

**1998 MEMORANDUM OF AGREEMENT
BETWEEN
WISCONSIN DEPARTMENT OF NATURAL RESOURCES AND THE
WISCONSIN DEPARTMENT OF TRANSPORTATION REGARDING
DETERMINATION OF CONFORMITY OF TRANSPORTATION PROJECTS
IN RURAL AREAS TO STATE IMPLEMENTATION PLANS**

WHEREAS, Section 176(c) of the Clean Air Act Amendments of 1990, 42 U.S.C. 7506(c), requires federally-funded transportation plans, programs, and projects that are funded or approved under Title 23, United States Code, or the Federal Transit Act to conform with State or Federal air quality implementation plans; and

WHEREAS, on November 23, 1993, the Environmental Protection Agency (EPA) promulgated its original regulation, 40 C.F.R. Parts 51 and 93, to implement the requirement that Metropolitan Planning Organizations (MPOs)/State DOTs and FHWA/FTA make conformity determinations on transportation plans and transportation improvement programs in nonattainment areas before they are adopted, approved or accepted, and on projects in those areas before they are approved or funded; and

WHEREAS, EPA determined that each State should have the flexibility to design a consultation process that will facilitate the development of approaches to maximize both air quality and mobility; and

WHEREAS, the validity of a conformity determination depends on proper consultation procedures and that each State and participating agencies should jointly develop their own legally enforceable State conformity procedures; and

WHEREAS, the preamble to EPA's original regulation stated: "EPA will accept State conformity procedures in any form provided the State can demonstrate to EPA's satisfaction that, as a matter of State law, the State has adequate authority to compel compliance with the requirements of the State conformity procedures"; and

WHEREAS, on May 29, 1995, the State of Wisconsin through its Departments of Transportation (WisDOT) and Natural Resources (WDNR) entered into a Memorandum of Agreement [Agreement] that is included in an EPA approved Conformity State Implementation Plan revision to enforce and assure compliance with the State Implementation Plan (SIP) and to satisfy the requirements of the Clean Air Act (CAA), ISTEA, and the implementing regulations of EPA and FHWA/FTA; and

WHEREAS, in 1995, the classification status for Counties in Wisconsin with respect to air quality standards was exclusively nonattainment for ozone as follows:

<u>Nonattainment Rural Transport</u>	<u>Nonattainment Moderate</u>	<u>Nonattainment Severe</u>
Door *	Kewaunee * Walworth Sheboygan * Manitowoc *	Waukesha Milwaukee Ozaukee Kenosha Washington Racine

* Designates non-urbanized area of Sheboygan County and rural Counties outside any MPO jurisdiction.

WHEREAS, on November 14, 1995, the Environmental Protection Agency (EPA) promulgated a regulation that adopted minor changes to 40 C.F.R. § 51.420, 51.438 and 51.452 that were incorporated into the Agreement on December 9, 1996 and approved by EPA as part of the Conformity SIP; and

WHEREAS, on August 15, 1997, the Environmental Protection Agency (EPA) promulgated a clarified, more flexible and streamlined regulation, 40 C.F.R. § 51.390 and Part 93, to give State and Local governments more authority in selecting the performance measures used as tests of conformity and more discretion when a transportation plan does not conform to a SIP, (for example, to allow motor vehicle emissions budgets in a submitted SIP to be used to determine conformity instead of the "build/no-build" test, and to allow rural areas to choose among several conformity tests to address the time period after that covered by the SIP); and

WHEREAS, in 1997, the classification status for Counties in Wisconsin with respect to air quality standards was exclusively nonattainment and attainment/maintenance for ozone as follows:

<u>Nonattainment Rural Transport</u>	<u>Nonattainment Moderate</u>	<u>Nonattainment Severe</u>	<u>Attainment/ Maintenance</u>
Door *	Manitowoc *	Waukesha Milwaukee Ozaukee Kenosha Washington Racine	Kewaunee * Walworth Sheboygan *

* Designates non-urbanized area of Sheboygan County and rural Counties outside any MPO jurisdiction.

WHEREAS, the August 15, 1997 regulations provide that conformity determinations will continue as usual in existing nonattainment and maintenance areas for several years and areas not currently subject to conformity will not start until EPA approves a Wisconsin State Implementation Plan that addresses the new National Ambient Air Quality Standards for ozone (and particulate matter) [August 15, 1997, Federal Register, XVI. Conformity and the Proposed NAAQS Revisions, Pages 43798-99]; and

WHEREAS, WisDOT and WDNR desire to enjoy the benefits of the new streamlined and flexible EPA regulations as soon as reasonably possible, and have revised their existing Agreement so that it may be included in a revised Conformity State Implementation Plan revision to be submitted to and approved by EPA as soon as reasonably possible, but not later than August 15, 1998; and

WHEREAS, the parties agree and declare that this Agreement and the consultation procedures herein are enforceable contractual agreements under Wisconsin law, as part of the SIP itself under 42 U.S.C. 7506(c)(1), and under the following Wisconsin statutory authority:

- **Section 66.30, Wis. Stats.** Authorizes state agencies to enter into legally binding cooperative contracts for the receipt or furnishing of services or the joint exercise of any power or duty required or authorized by law. Each party to the contract may act under the contract to the full extent of its lawful powers and duties. By statute, this law is interpreted liberally in favor of cooperative action.
- **Sections 285.11(5) and (6) and 285.23, Wis. Stats.** Authorizes and requires WDNR to implement the CAA to enhance the quality, management and protection of the State's air resources through comprehensive plans for the prevention, abatement and control of air pollution in this State.
- **Section 85.02, Wis. Stats.** Requires all state, regional and municipal agencies and commissions created under authority of law shall, when dealing with transportation, follow the recommendations made by WisDOT. WisDOT has authority over the development of the Statewide Transportation Improvement Program [STIP] and has been delegated the Governor's final approval authority over all MPO TIPs including amendments thereto under 23 U.S.C. 134 and Chapter 53 of Title 49 [49 U.S.C. §§ 5301 et seq.]. WisDOT will not include a nonconforming TIP or amendment thereto in the STIP. 23 C.F.R. Part 420, Subpart A, makes WisDOT responsible for administration of federal planning funds to MPOs in Wisconsin for work to carry out urban transportation planning. WisDOT will not request federal or state funding for any nonconforming projects, programs or plans.

- Sections 20.395 (9)(qx), 84.01(15), 84.015 and 84.03(1), Wis. Stats. Authorize and direct WisDOT to expend funds to construct and maintain highways and related projects within the meaning of Title 23, United States Code, and all acts amendatory and supplementary thereto, and the federal regulations issued under that Code, as well as to receive and expend all funds in accordance with the requirements of acts of congress making such funds available.
- Section 30.12(4)(a), Wis. Stats. Gives the transportation conformity agreements between WisDOT and WDNR full legal effect in Wisconsin. This law requires WisDOT and all activities undertaken through WisDOT to follow its agreements and liaison procedures with WDNR or be subject to the prohibitions or permit or approval requirements specified under secs. 29.29, 30.11, 30.12, 30.123, 30.195, 30.20, 59.971, 61.351, 62. 231 or 87.30, and Chapters 281 to 285 or 289 to 299, except s. 281.48, Wis. Stats.
- Section 1.11, Wis. Stats. The Wisconsin Environmental Policy Act (WEPA), may be enforced by citizens with regard to activities of WDNR and WisDOT; and

WHEREAS, the conformity procedures and agreements in the Conformity State Implementation Plan are also enforceable with regard to federal agency activities in Wisconsin pursuant to 42 U.S.C. 7506(c)(1): "No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve any activity which does not conform to an implementation plan after it has been approved or promulgated under Section 110 [42 U.S.C. 7410]."

NOW, THEREFORE, the parties intending to be legally bound agree that the foregoing paragraphs are part of this Agreement and that if any party fails to comply with a provision of the conformity criteria and procedures contained in this Agreement, that the other parties have the right to take appropriate action in any court of competent jurisdiction to enforce this Agreement.

The purpose of this Memorandum of Agreement is to implement Section 176(c) of the CAA, as amended (42 U.S.C. 7506(c)), and the related requirement of 23 U.S.C. 109(j), 134 and 135 with respect to the Conformity of transportation projects which are developed, funded or approved by the USDOT and are located within nonattainment or maintenance areas and outside the planning boundaries of any MPO with the applicable implementation plan required under Section 110 (42 U.S.C. 7410) and Part D of the CAA (42 U.S.C. §§ 7407(d) and 7505a) relating to nonattainment and maintenance areas. Terms used but not defined in this Agreement shall have the meaning given to them by the CAA, Title 23 and Title 49, United States Code, 40 C.F.R. § 93.101, other EPA regulations, or other USDOT regulations, in that order of priority.

A. **Applicability**

Transportation projects are subject to the provisions of this Agreement as specified in 40 C.F.R. §§ 51.390(b) and 93.102, except §93.102(d).

* §93.102(d) provides a 12-month grace period for areas that have been designated attainment for ozone since 1990 and are subsequently redesignated as nonattainment. Wisconsin has no such areas at the present time. In addition, on November 4, 1997, the United States Court of Appeals for the District of Columbia Circuit held that EPA's one year grace period provided under the EPA's 1995 amendments to its transportation conformity regulations, 40 C.F.R. § 51.394(d), was "contrary to the plain meaning of the Clean Air Act." *Sierra Club v. EPA*, No. 96-1007. Therefore, conformity requirements apply to new nonattainment areas immediately upon their designation.

B. **Frequency of Conformity Determinations**

The frequency of Conformity determinations shall be consistent with 40 C.F.R. § 93.104.

C. **Consultation Process**

Roles and Responsibilities of Agencies. The roles and responsibilities of the principal agencies involved in the Conformity process are defined below. Each principal agency shall determine which staff members will represent the agency, and shall take responsibility to see that the appropriate representatives are present to ensure a cooperative process, and adequate communication among and within all the principal agencies.

Wisconsin Department of Natural Resources (WDNR)

- Participate in meetings convened by WisDOT to discuss Conformity-related issues.
- Review and comment on draft Conformity analyses to WisDOT. Provide timely review comments to EPA on final Conformity analyses with copies of comments provided to WisDOT, MPO and USDOT (FHWA and FTA).
- Provide appropriate emission factors to WisDOT for completion of Conformity analyses.
- Keep principal agencies apprised of its SIP revision submittals and EPA's approval thereof and consider appropriate involvement of principal agencies in significant transportation-related SIP development processes.

Wisconsin Department of Transportation (WisDOT)

- Convene meetings and prepare meeting agendas and meeting materials required for fulfillment of consultation procedures outlined in this section.
- Conduct Conformity analyses in accordance with the procedures specified in this Agreement (or designate another entity to carry out the analyses).
- Arrange for the preparation of meeting summaries.
- Keep principal agencies apprised of status and content of statewide intermodal transportation plans and STIP.

US Department of Transportation (USDOT) agencies: Federal Highway Agency (FHWA) and Federal Transit Agency (FTA)

- Participate in meetings convened by WisDOT to discuss Conformity-related issues.
- Review and comment on draft and make timely final Conformity findings.

US Environmental Protection Agency (EPA)

- Participate in meetings convened by WisDOT as needed to discuss Conformity-related issues.
- Timely review and comment on draft and final Conformity analyses.

MPO (for projects in rural Sheboygan County)

- Participate in meetings convened by WisDOT as needed to discuss Conformity-related issues.
- Provide any additional information or expertise to WisDOT which will assist in carrying out the Conformity analysis for the rural project.
- Review and comment on draft and final Conformity analyses.

Conformity Planning Meetings

As part of a scoping process, the principal agencies shall have a meeting or conference call to discuss the Conformity analysis to be performed. Prior to the time that a Conformity analysis will be performed on a project, WisDOT shall convene a meeting of the principal agencies to discuss, in more detail, how the Conformity analysis will be conducted. The meeting shall be scheduled at a time and location that allows representatives from the following principal agencies to be present: WDNR, WisDOT, EPA, USDOT and the MPO (for projects in Sheboygan County only). Regional planning agencies with transportation-related responsibilities in the area shall be notified of the meeting at least 14 days prior to the day it is scheduled to occur and may send representatives to participate if desired. The letter of notification shall state that agencies interested in sending a representative should request that meeting materials be sent. A draft agenda and meeting materials which are needed to give attendees adequate background to prepare for discussion will be distributed at least seven days prior to the meeting. All invited participants shall have the opportunity to name additional items to be included on the agenda. In addition, any member of the public may request that particular Conformity-related concerns be discussed at this meeting.

WisDOT shall keep a list of members of the public who wish to be notified of the meetings and mail these individuals the same meeting materials sent to meeting participants on the same schedule. At these meetings, members of the public or other concerned agencies shall be given the opportunity to present any concerns or questions to the work group. In preparing the agenda, the chairman of the meeting shall make a provision on the agenda for questions or comments from nonmembers.

At this meeting, WisDOT shall outline the manner in which the upcoming Conformity analysis is to be carried out, informing the participants of any proposed changes in the procedures which differ from the procedures carried out in previous analyses. The following issues shall be reviewed and discussed at this meeting:

- The type of traffic analysis WisDOT will carry out to determine the impact of the project(s) on travel and emissions.
- The compatibility of the analysis with the mobile source inventory and forecasts contained in the Implementation plan revisions submitted to EPA.

- The timeframe for completion of the analysis and the date by which WDNR must supply the necessary emission factors for completion of the analysis.
- The horizon years to be used for the analysis.
- The choice among several conformity tests and methodologies as provided in 40 C.F.R. § 93.105(c)(1)(vii) and 93.109(g)(2)(iii).

WDNR shall provide the emission factors to WisDOT by the date requested for completion of the Conformity analysis. The emissions factors shall be developed in accordance with 40 C.F.R. §§ 93.111 and 93.122. Additional meetings shall be called as needed to discuss Conformity-related issues at the request of WDNR or WisDOT.

WisDOT and WDNR shall make a concerted effort to see that Conformity-related documents, including memoranda and guidance from Federal agencies will be made available to all the principal agencies involved in Conformity issues, with WisDOT taking a lead role in the distribution of these documents. The principal agencies will make a good-faith effort to ensure that communications are open and carried out in a manner that will promote cooperation among all the agencies.

Conformity Analysis Results

The draft results of the Conformity analysis shall be sent to the principal agencies for their review, 14 days prior to publication, along with the necessary documentation (See Section G). Representatives from these agencies may comment upon the analysis results at this time. The results shall also be made available to the public for review and comment in conjunction with other project hearings. After the completion of the public comment period, if any substantive public comments were received on the Conformity analysis or if any of the principal agencies disagree with the conclusions of the analysis, WisDOT shall convene a meeting or a conference call of the principal agencies listed above to discuss the comments and determine whether further Conformity-related analysis is needed.

Resolution of Conflicts

Conflicts between WDNR and WisDOT regarding the Conformity finding shall be escalated to the Governor if they cannot be resolved by the heads of the involved agencies. WDNR has 14 calendar days to appeal to the Governor after the State DOT or MPO has notified the head of the Air

Management Bureau of the resolution of his or her comments. This notification shall be made by certified mail, and the date of receipt of the certified letter shall begin the 14-day clock. If WDNR appeals to the Governor, the final Conformity analysis must have the concurrence of the Governor. If WDNR does not appeal to the Governor within 14 days, WisDOT may proceed with the final Conformity determination.

D. Criteria and Procedures

The Conformity analysis for a project shall be conducted in accordance with 40 C.F.R. §§ 93.110, 93.111, 93.112, 93.113(d), 93.115, 93.119, 93.122 and 93.124. Projects regionally significant facilities are subject to the Conformity process in order to be eligible for federal funding or approvals unless they are exempt as defined under 40 C.F.R. § 93.126.

Within six months of the date of the Agreement, WDNR and WisDOT shall cooperatively identify any transportation facilities which serve regional transportation needs and prepare a map of these facilities. Prior to undertaking a project on such facilities, the project shall be reviewed through the interagency process to determine if it is regionally significant and subject to Conformity.

The Conformity analysis shall be carried out using methods consistent with any agreement reached at the interagency planning meeting, or in subsequent related interagency discussions. The regional emissions analysis budget test required under 40 C.F.R. § 93.122 shall be performed for:

1. VOC as an ozone precursor.
2. Oxides of nitrogen (NOx) as an ozone precursor, unless the EPA Administrator has granted a waiver from the NOx-related provisions for the area in question. *Note: Effective April 6, 1998, the EPA granted a NOx waiver for SEWRPC counties and Manitowoc County. February 3, 1998, Federal Register, Pages 5460-5464.*

E. Documentation of Conformity Analysis

The Conformity analysis shall document all assumptions and relevant information used to determine the impact of the project on travel and emissions in the region, such that any person not directly involved in the analysis can understand how the Conformity finding was made. This documentation shall include information about the emission factors used in the analysis.

F. Project-level Mitigation and Control Measures

Prior to determining that a transportation project is in Conformity, WisDOT shall carry out the provisions of 40 C.F.R. § 93.125 related to project-level mitigation and control measures.

G. Exempt Projects

Projects shall be treated as exempt from the Conformity provisions as specified in 40 C.F.R. § 93.126. Projects shall be treated as exempt from the requirement to be included in regional emissions analysis as specified on 40 C.F.R. § 93.127. Traffic signal synchronization projects are exempt as provided in 40 C.F.R. § 93.128.

H. VMT Tracking Activities

Annually, WisDOT shall prepare a report of VMT in the nonattainment or maintenance areas in Wisconsin, using whatever data is available through the traffic counting program. At a meeting or through a conference call of the principal agencies, this data shall be compared to previous years, and to the VMT forecasts prepared for SIP planning purposes. If the data suggests that actual VMT was higher or lower by more than 3% of that forecasted in the most recent applicable SIP submittals, the WisDOT and WDNR shall prepare a report for the principal agencies which presents the data, analyzes possible reasons for the difference, and discusses potential ramifications and alternative courses of action which could or should be taken.

I. Modification of the Agreement

Any of the principal agencies may propose a revision to the Agreement, and request that representatives of the agencies meet to consider such a revision. This Agreement adopts by reference the cited provisions of the Wisconsin Statutes, the United States Code and Code of Federal Regulations as they exist on the date this Agreement is fully executed, but the intent of the parties is to comply with any subsequent mandatory changes to the extent practicable and permitted by law. Opportunity shall be given for public comment on any revision which proposes a significant change in Conformity analysis procedures or consultation procedures. The Conformity portion of the SIP will be revised to reflect any significant changes to this Agreement. Such changes shall be subject to the SIP revision requirements of 40 C.F.R. §§ 51.102, 51.104 and 51.105. This Agreement supersedes the Agreement of May 29, 1995, as amended December 9, 1996, upon its approval by EPA as a Conformity SIP revision.

WISCONSIN DEPARTMENT OF TRANSPORTATION

 _____
Name Sec. _____ Date 3/9/98
Title _____

WISCONSIN DEPARTMENT OF NATURAL RESOURCES

 _____
Name Secretary _____ Date 4/10/98
Title _____