COMMONWEALTH OF VIRGINIA
STATE AIR POLLUTION CONTROL BOARD

9VAC5 CHAPTER 160.
REGULATION FOR GENERAL CONFORMITY.

PART I.
GENERAL DEFINITIONS.

9VAC5-160-10. General.
9VAC5-160-20. Terms defined.

9VAC5-160-10. General.

A. For the purpose of this regulation and subsequent amendments or any orders issued by the board, the words or terms shall have the meanings given them in 9VAC5-160-20.

B. Unless specifically defined in the Virginia Air Pollution Control Law or in this regulation, terms used shall have the meanings given them by the federal Clean Air Act, other U.S. Environmental Protection Agency (EPA) regulations, 9VAC5-170-20 (definitions, Regulation for General Administration), or commonly ascribed to them by recognized authorities, in that order of priority.

9VAC5-160-20. Terms defined.

"Administrator" means the administrator of EPA or an authorized representative.

"Affected federal land manager" means the federal agency or the federal official charged with direct responsibility for management of an area designated as class I under the federal Clean Air Act, and located within 100 kilometers of the proposed federal action.

"Ambient air" means that portion of the atmosphere, external to buildings, to which the general public has access.

"Applicability analysis" means the process of determining if the federal action shall be supported by a conformity determination.

"Applicable implementation plan" means the portion or portions of the state implementation plan, or the most recent revision thereof, which has been approved under § 110(k) of the federal Clean Air Act, or a federal implementation plan promulgated under § 110(c) of the federal Clean Air Act, or promulgated or approved pursuant to regulations promulgated under § 301(d) of the federal Clean Air Act and which implements the relevant requirements of the federal Clean Air Act.

"Areawide air quality modeling analysis" means an assessment on a scale that includes the entire nonattainment area or maintenance area using an air quality dispersion model or photochemical grid model to determine the effects of emissions on air quality, for example, an assessment using EPA's community multi-scale air quality (CMAQ) modeling system.

"Board" means the State Air Pollution Control Board or its designated representative.

"Cause or contribute to a new violation" means a federal action that:

1. Causes a new violation of a national ambient air quality standard at a location in a nonattainment or maintenance area which would otherwise not be in violation of the standard during the future period in question if the federal action were not taken; or

2. Contributes, in conjunction with other reasonably foreseeable actions, to a new violation of a national ambient air quality standard at a location in a nonattainment or maintenance area in a manner that would increase the frequency or severity of the new violation.

"Caused by" means, as used in the terms "direct emissions" and "indirect emissions," emissions that would not otherwise occur in the absence of the federal action.

"Confidential business information" or "CBI" means information that has been determined by a federal agency, in accordance with its applicable regulations, to be a trade secret, or commercial or financial information obtained from a person and privileged or confidential and is exempt from required disclosure under the Freedom of Information Act (5 USC 552(b)(4)).

"Conformity determination" means the evaluation (made after an applicability analysis is completed) that a federal action conforms to the applicable implementation plan and meets the requirements of this regulation.

"Conformity evaluation" means the entire process from the applicability analysis through the conformity determination that is used to demonstrate that the federal action conforms to the requirements of this regulation.

"Consultation" means that one party confers with another identified party, provides all information to that party needed for meaningful input, and, prior to taking any action, considers the views of that party and responds to those views in a timely, substantive, written manner prior to any final decision on the action. The views and written response shall be made part of the record of any decision or action.

"Continuing program responsibility" means a federal agency has responsibility for emissions caused by (i) actions it takes itself; or (ii) actions of non-federal entities that the federal agency, in exercising its normal programs and authorities, approves, funds, licenses or permits, provided the agency can impose conditions on any portion of the action that could affect the emissions.

"Continuous program to implement" means that the federal agency has started the action identified in the plan and does not stop the actions for more than an 18-month period, unless it can demonstrate that such a stoppage was included in the original plan.

"Control" means the ability to regulate the emissions from the action. The ability to regulate may be demonstrated directly, such as through the use of emission control equipment, or indirectly, such as through the implementation of regulations or conditions on the nature of the activity that may be established in permits or approvals or by the design of the action. An example of control includes the ability of a federal agency to control the level of vehicle emissions by controlling the size of a parking facility and setting requirements for employee trip reductions.

"Criteria pollutant" means any pollutant for which there is established a national ambient air quality standard in 40 CFR Part 50.

"Department" means any employee or other representative of the Virginia Department of Environmental Quality, as designated by the director.

"Direct emissions" means those emissions of a criteria pollutant or its precursors that are caused or initiated by the federal action and originate in a nonattainment or maintenance area and occur at the same time and place as the action and are reasonably foreseeable.

"Director" means the director of the Virginia Department of Environmental Quality.

"Emergency" means, in the context of 9VAC5-160-30, a situation where extremely quick action on the part of federal agencies involved is needed and where the timing of the federal activities makes it impractical to meet the requirements of this regulation, such as natural disasters like hurricanes or earthquakes, civil disturbances such as terrorist acts, and military mobilizations.

"Emergency" means, in the context of 9VAC5-160-40, a situation that immediately and unreasonably affects, or has the potential to immediately and unreasonably affect, public health, safety or welfare; the health of animal or plant life; or property, whether used for recreational, commercial, industrial, agricultural or other reasonable use.

"Emissions budgets" means those portions of the total allowable emissions

defined in the applicable implementation plan for a certain date for the purpose of meeting reasonable further progress milestones or attainment or maintenance demonstrations, for any criteria pollutant or its precursors, specifically allocated by the applicable implementation plan to mobile sources, to any stationary source or class of stationary sources, to any federal action or any class of action, to any class of area sources, or to any subcategory of the emissions inventory. The allocation system shall be specific enough to assure meeting the criteria of § 176(c)(1)(B) of the federal Clean Air Act. An emissions budget may be expressed in terms of an annual period, a daily period, or other period established in the applicable implementation plan.

"Emissions inventory" means a listing of information on the location, type of source, type and quantity of pollutant emitted as well as other parameters of the emissions.

"Emissions offsets" means, for the purposes of 9VAC5-160-160, emissions reductions which are quantifiable, consistent with the applicable implementation plan attainment and reasonable future progress demonstrations, surplus to reductions required by, and credited to, other applicable implementation plan provisions, enforceable under both state and federal law, and permanent within the timeframe specified by that program. Emissions reductions intended to be achieved as emissions offsets under this regulation shall be monitored and enforced in a manner equivalent to that under the new source review program.

"EPA" means the U.S. Environmental Protection Agency.

"Facility" means something that is built, installed, or established to serve a particular purpose; includes, but is not limited to, buildings, installations, public works, businesses, commercial and industrial plants, shops and stores, heating and power plants, apparatus, processes, operations, structures, and equipment of all types.

"Federal action" means any activity engaged in by a federal agency, or any activity that a federal agency supports in any way, provides financial assistance for, licenses, permits, or approves, other than activities related to transportation plans, programs, and projects developed, funded, or approved under title 23 USC or the Federal Transit Act (49 USC 1601 et seq.). Where the federal action is a permit, license, or other approval for some aspect of a non-federal undertaking, the relevant action is the part, portion, or phase that the non-federal undertaking that requires the federal permit, license, or approval.

"Federal agency" means a department, agency, or instrumentality of the federal government.

"Federal Clean Air Act" means Chapter 85 (§ 7401 et seq.) of Title 42 of the United States Code.

"Increase the frequency or severity of any existing violation of any standard

in any area" means to cause a nonattainment area to exceed a standard more often, or to cause a violation at a greater concentration than previously existed or would otherwise exist during the future period in question, if the project were not implemented.

"Indirect emissions" means those emissions of a criteria pollutant or its precursors that:

1. Are caused or initiated by the federal action and originate in the same nonattainment or maintenance area, but occur at a different time or place as the action;

2. That are reasonably foreseeable;

3. That the agency can practically control; and

4. For which the agency has a continuing program responsibility.

For the purposes of this definition, even if a federal licensing, rulemaking or other approving action is a required initial step for a subsequent activity that causes emissions, such initial steps do not mean that a federal agency can practically control any resulting emissions.

"Lead Planning Organization" means 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 federal Clean Air Act. The organization includes elected officials of local governments in the affected nonattainment area, and representatives of the department, the Virginia Department of Transportation, the metropolitan planning organizations 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.

"Local air quality modeling analysis" means assessment of localized impacts on a scale smaller than the entire nonattainment or maintenance area, including, for example, congested roadways on a federal facility, that uses an air quality dispersion model (e.g., Industrial Source Complex Model or Emission and Dispersion Model System) to determine the effects of emissions on air quality.

"Maintenance area" means an area that was designated as nonattainment and has been redesignated in 40 CFR Part 81 to attainment, meeting the provisions of § 107(d)(3)(E) of the federal Clean Air Act and has a maintenance plan approved under § 175A of the federal Clean Air Act.

"Maintenance plan" means a revision to the applicable implementation plan, meeting the requirements of § 175A of the federal Clean Air Act.

"Metropolitan planning organization" means the policy board of an

organization created as a result of the designation process in 23 USC 134(d).

"Milestone" means as defined in §§ 182(g) and 189(c)(1) of the federal Clean Air Act. A milestone consists of an emissions level and the date on which it is required to be achieved.

"Mitigation measure" means any method of reducing emissions of the pollutant or its precursor taken at the location of the federal action and used to reduce the impact of the emissions of that pollutant caused by the action.

"National ambient air quality standards" means those standards established pursuant to § 109 of the federal Clean Air Act.

"NEPA" means the National Environmental Policy Act of 1969 as amended (42 USC 4321 et seq.)

"New source review (NSR) program" means a preconstruction review and permit program (i) for regulated air pollutants from new stationary sources or projects (physical changes or changes in the method of operation), (ii) established to implement the requirements of §§ 110 (a)(2)(C), 112 (relating to permits for hazardous air pollutants), 165 (relating to permits in prevention of significant deterioration areas), and 173 (relating to permits in nonattainment areas) of the federal Clean Air Act and associated regulations, and (iii) Article 7 (9VAC5-80-1400 et seq.), Article 8 (9VAC5-80-1605 et seq.) and Article 9 (9VAC5-80-2000 et seq.) of Part II of 9VAC5-80 (Permits for Stationary Sources) of the Regulations for the Control and Abatement of Air Pollution.

"Nonattainment area" means any geographic region of the United States which has been designated as nonattainment under § 107 of the federal Clean Air Act for any pollutant for which a national ambient air quality standard exists.

"PM_{10}" means particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers as measured by the applicable reference method or an equivalent method.

"Person" means an individual, corporation, partnership, association, a governmental body, a municipal corporation, or any other legal entity.

"Precursors of a criteria pollutant" means:

1. For ozone,

a. Nitrogen oxides, unless an area is exempted from nitrogen oxides requirements under § 182(f) of the federal Clean Air Act, and

b. Volatile organic compounds.

2. For PM_{10}, those pollutants described in the PM_{10} nonattainment area applicable implementation plan as significant contributors to the PM_{10} levels.

3. For $PM_{2.5}$, (i) sulfur dioxide in all $PM_{2.5}$ nonattainment and maintenance areas, (ii) nitrogen oxides in all $PM_{2.5}$ nonattainment and maintenance areas unless both the department and EPA determine that it is not a significant precursor, and (iii) volatile organic compounds and ammonia only in $PM_{2.5}$ nonattainment or maintenance areas where either the department or EPA determines that they are significant precursors.

"Reasonably foreseeable emissions" means projected future direct and indirect emissions that are identified at the time the conformity determination is made; the location of such emissions is known; and the emissions are quantifiable, as described and documented by the federal agency based on its own information and after reviewing any information presented to the federal agency.

"Regional water or wastewater projects" means construction, operation, and maintenance of water or wastewater conveyances, water or wastewater treatment facilities, and water storage reservoirs which affect a large portion of a nonattainment or maintenance area.

"Restricted information" means information that is privileged or that is otherwise protected from disclosure pursuant to applicable statutes, Executive Orders, or regulations. Such information includes, but is not limited to, classified national security information, protected critical infrastructure information, sensitive security information, and proprietary business information.

"Source" means any one or combination of the following: buildings, structures, facilities, installations, articles, machines, equipment, landcraft, watercraft, aircraft, or other contrivances which contribute, or may contribute, either directly or indirectly to air pollution. Any activity by any person that contributes, or may contribute, either directly or indirectly to air pollution, including, but not limited to, open burning, generation of fugitive dust or emissions, and cleaning with abrasives or chemicals.

"Take or start the federal action" means the date that the federal agency signs or approves the permit, license, grant or contract or otherwise physically begins the federal action that requires a conformity evaluation under this chapter.

"Total of direct and indirect emissions" means the sum of direct and indirect emissions increases and decreases caused by the federal action, that is, the "net" emissions considering all direct and indirect emissions. Any emissions decreases used to reduce the total shall have already occurred by the time the corresponding increases occur or shall be enforceable under state and federal law. The portion of emissions which are exempt or presumed to conform under 9VAC5-160-30 are not included in the "total of direct and indirect emissions," except as provided in 9VAC5-160-30 M. The "total of direct and indirect emissions" includes emissions of criteria pollutants and emissions of

precursors of criteria pollutants. Segmentation of projects for conformity analyses when emissions are reasonably foreseeable is prohibited.

"Virginia Air Pollution Control Law" means Chapter 13 (§ 10.1-1300 et seq.) of Title 10.1 of the Code of Virginia.

"Welfare" means that language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, human-made materials, animals, wildlife, weather, visibility and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well being.

PART II.
GENERAL PROVISIONS.

9VAC5-160-30. Applicability.
9VAC5-160-40. Authority of board and department.
9VAC5-160-50. Repealed.
9VAC5-160-60. Repealed.
9VAC5-160-70. Repealed.
9VAC5-160-80. Relationship of state regulations to federal regulations.
9VAC5-160-90. Repealed.
9VAC5-160-100. Repealed.

9VAC5-160-30. Applicability.

A. The provisions of this chapter shall apply in all nonattainment and maintenance areas for criteria pollutants for which the area is designated nonattainment or has a maintenance plan. Conformity requirements for newly designated nonattainment areas are not applicable until 1 year after the effective date of the final nonattainment designation for each national ambient air quality standard and pollutant in accordance with § 176(c)(6) of the federal Clean Air Act. The provisions of this chapter shall not apply in nonattainment and maintenance areas that were designated nonattainment or maintenance under a federal standard that has been revoked (see 9VAC5-20-204 B).

B. The provisions of this regulation apply with respect to emissions of the following criteria pollutants: ozone, carbon monoxide, nitrogen dioxide, particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM_{10}), 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 apply with respect to emissions of the following precursor pollutants:

1. For ozone:

a. Nitrogen oxides, unless an area is exempted from nitrogen oxides requirements under § 182(f) of the federal Clean Air Act, and

b. Volatile organic compounds.

2. For PM_{10}, those pollutants described in the PM_{10} nonattainment area applicable implementation plan as significant contributors to the PM_{10} levels.

3. For $PM_{2.5}$, (i) sulfur dioxide in all $PM_{2.5}$ nonattainment and maintenance areas, (ii) nitrogen oxides in all $PM_{2.5}$ nonattainment and maintenance areas unless both the department and EPA determine that it is not a significant precursor, and (iii) volatile organic compounds and ammonia only in $PM_{2.5}$ nonattainment or maintenance

areas where either the department or EPA determines that they are significant precursors.

D. Conformity determinations for federal actions related to transportation plans, programs, and projects developed, funded, or approved under title 23 USC or the Federal Transit Act (49 USC 1601 et seq.) shall meet the procedures and criteria of 9VAC5-151 (Regulation for Transportation Conformity), in lieu of the procedures set forth in this regulation.

E. For federal actions not covered by subsection D of this section, a conformity determination is required for each criteria pollutant or precursor where the total of direct and indirect emissions of the criteria pollutant or precursor in a nonattainment or maintenance area caused by a federal action would equal or exceed any of the rates in subdivision 1 or 2 of this subsection.

1. For the purposes of this subsection, the following rates apply in nonattainment areas:

	Tons per year
Ozone (VOCs or NO_X):	
Serious nonattainment areas	50
Severe nonattainment areas	25
Extreme nonattainment areas	10
Other ozone nonattainment areas outside an ozone transport region	100
Other ozone nonattainment areas inside an ozone transport region:	
VOC	50
NO_X	100
Carbon monoxide, all nonattainment areas	100
Sulfur dioxide or nitrogen dioxide, all nonattainment areas	100
PM_{10}:	
Moderate nonattainment areas	100
Serious nonattainment areas	70
$PM_{2.5}$:	
Direct emissions	100
Sulfur dioxide	100
Nitrogen oxides (unless determined not to be significant precursors)	100
Volatile organic compounds or	100

ammonia (if determined to be significant precursors)	
Lead, all nonattainment areas	25

2. For the purposes of this subsection, the following rates apply in maintenance areas:

	Tons per year
Ozone (NO_x), sulfur dioxide, or nitrogen dioxide, all maintenance areas	100
Ozone (VOCs):	
Maintenance areas inside an ozone transport region	50
Maintenance areas outside an ozone transport region	100
Carbon monoxide, all maintenance areas	100
PM_{10}, all maintenance areas	100
$PM_{2.5}$:	
Direct emissions	100
Sulfur dioxide	100
Nitrogen oxides (unless determined not to be a significant precursor)	100
Volatile organic compounds or ammonia (if determined to be significant precursors)	100
Lead, all maintenance areas	25

F. The requirements of this section shall not apply to the following federal actions:

1. Actions where the total of direct and indirect emissions are below the emissions levels specified in subsection E of this section.

2. The following actions which would result in no emissions increase or an increase in emissions that is clearly de minimis:

a. Judicial and legislative proceedings.

b. Continuing and recurring activities such as permit renewals where activities conducted shall be similar in scope and operation to activities currently being conducted.

c. Rulemaking and policy development and issuance.

d. Routine maintenance and repair activities, including repair and maintenance of administrative sites, roads, trails, and facilities.

e. Civil and criminal enforcement activities, such as investigations, audits, inspections, examinations, prosecutions, and the training of law enforcement personnel.

f. Administrative actions such as personnel actions, organizational changes, debt management, internal agency audits, program budget proposals, and matters relating to administration and collection of taxes, duties, and fees.

g. The routine, recurring transportation of materiel and personnel.

h. Routine movement of mobile assets, such as ships and aircraft, in home port reassignments and stations (when no new support facilities or personnel are required) to perform as operational groups and for repair or overhaul or both.

i. Maintenance dredging and debris disposal where no new depths are required, applicable permits are secured, and disposal shall be at an approved disposal site.

j. With respect to existing structures, properties, facilities, and lands where future activities conducted shall be similar in scope and operation to activities currently being conducted at the existing structures, properties, facilities, and lands, actions such as relocation of personnel, disposition of federally-owned existing structures, properties, facilities, and lands, rent subsidies, operation and maintenance cost subsidies, the exercise of receivership or conservatorship authority, assistance in purchasing structures, and the production of coins and currency.

k. The granting of leases, licenses such as for exports and trade, permits, and easements where activities conducted shall be similar in scope and operation to activities currently being conducted.

l. Planning, studies, and provision of technical assistance.

m. Routine operation of facilities, mobile assets, and equipment.

n. Transfers of ownership, interests, and titles in land, facilities, and real and personal properties, regardless of the form or method of the transfer.

o. The designation of empowerment zones, enterprise communities, or viticultural areas.

p. Actions by any of the federal banking agencies or the federal

reserve banks, including actions regarding charters, applications, notices, licenses, the supervision or examination of depository institutions or depository institution holding companies, access to the discount window, or the provision of financial services to banking organizations or to any state, agency, or instrumentality of the United States.

q. Actions by the Board of Governors of the federal reserve system or any federal reserve bank to effect monetary or exchange rate policy.

r. Actions that implement a foreign affairs function of the United States.

s. Actions or portions thereof associated with transfers of land, facilities, title, and real properties through an enforceable contract or lease agreement where the delivery of the deed is required to occur promptly after a specific, reasonable condition is met, such as promptly after the land is certified as meeting the requirements of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and where the federal agency does not retain continuing authority to control emissions associated with the lands, facilities, title, or real properties.

t. Transfers of real property, including land, facilities, and related personal property from a federal entity to another federal entity, and assignments of real property, including land, facilities, and related personal property from a federal entity to another federal entity, for subsequent deeding to eligible applicants.

u. Actions by the Department of the Treasury to effect fiscal policy and to exercise the borrowing authority of the United States.

v. Air traffic control activities and adopting approach, departure, and en route procedures for aircraft operations above the mixing height specified in the applicable implementation plan. Where the applicable implementation plan does not specify a mixing height, the federal agency may use the 3,000 feet above ground level as a default mixing height, unless the agency demonstrates that use of a different mixing height is appropriate because the change in emissions at and above that height caused by the federal action is de minimis.

3. Actions where the emissions are not reasonably foreseeable, such as the following:

a. Initial outer continental shelf lease sales which are made on a broad scale and are followed by exploration and development plans on a project level.

b. Electric power marketing activities that involve the acquisition, sale, and transmission of electric energy.

4. Individual actions which implement a decision to conduct or carry out a program that has been found to conform to the applicable implementation plan, such as

prescribed burning actions which are consistent with a conforming land management plan, that has been found to conform to the applicable implementation plan. The land management plan shall have been found to conform within the past five years.

G. Notwithstanding the other requirements of this section, a conformity determination is not required for the following federal actions or portions thereof:

1. The portion of an action that includes major or minor new or modified stationary sources that require a permit under the new source review program.

2. Actions in response to emergencies that are typically commenced on the order of hours or days after the emergency and, if applicable, which meet the requirements of subsection H of this section.

3. Research, investigations, studies, demonstrations, or training (other than those exempted under subdivision F 2 of this section), where no environmental detriment is incurred, or the particular action furthers air quality research, as determined by the department.

4. Alteration and additions of existing structures as specifically required by new or existing applicable environmental legislation or environmental regulations (for example, hush houses for aircraft engines and scrubbers for air emissions).

5. Direct emissions from remedial and removal actions carried out under CERCLA and associated regulations to the extent the emissions either comply with the substantive requirements of the new source review program, or are exempted from other environmental regulation under the provisions of CERCLA and applicable regulations issued under CERCLA.

H. Federal actions which are part of a continuing response to an emergency or disaster under subdivision G 2 of this section and which are to be taken more than six months after the commencement of the response to the emergency or disaster under subdivision G 2 of this section are exempt from the requirements of this subsection only if:

1. The federal agency taking the actions makes a written determination that, for a specified period not to exceed an additional six months, it is impractical to prepare the conformity analyses which would otherwise be required and the actions cannot be delayed due to overriding concerns for public health and welfare, national security interests, and foreign policy commitments; or

2. For actions which are to be taken after those actions covered by subdivision H 1 of this section, the federal agency makes a new determination as provided in subdivision H 1 of this section, and:

a. Provides a draft copy of the written determinations required to affected EPA regional offices, the affected states and air pollution control agencies, and

any federally recognized Indian tribal government in the nonattainment or maintenance area. Those organizations shall be allowed 15 days from the beginning of the extension period to comment on the draft determination; and

b. Within 30 days after making the determination, publish a notice of the determination by placing a prominent advertisement in a daily newspaper of general circulation in the area affected by the action.

3. If additional actions are necessary in response to an emergency or disaster under subdivision G 2 of this section beyond the specified time period in subdivision 2 of this subsection, a federal agency may make a new written determination as described in subdivision 2 of this subsection for as many 6-month periods as needed, but in no case shall this exemption extend beyond three, 6-month periods except where an agency provides information to EPA and the department stating that the conditions that gave rise to the emergency exemption continue to exist and how such conditions effectively prevent the agency from conducting a conformity evaluation.

I. Notwithstanding other requirements of this regulation, actions specified by individual federal agencies that have met the criteria set forth in subdivision J 1 , J 2 , or J 3 of this section and the procedures set forth in subsection K of this section are presumed to conform, except as provided in subsection M of this section. Actions specified by individual federal agencies as presumed to conform shall not be used in combination with one another when the total direct and indirect emissions from the combination of actions would equal or exceed any of the rates specified in subdivision E 1 or E 2 of this section.

J. The federal agency shall meet the criteria for establishing activities that are presumed to conform by fulfilling the requirements set forth in subdivision 1, 2 , or 3 of this subsection.

1. The federal agency shall clearly demonstrate, using methods consistent with this regulation, that the total of direct and indirect emissions from the type of activities which would be presumed to conform would not:

a. Cause or contribute to any new violation of any standard in any area;

b. Interfere with the provisions in the applicable implementation plan for maintenance of any standard;

c. Increase the frequency or severity of any existing violation of any standard in any area;

d. Delay timely attainment of any standard or any required interim emissions reductions or other milestones in any area including, where applicable,

emission levels specified in the applicable implementation plan for purposes of:

(1) A demonstration of reasonable further progress;

(2) A demonstration of attainment; or

(3) A maintenance plan.

2. The federal agency shall provide documentation that the total of direct and indirect emissions from the future actions would be below the emission rates for a conformity determination that are established in subsection B of this section, based, for example, on similar actions taken over recent years.

3. The federal agency shall clearly demonstrate that the emissions from the type or category of actions and the amount of emissions from the action are included in the applicable implementation plan and the department provides written concurrence that the emissions from the actions along with all other expected emissions in the area will not exceed the emission budget in the applicable implementation plan.

K. In addition to meeting the criteria for establishing exemptions set forth in subdivision J 1, J 2 , or J 3 of this section, the following procedures shall also be complied with to presume that activities shall conform:

1. The federal agency shall identify through publication in the Federal Register its list of proposed activities that are presumed to conform, and the basis for the presumptions. The notice shall clearly identify the type and size of the action that would be presumed to conform and provide criteria for determining if the type and size of action qualifies it for the presumption;

2. The federal agency shall notify the appropriate EPA regional office(s), department, and local air quality agencies and, where applicable, the lead planning organization, and the metropolitan planning organization and provide at least 30 days for the public to comment on the list of proposed activities presumed to conform. If the presumed to conform action has regional or national application (e.g., the action will cause emission increases in excess of the de minimis levels identified in subsection E of this section in more than one EPA region), the federal agency, as an alternative to sending it to EPA regional offices, may send the draft conformity determination to EPA, Office of Air Quality Planning and Standards;

3. The federal agency shall document its response to all the comments received and make the comments, response, and final list of activities available to the public upon request; and

4. The federal agency shall publish the final list of such activities in the Federal Register.

L. Emissions from the following actions are presumed to conform:

1. Actions at installations with facility-wide emission budgets meeting the requirements in 9VAC5-160-181 provided that the department has included the emission budget in the EPA-approved applicable implementation plan and the emissions from the action along with all other emissions from the installation will not exceed the facility-wide emission budget.

2. Prescribed fires conducted in accordance with a smoke management program that meets the requirements of EPA's Interim Air Quality Policy on Wildland and Prescribed Fires or an equivalent replacement EPA policy.

3. Emissions for actions that the department identifies in the EPA-approved applicable implementation plan as presumed to conform.

M. Even though an action would otherwise be presumed to conform under subsection I or L of this section, an action shall not be presumed to conform and the requirements of 9VAC5-160-110, 9VAC5-160-190, 9VAC5-160-120 through 9VAC5-160-180 and 9VAC5-160-182 through 9VAC5-160-184 shall apply to the action if EPA or a third party shows that the action would:

1. Cause or contribute to any new violation of any standard in any area;

2. Interfere with provisions in the applicable implementation plan for maintenance of any standard;

3. Increase the frequency or severity of any existing violation of any standard in any area; or

4. Delay timely attainment of any standard or any required interim emissions reductions or other milestones in any area including, where applicable, emission levels specified in the applicable implementation plan for purposes of (i) a demonstration of reasonable further progress; (ii) a demonstration of attainment; or (iii) a maintenance plan.

N. Any measures used to affect or determine applicability of this regulation, as determined under this section, shall result in projects that are in fact de minimis, shall result in the de minimis levels prior to the time the applicability determination is made, and shall be state or federally enforceable. Any measures that are intended to reduce air quality impacts for this purpose shall be identified (including the identification and quantification of all emission reductions claimed) and the process for implementation (including any necessary funding of the measures and tracking of the emission reductions) and enforcement of the measures shall be described, including an implementation schedule containing explicit timelines for implementation. Prior to a determination of applicability, the federal agency making the determination shall obtain

written commitments from the appropriate persons or agencies to implement any measures which are identified as conditions for making the determinations. The written commitment shall describe the mitigation measures and the nature of the commitment, in a manner consistent with the previous sentence. After this regulation is approved by EPA, enforceability through the applicable implementation plan of any measures necessary for a determination of applicability shall apply to all persons who agree to reduce direct and indirect emissions associated with a federal action for a conformity applicability determination.

9VAC5-160-40. Authority of board and department.

A. No provision of this regulation shall limit the power of the board to take such appropriate action as necessary to control and abate air pollution in emergency situations.

B. In accordance with the Virginia Air Pollution Control Law and the Administrative Process Act and by the adoption of this regulation, the board confers upon the department the administrative, enforcement and decision making authority enumerated in this regulation.

C. The board reserves the right to exercise its authority in any of the powers delegated in this regulation should it choose to do so.

D. The director has final authority to adjudicate contested decisions of subordinates delegated powers by the director prior to appeal of the decisions to the circuit court or consideration by the board.

9VAC5-160-50. Repealed.

9VAC5-160-60. Repealed.

9VAC5-160-70. Repealed.

9VAC5-160-80. Relationship of state regulations to federal regulations.

A. In order for the Commonwealth of Virginia to fulfill its obligations under the federal Clean Air Act, some provisions of this regulation are required to be approved by EPA and when approved those provisions become federally enforceable.

B. In cases where this regulation specifies that procedures or methods shall be approved by, acceptable to, or determined by the board or department or other similar phrasing or specifically provide for decisions to be made by the board or department, it may be necessary to have the actions (approvals determinations, exemptions, exclusions, or decisions) reviewed and confirmed as acceptable or approved by EPA in order to make them federally enforceable. Determination of which state actions require federal confirmation or approval and the administrative mechanism for making associated confirmation or approval decisions shall be made on a case-by-case basis in accordance

with EPA regulations and policy.

9 VAC 5-160-90. Repealed.

PART III.
CRITERIA AND PROCEDURES FOR MAKING CONFORMITY DETERMINATIONS.

9VAC5-160-110. General.
9VAC5-160-120. Federal agency conformity responsibility.
9VAC5-160-130. Reporting requirements.
9VAC5-160-140. Public participation.
9VAC5-160-150. Reevaluation of conformity.
9VAC5-160-160. Criteria for determining conformity of general federal actions.
9VAC5-160-170. Procedures for conformity determinations.
9VAC5-160-180. Mitigation of air quality impacts.
9VAC5-160-190. Savings provision.
9VAC5-160-200. Review and confirmation of this chapter by board.

9VAC5-160-110. General.

A. No federal agency 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 applicable implementation plan.

B. A federal agency must make a determination that a federal action conforms to the applicable implementation plan in accordance with the requirements of this regulation before the action is taken.

C. Reserved.

D. Notwithstanding any provision of this regulation, a determination that an action is in conformity with the applicable implementation plan does not exempt the action from any other requirements of the applicable implementation plan, NEPA, or the federal Clean Air Act.

E. If an action would result in emissions originating in more than one nonattainment or maintenance area, the conformity must be evaluated for each area separately.

9VAC5-160-120. Federal agency conformity responsibility.

Any department, agency, or instrumentality of the federal government taking an action subject to this regulation shall make its own conformity determination consistent with the requirements of this part. In making its conformity determination, a federal agency shall follow the requirements in 9VAC5-160-130 through 9VAC5-160-180 and 9VAC5-160-182 through 9VAC5-160-185, and shall consider comments from any interested parties. Where multiple federal agencies have jurisdiction for various aspects of a project, a federal agency may choose to adopt the analysis of another federal agency or develop its own analysis in order to make its conformity determination.

9VAC5-160-130. Reporting requirements.

A. A federal agency making a conformity determination under 9VAC5-160-120 through 9VAC5-160-180 and 9VAC5-160-181 through 9VAC5-160-184 shall provide to the appropriate EPA regional office or offices, department and local air quality agencies, any federally-recognized Indian tribal government in the nonattainment or maintenance area, and, where applicable, affected federal land managers, the lead planning organization, and the metropolitan planning organization, a 30-day notice which describes the proposed action and the federal agency's draft conformity determination on the action. If the action has multi-regional or national impacts (e.g., the action will cause emission increases in excess of the de minimis levels identified in 9VAC5-160-30 E in three or more EPA regions), the federal agency, as an alternative to sending it to EPA regional offices, may provide the notice to EPA's Office of Air Quality Planning and Standards.

B. A federal agency shall notify the appropriate EPA regional office(s), department and local air quality agencies, any federally-recognized Indian tribal government in the nonattainment or maintenance area, and, where applicable, affected federal land managers, the lead planning organization, and the metropolitan planning organization within 30 days after making a final conformity determination under 9VAC5-160-160.

C. The draft and final conformity determination shall exclude any restricted information or confidential business information. The disclosure of restricted information and confidential business information shall be controlled by the applicable laws, regulations, security manuals, or executive orders concerning the use, access, and release of such materials. Subject to applicable procedures to protect restricted information from public disclosure, any information or materials excluded from the draft or final conformity determination or supporting materials may be made available in a restricted information annex to the determination for review by federal and department representatives who have received appropriate clearances to review the information.

9VAC5-160-140. Public participation.

A. Upon request by any person regarding a specific federal action, a federal agency shall make available, subject to the limitation in subsection E of this section, for review its draft conformity determination under 9VAC5-160-160 with supporting materials that describe the analytical methods and conclusions relied upon in making the applicability analysis and draft conformity determination.

B. A federal agency shall make public its draft conformity determination under 9VAC5-160-160 by placing a notice by prominent advertisement in a daily newspaper of general circulation in the area affected by the action and by providing 30 days for written public comment prior to taking any formal action on the draft determination. This comment period may be concurrent with any other public involvement such as occurs in the NEPA process. If the action has multi-regional or national impacts (e.g., the action

will cause emission increases in excess of the de minimis levels identified in 9VAC5-160-30 E in three or more EPA regions), the federal agency, as an alternative to publishing separate notices, may publish a notice in the Federal Register.

C. A federal agency shall document its response to all the comments received on its draft conformity determination under 9VAC5-160-160 and make the comments and responses available, subject to the limitation in subsection E of this section, upon request by any person regarding a specific federal action, within 30 days of the final conformity determination.

D. A federal agency shall make public its final conformity determination under 9VAC5-160-160 for a federal action by placing a notice by prominent advertisement in a daily newspaper of general circulation in the area affected by the action within 30 days of the final conformity determination. If the action would have multi-regional or national impacts, the federal agency, as an alternative, may publish the notice in the Federal Register.

E. The draft and final conformity determination shall exclude any restricted information or confidential business information. The disclosure of restricted information and confidential business information shall be controlled by the applicable laws, regulations or executive orders concerning the release of such materials.

9VAC5-160-150. Reevaluation of conformity.

A. Once a conformity determination is completed by a federal agency, that determination is not required to be re-evaluated if the agency has maintained a continuous program to implement the action; the determination has not lapsed as specified in subsection B of this section; or any modification to the action does not result in an increase in emissions above the levels specified in 9VAC5-160-30 B. If a conformity determination is not required for the action at the time NEPA analysis is completed, the date of the finding of no significant impact for an environmental assessment, a record of decision for an environmental impact statement, or a categorical exclusion determination may be used as a substitute date for the conformity determination date.

B. The conformity status of a federal action automatically lapses five years from the date a final conformity determination is reported under 9VAC5-160-130, unless the federal action has been completed or a continuous program to implement the federal action has commenced.

C. Ongoing federal activities at a given site showing continuous progress are not new actions and do not require periodic redeterminations so long as such activities are within the scope of the final conformity determination reported under 9VAC5-160-130.

D. If the federal agency originally determined through the applicability analysis that a conformity determination was not necessary because the emissions for the action

were below the limits in 9VAC5-160-30 B and changes to the action would result in the total emissions from the action being above the limits in 9VAC5-160-30 B, then the federal agency shall make a conformity determination.

9VAC5-160-160. Criteria for determining conformity of general federal actions.

A. An action required under 9VAC5-160-30 to have a conformity determination for a specific pollutant, shall be determined to conform to the applicable implementation plan if, for each pollutant that exceeds the rates in 9VAC160-30 E, or otherwise requires a conformity determination due to the total of direct and indirect emissions from the action, the action meets the requirements of subsection C of this section, and meets any of the following requirements:

1. For any criteria pollutant or precursor, the total of direct and indirect emissions from the action are specifically identified and accounted for in the applicable implementation plan's attainment or maintenance demonstration or reasonable further progress milestone or in a facility-wide emission budget included in an applicable implementation plan in accordance with 9VAC5-160-181;

2. For precursors of ozone, nitrogen dioxide, or particulate matter, the total of direct and indirect emissions from the action are fully offset within the same nonattainment or maintenance area (or nearby area of equal or higher classification provided the emissions from that area contribute to the violations, or have contributed to violations in the past, in the area with the federal action) through a revision to the applicable implementation plan or a similarly enforceable measure that effects emission reductions so that there is no net increase in emissions of that pollutant;

3. For any directly-emitted criteria pollutant, the total of direct and indirect emissions from the action meets the requirements:

a. Specified in subsection B of this section, based on areawide air quality modeling analysis and local air quality modeling analysis; or

b. Meet the requirements of subdivision 5 of this section, and, for local air quality modeling analysis, the requirement of subsection B of this section;

4. For carbon monoxide or directly emitted particulate matter:

a. Where the department determines (in accordance with 9VAC5-160-120 and 9VAC5-160-130 and consistent with the applicable implementation plan) that an areawide air quality modeling analysis is not needed, the total of direct and indirect emissions from the action meet the requirements specified in subsection B of this section, based on local air quality modeling analysis; or

b. Where the department determines (in accordance with 9VAC5-160-120 and 9VAC5-160-130 and consistent with the applicable implementation plan)

that an areawide air quality modeling analysis is appropriate and that a local air quality modeling analysis is not needed, the total of direct and indirect emissions from the action meet the requirements specified in subsection B of this section, based on areawide modeling, or meet the requirements of subdivision 5 of this section; or

5. For ozone or nitrogen dioxide, and for the purposes of subdivisions 3 b and 4 b of this subsection, each portion of the action or the action as a whole meets any of the following requirements:

a. Where EPA has approved a revision to the applicable implementation plan after the area was designated as nonattainment and the department makes a determination that as provided in subdivision 5 a (1) of this subsection or where the Commonwealth of Virginia makes a commitment as provided in subdivision 5 a (2) of this section:

(1) The total of direct and indirect emissions from the action or portion thereof is determined and documented by the department to result in a level of emissions which, together with all other emissions in the nonattainment or maintenance area, would not exceed the emissions budgets specified in the applicable implementation plan.

(2) The total of direct and indirect emissions from the action or portion thereof is determined and documented by the department to result in a level of emissions which, together with all other emissions in the nonattainment or maintenance area, would exceed an emissions budgets specified in the applicable implementation plan and the governor or the governor's designee for state implementation plan actions makes a written commitment to EPA which includes the following:

(a) A specific schedule for adoption and submittal of a revision to the applicable implementation plan which would achieve the needed emissions reductions prior to the time emissions from the federal action would occur;

(b) Identification of specific measures for incorporation into the applicable implementation plan which would result in a level of emissions which, together with all other emissions in the nonattainment or maintenance area, would not exceed any emissions budget specified in the applicable implementation plan.

(c) A demonstration that all existing applicable implementation plan requirements are being implemented in the area for the pollutants affected by the federal action, and that local authority to implement additional requirements has been fully pursued;

(d) A determination that the responsible federal agencies have required all reasonable mitigation measures associated with their action; and

(e) Written documentation including all air quality analyses supporting the conformity determination;

(3) Where a federal agency made a conformity determination based on a commitment from the Commonwealth of Virginia under subdivision 5 a (2) of this subsection, and the department has submitted an implementation plan to EPA covering the time period during which the emissions will occur or is scheduled to submit such an implementation plan within 18 months of the conformity determination, the commitment is automatically deemed a call for a revision to the applicable implementation plan by EPA under § 110(k)(5) of the federal Clean Air Act, effective on the date of the federal conformity determination and requiring response within 18 months or any shorter time within which the Commonwealth of Virginia commits to revise the applicable implementation plan;

(4) Where a federal agency made a conformity determination based on a commitment from the Commonwealth of Virginia under subdivision 5 a (2) of this subsection and the department has not submitted an implementation plan covering the time period when the emissions will occur or is not scheduled to submit such an implementation plan within 18 months of the conformity determination, the department will, within 18 months, submit to EPA a revision to the existing implementation plan committing to include the emissions in the future implementation plan revision.

b. The action or portion thereof, as determined by the metropolitan planning organization, is specifically included in a current transportation plan and transportation improvement program which have been found to conform to the applicable implementation plan under 40 CFR Part 51, subpart T, or 40 CFR Part 93, subpart A;

c. The action or portion thereof fully offsets its emissions within the same nonattainment or maintenance area (or nearby area of equal or higher classification provided the emissions from that area contribute to the violations, or have contributed to violation in the past, in the area with the federal action) through a revision to the applicable implementation plan or an equally enforceable measure that effects emissions reductions equal to or greater than the total of direct and indirect emissions from the action so that there is no net increase in emissions of that pollutant;

d. Where EPA has not approved a revision to the relevant implementation plan since the area was designated or reclassified, the total of direct and indirect emissions from the action for the future years (described in 9VAC5-160-170) do not increase emissions with respect to the baseline emissions;

(1) The baseline emissions reflect the historical activity levels that occurred in the geographic area affected by the proposed federal action during:

(a) The most current calendar year with a complete emissions inventory available before an area is designated unless EPA sets another

year; or

(b) The emission budget in the applicable implementation plan; or

(c) The year of the baseline inventory in the PM_{10}-applicable implementation plan;

(2) The baseline emissions are the total of direct and indirect emissions calculated for the future years (described in 9VAC5-160-170 D) using the historic activity levels (described in subdivision 5 d (1) of this subsection) and appropriate emission factors for the future years; or

e. Where the action involves regional water or wastewater projects or both, the projects are sized to meet only the needs of population projections that are in the applicable implementation plan, based on assumptions regarding per capita use that are developed or approved in accordance with 9VAC5-160-170 A.

B. The areawide or local air quality modeling analyses or both shall:

1. Meet the requirements of 9VAC5-160-170; and

2. Show that the action does not:

a. Cause or contribute to any new violation of any standard in any area; or

b. Increase the frequency or severity of any existing violation of any standard in any area.

C. Notwithstanding any other requirements of this section, an action subject to this section may not be determined to conform to the applicable implementation plan unless the total of direct and indirect emissions from the action is in compliance or consistent with all relevant requirements and milestones contained in the applicable implementation plan, such as elements identified as part of the reasonable further progress schedules, assumptions specified in the attainment or maintenance demonstration, prohibitions, numerical emission limits, and work practice requirements, and the action is otherwise in accordance with all relevant requirements of the applicable implementation plan.

D. Any analyses required under this section shall be completed, and any mitigation requirements necessary for a finding of conformity shall be identified in accordance with 9VAC5-160-180 before the determination of conformity is made.

9VAC5-160-170. Procedures for conformity determinations.

A. The analyses required under this section shall be based on the latest planning

assumptions.

1. All planning assumptions (including, but not limited to, per capita water and sewer use, vehicle miles traveled per capita or per household, trip generation per household, vehicle occupancy, household size, vehicle fleet mix, vehicle ownership, wood stoves per household, and the geographic distribution of population growth) shall be derived from the estimates of current and future population, employment, travel, and congestion most recently approved by the metropolitan planning organization or other agency authorized to make the estimates, where available. The conformity determination shall also be based on the latest assumptions about current and future background concentrations and other federal actions.

2. Any revisions to these estimates used as part of the conformity determination, including projected shifts in geographic location or level of population, employment, travel, and congestion shall be approved by the metropolitan planning organization or other agency authorized to make the estimates for the urban area.

B. The analyses required under this subsection shall be based on the latest and most accurate emission estimation techniques available as described below, unless such techniques are inappropriate. If such techniques are inappropriate, the federal agency may obtain written approval from the appropriate EPA Regional Administrator for a modification or substitution, of another technique on a case-by-case basis or, where appropriate, on a generic basis for a specific federal agency program.

1. For motor vehicle emissions, the most current version of the motor vehicle emissions model specified by EPA for use in the preparation or revision of the applicable implementation plan shall be used for the conformity analysis as specified in subdivisions 1 a and 1 b of this subsection.

a. The EPA shall publish in the Federal Register a notice of availability of any new motor vehicle emissions model.

b. A grace period of three months shall apply during which the motor vehicle emissions model previously specified by EPA as the most current version may be used unless EPA announces a longer grace period in the Federal Register. Conformity analyses for which the analysis was begun during the grace period or no more than three months before the Federal Register notice of availability of the latest emission model may continue to use the previous version of the model specified by EPA.

2. For non-motor vehicle sources, including stationary and area source emissions, the latest emission factors specified by EPA in the "Compilation of Air Pollutant Emission Factors (AP-42)" shall be used for the conformity analysis unless more accurate emission data are available, such as actual stack test data from stationary sources which are part of the conformity analysis.

C. The air quality modeling analyses required under this section shall be based on

the applicable air quality models, databases, and other requirements specified in Appendix W of 40 CFR Part 51.

D. The analyses required under this subsection shall be based on the total of direct and indirect emissions from the action and shall reflect emission scenarios that are expected to occur under each of the following cases:

1. The attainment year specified in the applicable implementation plan or if the applicable implementation plan does not specify an attainment year, the latest attainment year possible under the federal Clean Air Act; or

2. The last year for which emissions are projected in the maintenance plan;

3. The year during which the total of direct and indirect emissions from the action is expected to be the greatest on an annual basis; and

4. Any year for which the applicable implementation plan specifies an emissions budget.

9VAC5-160-180. Mitigation of air quality impacts.

A. Any measures that are intended to mitigate air quality impacts shall be identified (including the identification and quantification of all emission reductions claimed) and the process for implementation (including any necessary funding of the measures and tracking of the emission reductions) and enforcement of the measures shall be described, including an implementation schedule containing explicit timelines for implementation.

B. Prior to determining that a federal action is in conformity, the federal agency making the conformity determination shall obtain written commitments from the appropriate persons or agencies to implement any mitigation measures which are identified as conditions for making conformity decisions. The written commitment shall describe the mitigation measures and the nature of the commitment, in a manner consistent with subsection A of this section.

C. Persons or agencies voluntarily committing to mitigation measures to facilitate positive conformity determinations shall comply with the obligations of the commitments.

D. In instances where the federal agency is licensing, permitting, or otherwise approving the action of another governmental or private entity, approval by the federal agency shall be conditioned on the other entity meeting the mitigation measures set forth in the conformity determination as provided in subsection A of this section.

E. When necessary because of changed circumstances, mitigation measures may be modified so long as the new mitigation measures continue to support the conformity determination. Any proposed change in the mitigation measures is subject to the

reporting requirements of 9VAC5-160-130 and the public participation requirements of 9VAC5-160-140.

F. Written comments to mitigation measures shall be obtained prior to a positive conformity determination, and such commitments shall be fulfilled.

G. After EPA approves this regulation, any agreements, including mitigation measures, necessary for a conformity determination shall be both state and federally enforceable. Enforceability through the applicable implementation plan shall apply to all persons who agree to mitigate direct and indirect emissions associated with a federal action for a conformity determination.

9VAC5-160-181. Conformity evaluation for federal installations with facility-wide emission budgets.

A. The department may, in cooperation with federal agencies or third parties authorized by the agency that operate installations subject to federal oversight, develop and adopt a facility-wide emission budget to be used for demonstrating conformity under 9VAC5-160-160 A 1. The facility-wide budget shall meet the following criteria:

1. Be for a set time period;

2. Cover the pollutants or precursors of the pollutants for which the area is designated nonattainment or maintenance;

3. Include specific quantities allowed to be emitted on an annual or seasonal basis;

4. The emissions from the facility along with all other emissions in the area will not exceed the emission budget for the area;

5. Include specific measures to ensure compliance with the budget, such as periodic reporting requirements or compliance demonstration, when the federal agency is taking an action that would otherwise require a conformity determination;

6. Be submitted to EPA as a revision to the applicable implementation plan; and

7. The revision to the applicable implementation plan shall be approved by EPA.

B. The facility-wide budget developed and adopted in accordance with subsection A of this section may be revised by following the requirements in subsection A of this section.

C. Total direct and indirect emissions from federal actions in conjunction with all other emissions subject to general conformity from the facility that do not exceed the facility budget adopted pursuant to subsection A of this section are presumed to conform to the applicable implementation plan and do not require a conformity analysis.

D. If the total direct and indirect emissions from the federal actions in conjunction with the other emissions subject to general conformity from the facility exceed the budget adopted pursuant to subsection A of this section, the action shall be evaluated for conformity. A federal agency may use the compliance with the facility-wide emissions budget as part of the demonstration of conformity, i.e., the agency would have to mitigate or offset the emissions that exceed the emission budget.

E. If the applicable implementation plan for the area includes a category for construction emissions, the negotiated budget may exempt construction emissions from further conformity analysis.

9VAC5-160-182. Emissions beyond the time period covered by the applicable implementation plan.

If a federal action would result in total direct and indirect emissions above the applicable thresholds which would be emitted beyond the time period covered by the applicable implementation plan, the federal agency may (i) demonstrate conformity with the last emission budget in the applicable implementation plan; or (ii) request the Commonwealth of Virginia to adopt an emissions budget for the action for inclusion in the applicable implementation plan. The Commonwealth of Virginia will submit a revision of the applicable implementation plan to EPA within 18 months either including the emissions in the existing implementation plan or establishing an enforceable commitment to include the emissions in future revisions to the applicable implementation plan based on the latest planning assumptions at the time of the revision to the applicable implementation plan. No such commitment by the Commonwealth of Virginia shall restrict the Commonwealth of Virginia's ability to require RACT, RACM or any other control measures within the Commonwealth of Virginia's authority to ensure timely attainment of the national ambient air quality standards.

9VAC5-160-183. Timing of offsets and mitigation measures.

A. The emissions reductions from an offset or mitigation measure used to demonstrate conformity shall occur during the same calendar year as the emission increases from the action except, as provided in subsection B of this section.

B. The department may approve emissions reductions in other years provided:

1. The reductions are greater than the emission increases by the following ratios:

Extreme nonattainment areas:	1.5:1
Severe nonattainment areas:	1.3:1
Serious nonattainment areas:	1.2:1
Moderate nonattainment areas:	1.15:1
All other areas:	1.1:1

2. The time period for completing the emissions reductions shall not exceed twice the period of the emissions.

3. The offset or mitigation measure with emissions reductions in another year shall not:

a. Cause or contribute to a new violation of any air quality standard;

b. Increase the frequency or severity of any existing violation of any air quality standard; or

c. Delay the timely attainment of any standard or any interim emissions reductions or other milestones in any area.

C. The approval by the department of an offset or mitigation measure with emissions reductions in another year does not relieve the Commonwealth of Virginia of any obligation to meet any implementation plan or federal Clean Air Act milestone or deadline. The approval of an alternate schedule for mitigation measures is at the discretion of the department, and it is not required to approve an alternate schedule.

9VAC5-160-184. Inter-precursor mitigation measures and offsets.

Federal agencies shall reduce the same type of pollutant as being increased by the federal action except the department may approve offsets or mitigation measures of different precursors of the same criteria pollutant, if such trades are allowed by the Commonwealth of Virginia in 9VAC5-80 (Permits for Stationary Sources) as approved in the applicable implementation plan, is technically justified, and has a demonstrated environmental benefit.

9VAC5-160-185. Early emission reduction credit programs at federal facilities and installation subject to federal oversight.

A. Federal facilities and installations subject to federal oversight may, with the approval of the department, create an early emissions reductions credit program. The federal agency may create the emission reduction credits in accordance with the requirements in subsection B of this section and use them in accordance with subsection C of this section.

B. Creation of emission reduction credits shall be accomplished as follows.

1. Emissions reductions shall be quantifiable through the use of standard emission factors or measurement techniques. If non-standard factors or techniques to quantify the emissions reductions are used, the federal agency shall receive approval from the department and from the EPA regional office. The emission reduction credits do not have to be quantified before the reduction strategy is implemented, but shall be quantified before the credits are used in the general conformity evaluation.

2. The emission reduction methods shall be consistent with the applicable implementation plan attainment and reasonable further progress demonstrations.

3. The emissions reductions shall not be required by or credited to other applicable implementation plan provisions.

4. Both the department and federal air quality agencies shall be able to take legal action to ensure continued implementation of the emission reduction strategy. In addition, private citizens shall also be able to initiate action to ensure compliance with the control requirement.

5. The emissions reductions shall be permanent or the timeframe for the reductions shall be specified.

6. The federal agency shall document the emissions reductions and provide a copy of the document to the department and the EPA regional office for review. The documentation shall include a detailed description of the emission reduction strategy and a discussion of how it meets the requirements of subdivisions 1 through 5 of this subsection.

C. The emission reduction credits created in accordance with subsection B of this section may be used, subject to the following limitations, to reduce the emissions increase from a federal action at the facility for the conformity evaluation.

1. If the technique used to create the emission reduction is implemented at the same facility as the federal action and could have occurred in conjunction with the federal action, then the credits may be used to reduce the total direct and indirect emissions used to determine the applicability of the regulation as required in 9VAC5-160-30 and as offsets or mitigation measures required by 9VAC5-160-160.

2. If the technique used to create the emission reduction is not implemented at the same facility as the federal action or could not have occurred in conjunction with the federal action, then the credits shall not be used to reduce the total direct and indirect emissions used to determine the applicability of the regulation as required in 9VAC5-160-30, but may be used to offset or mitigate the emissions as required by 9VAC5-160-160.

3. Emissions reductions credits shall be used in the same year in which they are generated.

4. Once the emission reduction credits are used, they shall not be used as credits for another conformity evaluation. However, unused credits from a strategy used for one conformity evaluation may be used for another conformity evaluation as long as the reduction credits are not double counted.

5. Federal agencies shall notify the department and the EPA regional office when the emission reduction credits are being used.

9VAC5-160-190. Savings provision.

The requirements of 40 CFR Part 93 to demonstrate conformity required under § 176(c) of the federal Clean Air Act apply to all federal actions in designated nonattainment and maintenance areas where EPA has not approved this regulation. When EPA approves this regulation in a revision to the Commonwealth of Virginia applicable implementation plan, a conformity evaluation is governed by the approved or approved portion of this regulation. The regulations contained in 40 CFR Part 93 apply only for the portions, if any, of the 40 CFR Part 93 requirements not contained in the provisions of this regulation approved by EPA. In addition, any previously applicable implementation plan requirements shall remain enforceable until EPA approves the revision to the Commonwealth of Virginia's applicable implementation plan to specifically include the revised requirements or remove requirements.

9VAC5-160-200. (Repealed).

DOCUMENTS INCORPORATED BY REFERENCE

Compilation of Air Pollutant Emission Factors, Volume I: Stationary and Area Sources, stock number 055-000-00500-1, 1995; Supplement A, stock number 055-000-00551-6, 1996; Supplement B, stock number 055-000-00565, 1997; Supplement C, stock number 055-000-00587-7, 1997; Supplement D, 1998; Supplement E, 1999; Supplement F, 2000 (http:/www.epa.gov/ttn/chiefs/efpac).

EPA's Interim Air Quality Policy on Wildland and Prescribed Fires. U.S. EPA, April 23, 1998.

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