DISTRICT DEPARTMENT OF THE ENVIRONMENT

NOTICE OF PROPOSED RULEMAKING

The Acting Director of the District Department of the Environment, pursuant to the authority set forth in the sections 5 and 6(b) of the District of Columbia Air Pollution Control Act of 1984, as amended, effective March 15, 1985 (D.C. Law 5-165; D.C. Official Code §§ 8-101.05 and 8-101.06(b)), section 107(4) of the District Department of the Environment Establishment Act of 2005, effective February 15, 2006 (D.C. Law 16-51; D.C. Official Code § 8-151.07(4)), Mayor's Order 98-44, dated April 10, 1998, and Mayor's Order 2006-61, dated June 14, 2006, hereby gives notice of the intent to amend Chapter 4, reserve Chapter 14, and adopt new Chapters 15 and 16 to Title 20 (Environment) of the District of Columbia Municipal Regulations (DCMR) in not less than forty-five (45) days from the date of publication of this notice in the *D.C. Register.* Further, these rules shall not become effective until approved by the Council of the District of Columbia, or forty-five (45) days after submission to the Council, not including Saturdays, Sundays, legal holidays, and days of Council recess, if the Council has not disapproved these rules.

The proposed rules are necessary to amend general conformity requirements and adopt new transportation conformity regulations that will help develop and implement the air quality State Implementation Plan (SIP). The air quality SIP includes conformity of Federal actions based on the federal Clean Air Act, §§ 110 and 171-193 (Part D), 42 U.S.C. §§ 7410 and 7501 *et seq.*, as amended (the "Clean Air Act"). The federal conformity regulations in 40 CFR §§ 93.100 - .160 establish standards and procedures to follow when evaluating the conformity of federal projects to all applicable implementation plans.

Transportation conformity is a way to ensure that federal funding goes to transportation activities that are consistent with air quality goals. A transportation conformity determination demonstrates that the total emissions projected for a plan or program are within the emissions limits established by the SIP, and that transportation control measures are implemented in a timely fashion. Transportation conformity applies to transportation plans, transportation improvement programs, and projects funded or approved by the Federal Highway Administration or the Federal Transit Administration in areas that do not meet or previously have not met air quality standards for ozone, carbon monoxide, particulate matter, or nitrogen dioxide. These areas are known as "nonattainment areas." The Washington region is in nonattainment for ozone and fine particle particulate matter.

Since conformity commitments in the SIP must be enforceable, the District's transportation conformity responsibilities must be codified in the District of Columbia Municipal Regulations.

TITLE 20 DCMR (ENVIRONMENT) is amended as follows:

CHAPTER 4 is amended by striking subsection 403.1 and revising the heading for Chapter 4 to read:

AMBIENT MONITORING, EMERGENCY PROCEDURES, AND CHEMICAL ACCIDENT PREVENTION

CHAPTER 14 is reserved.

CHAPTER 15, GENERAL CONFORMITY, is added as follows:

1500 PURPOSE

1500.1 In accordance with §§ 110 and 171-193 (Part D) of the Clean Air Act, 42 U.S.C. §§ 7410 and 7501 *et seq.*, the District of Columbia ("District") must develop an air quality State Implementation Plan (SIP) that includes conformity of federal actions. The federal conformity regulations in 40 CFR §§ 93.100 - .160 establish standards and procedures to follow when evaluating the conformity of federal projects to all applicable implementation plans.

1501 GENERAL REQUIREMENTS

1501.1 The requirements of 40 CFR §§ 93.150 - .160 (Subpart B), as amended, are hereby adopted by reference for purposes of determining conformity of federal actions to state or federal implementation plans.

1501.2 This rule only applies when the District of Columbia is designated as a nonattainment or maintenance area under the federal Clean Air Act.

CHAPTER 16, TRANSPORTATION CONFORMITY is added as follows:

1600 PURPOSE

1600.1 In accordance with §§ 110 and 171-193 (Part D) of the Clean Air Act, 42 U.S.C. §§ 7410 and 7501 *et seq.*, the District of Columbia ("District") must develop an air quality State Implementation Plan (SIP) that includes conformity of transportation plans, programs, and projects funded or approved by the United States Department of Transportation; the metropolitan planning organization; the Federal Aid Highway Act of 1962, as amended, 23 U.S.C. § 134 *et seq.*; or the federal transit laws, 49 U.S.C. § 5303 *et seq.*

1600.2 In accordance with 40 CFR §§ 51.390 and 93.100 - .160, the District must periodically revise the air quality SIP to address transportation conformity.

1600.3 A conformity determination must demonstrate that the total emissions projected for a plan or program are within the emissions limits established by the SIP, and that transportation control measures (TCMs), included in United States Environmental Protection Agency approved SIPs, are implemented in a timely fashion.

1601 GENERAL CONSULTATION PROCESS

1601.1 The Metropolitan Planning Organization (MPO), Regional Planning Organization (RPO), the District Department of the Environment (DDOE or the Department), and the District Department of Transportation (DDOT) shall comply with the procedures in this chapter governing interagency consultation, conflict resolution, and public consultation with each other and with divisional or regional offices of the United States Environmental Protection Agency (EPA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA) on the development of:

(a) Control strategy implementation and maintenance plan revisions;

(b) The list of transportation control measures (TCMs) in applicable implementation plans;

(c) The Unified Planning Work Program (UPWP) in accordance with 23 CFR § 450.314;

(d) Transportation plans;

(e) Transportation improvement programs (TIPs); and

(f) Associated conformity determinations required by this chapter.

1601.2 An agency may not participate in the consultation process unless it is identified in this chapter.

1602 INTERAGENCY CONSULTATION REQUIREMENTS

1602.1 In accordance with this chapter, representatives of the MPO, RPO, DDOE, and DDOT shall undertake an interagency consultation process with the FHWA, FTA, and EPA on the development of the UPWP, transportation

plans, TIPs, SIPs, associated conformity determinations, and any revisions to the plans or programs thereof as follows:

(a) The MPO is the lead agency responsible for preparing an amendment or revision of the UPWP, the transportation plan, or the TIP and for making conformity determinations;

(b) DDOE is the lead agency responsible for preparing revisions to the SIP and incorporating TCMs recommended by the MPO and DDOT; and

(c) In the case of metropolitan nonattainment and maintenance areas that have a certified RPO, the RPO is the agency responsible for preparing an air quality plan and for assuring the adequacy of the interagency consultation process with respect to the development of the proposed air quality plan, and any amendments or revisions to the plan.

1602.2 When serving as lead agency, the MPO, RPO, DDOT, and DDOE have the following responsibilities:

(a) Initiating the applicable consultation process by notifying other participants, convening meetings, preparing summaries, assuring that all relevant documents and information are supplied to all participants in the consultation process in a timely manner, maintaining a written record of the consultation process, and providing final documents and supporting information to each participating agency after approval or adoption;

(b) Enabling regular consultation on major activities (such as the development of a transportation plan, the development of a TIP, any determination of conformity on transportation plans or TIPs, or the development of a SIP) including meetings beginning on a date determined by the lead agency to be adequate to meet the date a final decision is required and continuing at a frequency mutually agreed upon by the affected agencies;

(c) Convening meetings of technical staff as necessary;

(d) Conferring with all other agencies identified in §1601 with an interest in the planning process, providing all information to those agencies needed for meaningful input, soliciting early and continuing input from those agencies, before taking any action; and

(e) Considering the views of each agency and responding to those views in a timely, substantive written manner, and making the

views and written response part of the record of any decision or action.

1602.3 In addition to serving as lead agency pursuant to §1602.1(a), the MPO is responsible for:

(a) Developing or approving transportation and related socioeconomic data and local planning assumptions, and providing data and assumptions for use in air quality analysis for SIP tracking and conformity of transportation plans, TIPs, and projects;

(b) Providing transportation demand forecasting for development of on-road mobile source emissions inventories by DDOE and DDOT;

(c) In cooperation with DDOT, evaluating potential TCM projects and impacts;

(d) In cooperation with DDOT, monitoring regionally significant projects to determine a need for emissions modeling;

(e) In cooperation with DDOT, providing technical and policy input into the development of emissions budgets;

(f) In cooperation with DDOT, consulting with the RPO on emissions analysis for transportation activities which cross the borders of the MPO or nonattainment areas;

(g) In cooperation with DDOT, determining which transportation projects should be considered "regionally significant" for the purpose of regional emission analysis (in addition to those functionally classified as principal arterial roadway or higher classifications, 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;

(h) In cooperation with DDOT, assuring that plans for construction of regionally significant projects which are not FHWA or FTA funded or approved projects (including projects for which alternative locations, design concept and scope, or the no-build options are still being considered), including all plans by recipients of funds designated under the Federal Aid Highway Act of 1962, as amended, 23 U.S.C. § 134 *et seq.* or the federal transit laws, 49 U.S.C. § 5303 *et seq.*, are disclosed by the MPO members, and that any changes to those plans are involved in the interagency

consultation process with the MPO and DDOT, and the recipients of funds designated under 23 U.S.C. § 134 *et seq.* or 49 U.S.C § 5303 *et seq.*;

(i) In cooperation with DDOT, designing, scheduling, and funding research and data collection efforts and model developments in regional transportation, such as household or travel transportation surveys;

(j) In cooperation with DDOT and DDOE, evaluating and choosing each model or models and associated methods and assumptions to be used in regional transportation demand analysis, including vehicle miles traveled (VMT) forecasting;

(k) In cooperation with DDOT and DDOE, evaluating whether projects otherwise exempted from meeting the requirements of 40 CFR § 93.127 should be treated as nonexempt in cases where potential adverse emissions impacts may exist for any reason;

(l) In cooperation with DDOT and DDOE, making a determination as required by 40 CFR § 93.113, whether past obstacles to implementation of TCMs that 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 approvals or funding for TCMs, and as part of this consultation, considering whether delays in TCM implementation necessitate revisions to the applicable implementation plan to remove TCM or substitute TCMs or other emission reduction measures;

(m) In cooperation with DDOT and DDOE, determining what forecast of vehicle miles traveled (VMT) to use in establishing or tracking emissions budgets, developing transportation plans, TIPs, or control strategy implementation plan revisions, or making conformity determinations;

(n) In cooperation with DDOT and DDOE, evaluating events which may trigger new conformity determinations in addition to those triggering events established by 40 CFR § 93.104;

(o) In cooperation with DDOT and DDOE, developing assumptions regarding the location and design concept and scope of projects which are disclosed to the MPO as required by this regulation, 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, as amended;

(p) In cooperation with DDOT and DDOE, consulting with the FHWA and FTA on timely action on final findings of conformity; and

(q) In cooperation with DDOT and DDOE, obtaining guidance on conformity and the transportation planning process for agencies involved in the interagency consultation process.

1602.4 In addition to serving as lead agency pursuant to §1602.2, DDOT is responsible for:

(a) Circulating draft and final environmental impact or assessment documents to appropriate agencies;

(b) Convening air quality technical review meetings on specific projects as needed or when requested by other agencies; and

(c) Identifying, as required by 40 CFR § 93.123, projects located at sites in $PM_{2.5}$ nonattainment areas which will have vehicle and roadway emission and dispersion characteristics which are essentially identical to those sites which have violations verified by monitoring and, therefore, require qualitative or quantitative $PM_{2.5}$ hot-spot analysis as required by 40 CFR §§ 93.100 - .129 (Part 93, Subpart A), as amended.

1602.5 In addition to serving as lead agency pursuant to §1602.1(b), DDOE is responsible for:

(a) Developing emissions inventories and budgets;

(b) Tracking attainment of air quality standards and emission factor model updates;

(c) Gaining final approval at the State level for control strategy implementation plan revisions and maintenance plans;

(d) In cooperation with DDOT, evaluating and choosing each model or models and associated methods and assumptions to be used in hot-spot analysis;

(e) In cooperation with DDOT and the MPO, consulting with the EPA on review and approval of updated motor vehicle emissions factors, emission inventories, and budgets;

(f) In cooperation with DDOT and the MPO, obtaining guidance on conformity criteria and procedures for the agencies involved in the interagency consultation process; and

(g) In nonattainment areas where an RPO has been certified, cooperating with the RPO in the development of emissions inventories and budgets, and in the development of regional air quality plans.

1602.6 When not fulfilling the responsibilities of a lead agency, reviewing and commenting as appropriate (including comments in writing) on all proposed decisions and actions in a timely manner, attending consultation and decision meetings, providing input on any area of substantive expertise or responsibility, and providing technical assistance to the lead agency or to the consultation process when requested.

1603 CONFLICT RESOLUTION ASSOCIATED WITH CONFORMITY DETERMINATIONS

1603.1 Unresolved conflicts among State agencies, or between State agencies and the MPO, or among the MPO member jurisdictions, shall be identified by the MPO or agency in writing to the other MPO, DDOE, or DDOT, with copies to the FHWA, FTA, and EPA. The MPO's or the agency's written notice shall:

(a) Explain the nature of the conflict;

(b) Review options for resolving the conflict;

(c) Describe the MPO's or agency's proposal to resolve the conflict;

(d) Explain the consequences of not reaching a resolution; and

(e) Request that comments on the matter be received within two (2) weeks.

1603.2 If the action in §1603.1 does not result in a resolution of the conflict, one of the following applies:

(a) If the conflict is between the MPO and DDOT then the parties shall follow the coordination procedures of 40 CFR § 93.105(d);

(b) If the conflict is between the MPO or DDOT and DDOE, and the conflict cannot be resolved by the affected agency heads:

(1) The Director of DDOE may elevate the conflict to the Mayor in accordance with the procedures of subsection 1603.3; or

(2) If the Director of DDOE does not appeal to the Mayor within 14 days as provided in § 1603.3(a), the MPO may proceed with its final conformity determination; and

(c) In the case of interstate nonattainment areas, if the conflict involves agencies outside of the District, Maryland, or Virginia, and the conflict cannot be resolved by the affected agency heads, the conflict may be resolved in a manner mutually agreed to by the parties involved.

1603.3 Appeals to the Mayor by the Director of DDOE under the provisions of §1603.2(b) (1) shall be in accordance with the following procedures:

(a) The Director of DDOE has 14 calendar days to appeal to the Mayor after the MPO or DDOT has notified the Director of DDOE of the MPO's or DDOT's resolution of the Department's comments;

(b) The notification to the Director of DDOE shall be in writing and shall be hand-delivered;

(c) The 14-day appeal commences when DDOT or MPO has confirmed receipt by the Director of DDOE of the agency's or MPO's resolution of the Department's comments;

(d) The appeal to the Mayor shall contain:

(1) The conformity determination and any supporting documentation;

(2) DDOE's comments on the determination; and

(3) Any response by the MPO or DDOT;

(e) DDOE shall provide a complete appeal package to the MPO and DDOT within 24 hours following the date on which the appeal is filed with the Mayor's Office;

(f) If the Mayor does not concur with the conformity determination, the Mayor may direct revision of the applicable implementation plan, revision of the planned program of projects, revision of the conformity analysis, or any combination of these;

(g) If the Mayor concurs with the conformity determination made by the MPO and DDOT, the MPO and DDOT may proceed with the final conformity determination; and

(h) The Mayor may delegate the Mayor's role in this process, but not to the agency head or staff of the DDOE or DDOT.

1603.4 This regulation does not prevent the State agencies and MPO from making efforts on their own initiative to obtain mutual conflict resolution through conferences or other appropriate means.

1604 PUBLIC CONSULTATION PROCEDURES

1604.1 In accordance with 40 CFR § 93.105(e), the MPO shall:

(a) Establish a proactive public involvement process which provides reasonable opportunity for review and comment before taking formal action on a conformity determination for all transportation plans and TIPs, consistent with the requirements of 23 CFR § 450.316(a) and (b);

(b) Release information supporting conformity determinations at the beginning of the public comment period; and

(c) Assess and impose reasonable charges for public inspection and copying of such information, consistent with the fee schedule contained in 1 DCMR §408.

1604.2 If the public disagrees with the MPO's decision about whether a project is regionally significant and whether it was modeled properly in the emission analysis supporting a proposed conformity finding for a transportation plan or TIP, a written explanation shall be provided by the MPO upon request by the public.

1604.3 The MPO shall also provide an opportunity for public involvement in conformity determinations for projects when otherwise required by law.

1605 INTERAGENCY CONSULTATION PROCEDURES

1605.1 The MPO, RPO, DDOT, and the Department may enter into agreements to set forth specific consultation procedures in more detail that are not in conflict with this chapter.

1606 PROCEDURES FOR DETERMINING REGIONAL TRANSPORTATION-RELATED EMISSIONS

1606.1 Written commitments to control measures that are not included in the transportation plan and TIP must be obtained prior to a conformity determination and such commitments must be fulfilled.

1607 ENFORCEABILITY OF DESIGN CONCEPT AND SCOPE AND PROJECT-LEVEL MITIGATION AND CONTROL MEASURES

1607.1 Written commitments to mitigation measures must be obtained prior to a positive conformity determination and project sponsors must comply with such commitments.

1699 DEFINITIONS

1699.1 The meanings ascribed to the definitions and abbreviations appearing in 20 DCMR § 199 shall apply to the terms and abbreviations in this chapter. In addition the following terms and phrases used in this chapter shall have the meanings set forth in this section unless the text or context of a particular section, subsection or paragraph provides otherwise.

Ambient Air – that portion of the atmosphere, external to buildings, to which the general public has access.

Applicable implementation plan – as defined in § 302(q) of the Clean Air Act, the portion(s) of the implementation plan, or most recent revision thereof, which has been approved under §110, or promulgated under §110(c), and which implements the relevant requirements of the Clean Air Act.

Clean Air Act – the federal Clean Air Act, as amended, 42 U.S.C. § 7401, *et seq.*

Control strategy implementation plan revision – the implementation plan which contains specific strategies for controlling the emissions of and reducing ambient levels of pollutants in order to satisfy the Clean Air Act requirements for demonstrations of reasonable further progress and attainment, including implementation plan revisions submitted to satisfy: §172(c); §§ 182(b)(1), (c)(2)(A) and (B); §§ 187(a)(7) and(g); §§ 189(a)(1)(B), (b)(1)(A), and (d); and §§192(a) and (b), for nitrogen dioxide; and any other applicable provision of the Clean Air Act requiring a demonstration of reasonable further progress or attainment.

DDOE or the Department – the District Department of the Environment.

DDOT – the District Department of Transportation.

EPA – the United States Environmental Protection Agency.

FHWA – the Federal Highway Administration within the United States Department of Transportation.

FHWA/FTA project – 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 FHWA or 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.

FTA – the Federal Transit Administration within the United States Department of Transportation.

Highway project – 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.

Maintenance area – any geographic region of the United States previously designated nonattainment under of the § 107 of the Clean Air Act, 42 U.S.C. § 7407, and subsequently redesignated to attainment subject to the requirement to develop a maintenance plan.

Maintenance plan – a revision to the applicable implementation plan, meeting the requirements of the §175A of the Clean Air Act, 42 U.S.C. § 7505a.

Mayor – the Mayor of the District of Columbia.

MPO or Metropolitan Planning Organization – the organization designated as being responsible, together with the state, for conducting the continuing, cooperative, and comprehensive planning process under 23 U.S.C. § 134 and 49 U.S.C. § 5303. It is the forum for cooperative transportation decision-making. The "National Capital Region Transportation Planning Board (TPB)" is the MPO for the Washington region. The TPB is comprised of: Frederick, Montgomery, and Prince George's counties in Maryland; Arlington, Fairfax, Frederick, Loudoun, and Prince William Counties, and the cities of

Alexandria, Fairfax, Falls Church and Manassas in Virginia; and the District of Columbia.

Nonattainment area – any geographic region of the United States which has been designated as nonattainment under § 107 of the Clean Air Act, 42 U.S.C. 7407, for any pollutant for which a national ambient air quality standard exists.

$PM_{2.5}$ – particulate matter with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers as measured by the applicable reference method or an equivalent method.

Project – a highway project or transit project.

Regionally significant project – 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) 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.

RPO or Regional Planning Organization – the organization certified by the state as being responsible for the preparation of control strategy implementation plan revisions for nonattainment areas under § 174 of the Clean Air Act, 42 U.S.C. § 7504. The organization may include elected officials of local governments in the affected nonattainment area, and representatives of DDOE, DDOT, the MPO for the affected area, and other agencies and organizations that have responsibilities for developing, submitting or implementing any of the plan revisions. It is the forum for cooperative air quality planning decision-making. The RPO for the Washington region is the Metropolitan Washington Air Quality Committee (MWAQC).

State – the District of Columbia.

Statewide transportation improvement program – a staged, multiyear, intermodal program of transportation projects covering the State, which is consistent with the Statewide transportation plan and metropolitan transportation plans, and developed under 23 CFR §§ 450.300 - . 338.

Statewide transportation plan – the official intermodal Statewide transportation plan that is developed through the Statewide planning process for the State, under 23 CFR §§ 450.300 -.338.

TCM or transportation control measure – any measure that is specifically identified and committed to in the state implementation plan that is either one of the types listed in §108 of the Clean Air Act, 42 U.S.C. § 7408(f), or any other measure to reduce emissions or concentrations of air pollutants from transportation sources by reducing vehicle use or

changing traffic flow or congestion conditions. 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 chapter.

TIP or transportation improvement program – a staged, multiyear, intermodal program of transportation projects covering a metropolitan planning area which is consistent with the metropolitan transportation plan, and developed pursuant to 23 CFR §§ 450.300 - .338.

Transit – 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.

Transit project – 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 local transit agencies, 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 broad 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.

Transportation plan – the official intermodal metropolitan transportation plan that is developed through the metropolitan planning process for the metropolitan planning area, developed pursuant to 23 CFR §§ 450.300 - .338.

Transportation project – a highway project or a transit project.

USDOT – the United States Department of Transportation.

Comments on these proposed rules must be submitted, in writing, no later than thirty (30) days after the date of publication of this notice in the *D.C. Register* to Ms. Cecily Beall, District Department of the Environment, Air Quality Division, 51 N Street, NE, 3rd Floor, Washington, D.C. 20002. Copies of the proposed rule may be obtained between the hours of 9:00 a.m. and 5:00 p.m. at the address listed above.