIPs must require that written commitments to mitigation measures be obtained prior to a project-level conformity determination, and that project sponsors comply with such commitments.

Once this state regulation is approved by EPA into the Rhode Island SIP, it has full legal effect. Conformity determinations will be governed by these criteria and procedures as well as any applicable portions of the federal conformity rules that are not addressed by the state rule.

Demonstration of Need

This regulation is necessary to meet the requirements of the federal transportation conformity rule (40 CFR part 93)

Alternative Approaches Considered

No alternative approaches were considered.

Identification of Overlapped or Duplicated State Regulations

The Office of Air Resources has identified no state regulations that overlap or duplicate the proposed regulation.

Determination of Significant Adverse Economic Impact on Small Business or Any City or Town

No significant adverse economic impact to small business or any city or town is anticipated related to this proposed regulation.

Public Notice

A public notice regarding the proposed Air Pollution Control Regulation No. 49 "Transportation Conformity" will be released on 6 June 2011.

For more information or copies of the proposed regulation contact:

Frank Stevenson, P.E., Supervising Air Quality Specialist
Office of Air Resources
235 Promenade Street
Providence, RI 02908
(401) 222-2808 ext. 7021
toll free 1-800-752-8088
TCDD (401) 222-6800
frank.stevenson@dem.ri.gov
Or, visit the DEM web site at www.dem.ri.gov



RHODE ISLAND
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

235 Promenade Street, Providence, RI 02908-5767

TDD 401-831-5508

Date: 19 May 2011

To: Rita Menard
Governor's Office

Sherri Lynn Carrera
R.I. Economic Development Corporation

Peter Dennehy
Department of Administration

From: Douglas L. McVay, Acting Chief *DM*
Office of Air Resources
Department of Environmental Management

RE: Economic Impact Statement & Regulatory Flexibility Analysis for proposed Air
Pollution Control Regulation No. 49 Transportation Conformity

Reason for the Rulemaking

DEM, RIDOT, RIPTA, Statewide Planning, in their capacity as the state's Metropolitan Planning Organization (MPO), and their federal counterpart agencies: the Environmental Protection Agency (EPA), the Federal Highway Administration (FHWA), and the Federal Transit Administration (FTA), must fulfill responsibilities under the federal Clean Air Act, to ensure that federal funding and approval are given to transportation plans, programs and projects that are consistent with the air quality goals established by Rhode Island's State Implementation Plan (SIP). Conformity, to the purpose of the SIP, means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment of the NAAQS. The transportation conformity rule (40 CFR part 93) sets forth policy, criteria, and procedures for demonstrating and assuring conformity of transportation activities. This proposed regulation is intended to formally incorporate procedures followed to complete this process.

The purpose of this regulation is to fulfill the requirement in 40 CFR 51.390(b) to establish a SIP revision that includes the following three sections of the federal transportation conformity rule:

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- 40 CFR 93.122(a)(4)(ii), which states that conformity SIPs must require that written commitments to control measures be obtained prior to a conformity determination if the control measures are not included in a metropolitan planning organization's (MPO's) transportation plan and transportation improvement program (TIP); and that such a commitment be fulfilled; and

- 40 CFR 93.125(c), which states that conformity SIPs must require that written commitments to mitigation measures be obtained prior to a project-level conformity determination, and that project sponsors comply with such commitments.

Once this state regulation is approved by EPA into the Rhode Island implementation plan, it has full legal effect. Conformity determinations will be governed by these criteria and procedures as well as any applicable portions of the federal conformity rules that are not addressed by the state rule.

Economic Impact Statement

Because this proposed regulation is only intended to codify policies and procedures governing communication and coordination between several State and Federal agencies relating to transportation system planning, the Department maintains that this rulemaking has no economic impact.

- 1. An identification and estimate of the number of the small businesses subject to the proposed regulations.**

None.

- 2. The projected reporting, recordkeeping, and other administrative costs required for compliance with the proposed regulation, including the type of professional skills necessary for preparation of the report or record**

None.

- 3. A statement of the probable effect on impacted small businesses.**

No impact.

- 4. A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation.**

No alternatives considered. This proposed regulation is based on a Model Rule developed and recommended by EPA.

Regulatory Flexibility Analysis

- 1. The establishment of less stringent compliance or reporting requirements for small businesses.**

No requirements are proposed for small businesses.

- 2. The establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses.**

No requirements are proposed for small businesses.

3. The consolidation or simplification of compliance or reporting requirements for small businesses.

No requirements are proposed for small businesses.

4. The establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation.

No requirements are proposed for small businesses.

5. The exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

No requirements are proposed for small businesses.

A public notice regarding the proposed regulation revisions is scheduled to be released June 6, 2011.

Attachments: Proposed Air Pollution Control Regulation No. 49
Regulation No. 49 Fact Sheet



RHODE ISLAND
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

235 Promenade Street, Providence, RI 02908-5767

TDD 401-831-5508

Date: 19 May 2011

To: Sharon Savicki
Budget Office
Department of Administration

cc: Todd Leveillee
Budget Office
Department of Administration

From: Douglas L. McVay, Acting Chief *DM*
Office of Air Resources
Department of Environmental Management

RE: Fiscal Note for proposed Air Pollution Control Regulation No. 49, "Transportation Conformity"

Description of the proposed rule changes

The purpose of this regulation is to fulfill the requirement in 40 CFR 51.390(b) to establish a State Implementation Plan (SIP) revision that includes the following three sections of the federal transportation conformity rule:

- 40 CFR 93.105, which addresses consultation procedures;
- 40 CFR 93.122(a)(4)(ii), which states that conformity SIPs must require that written commitments to control measures be obtained prior to a conformity determination if the control measures are not included in a metropolitan planning organization's (MPO's) transportation plan and transportation improvement program (TIP); and that such a commitment be fulfilled; and
- 40 CFR 93.125(c), which states that conformity SIPs must require that written commitments to mitigation measures be obtained prior to a project-level conformity determination, and that project sponsors comply with such commitments.

Once this state regulation is approved by the Environmental Protection Agency (EPA) into the Rhode Island SIP, it has full legal effect. Conformity determinations will be governed by these criteria and procedures as well as any applicable portions of the federal conformity rules that are not addressed by the state rule.

Economic impact on the state or any city/ town

Because this proposed regulation is only intended to codify policies and procedures governing communication and coordination between several State and Federal agencies relating to transportation system planning, the Department maintains that this rulemaking has no economic impact to the state or any city or town.

Conclusion

As indicated above, it is DEM's position that promulgation of this regulation will not fiscally impact the state or any city or town. We plan to release the public notice for these regulation changes on 6 June 2011.

Feel free to contact me with any questions or for more information. I can be reached by phone at 222-2808, x-7011 or by e-mail at doug.mcvay@dem.ri.gov. Please direct all correspondence concerning this Fiscal Note to me.

Attachments: Proposed Air Pollution Control Regulation No. 49
Regulation No. 49 Fact Sheet

*State of Rhode Island and Providence Plantations
Department of Administration
Budget Office*

Fiscal Note for Proposed Administrative Rules (R.I.G.L. 22-12-1.1)

Name of Administrative Rule: Air Pollution Control Regulations No. 49 "Transportation Conformity"

Date of Notice: 6 June 2011

Date of Hearing: _____

RIGL: 42-35-3

FISCAL IMPACT

<i>Revenues</i>		<i>General Revenue Expenditures</i>		<i>All Funds Expenditures</i>	
FY 2010	\$	FY 2010	\$	FY 2010	\$
FY 2011	\$	FY 2011	\$	FY 2011	\$
FY 2012	\$	FY 2012	\$	FY 2012	\$

Summary of Policy Change: The purpose of this regulation is to fulfill the requirement in 40 CFR 51.390(b) to establish a SIP revision that includes the following three sections of the federal transportation conformity rule:

- 40 CFR 93.105, which addresses consultation procedures;
- 40 CFR 93.122(a)(4)(ii), which states that conformity SIPs must require that written commitments to control measures be obtained prior to a conformity determination if the control measures are not included in a metropolitan planning organization's (MPO's) transportation plan and transportation improvement program (TIP); and that such a commitment be fulfilled; and
- 40 CFR 93.125(c), which states that conformity SIPs must require that written commitments to mitigation measures be obtained prior to a project-level conformity determination, and that project sponsors comply with such commitments.

Once this state regulation is approved by EPA into the Rhode Island implementation plan, it has full legal effect. Conformity determinations will be governed by these criteria and procedures as well as any applicable portions of the federal conformity rules that are not addressed by the state rule.

Summary of Fiscal Impact: The proposed regulation should not have a direct fiscal impact on the state or state agencies.

City or Town Impact: The proposed regulation will not have a direct fiscal impact on municipalities.

Approved:

Thomas A. Mullaney
Executive Director/State Budget Officer

Date