

## Chapter NR 489

## CONFORMITY OF GENERAL FEDERAL ACTIONS TO STATE IMPLEMENTATION PLANS

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**NR 489.01 Purpose.** (1) The purpose of this rule is to implement section 176 (c) of the clean air act (42 USC 7406 (c)) and regulations under 40 CFR part 51 subpart W as in effect on July 1, 1998 with respect to the conformity of general federal actions to the applicable implementation plan. Under those authorities, no department, agency or instrumentality of the federal government may 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. This chapter sets forth policy, criteria and procedures for demonstrating and assuring conformity of such actions with the applicable implementation plan.

(2) Under section 176 (c) of the act (42 USC 7506 (c)) and 40. CFR part 51 subpart W, a federal agency must make a determination that a federal action conforms to the applicable implementation plan in accordance with the requirements of this chapter before the action is taken.

(3) Subsection (2) does not include federal actions where either:

(a) A national environmental policy act (NEPA) analysis was completed as evidenced by a final environmental assessment (EA), environmental impact statement (EIS), or finding of no significant impact (FONSI) that was prepared prior to January 31, 1994; or

(b) 1. Prior to January 31, 1994, an EA was commenced or a contract was awarded to develop the specific environmental analysis;

2. Sufficient environmental analysis was completed by March 15, 1994, so that the federal agency may determine that the federal action is in conformity with the specific requirements and the purposes of the applicable implementation plan pursuant to the agency's affirmative obligation under section 176 (c) of the act (42 USC 7506 (c)); and

3. A written determination of conformity under section 176 (c) of the act (42 USC 7506 (c)) has been made by the federal agency responsible for the federal action by March 15, 1994.

(4) Notwithstanding any provision of this chapter, 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, the NEPA, or the act.

**History:** Cr. Register, September, 1995, No. 477, eff. 10-1-95; am. (1) Register, November, 1999, No. 527, eff. 12-1-99.

**NR 489.02 Definitions.** The definitions contained in ch. NR 400 apply to the terms used in this chapter. In addition, terms used but not defined in ch. NR 400 or this chapter shall have the meanings given them by the act and the environmental protection agency's (EPA) regulations promulgated under the act as of July 1, 1998, in that order of priority. The following definitions apply to the terms used in this chapter:

(1) "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 section 162 of the act (42 USC 7472) that is located within 100 km of the proposed federal action.

(2) "Applicable implementation plan" means the portion, or portions, of the state implementation plan, or most recent revision thereof, which has been approved under section 110 of the act (42 USC 7410), a federal implementation plan promulgated under section 110 (c) of the act (42 USC 7410 (c)), or a tribal implementation plan promulgated or approved pursuant to regulations promulgated under section 301 (d) of the act (42 USC 7601 (d)) and which implements the relevant requirements of the act.

(3) "Areawide air quality modeling analysis" means an assessment on a scale that includes the entire nonattainment or maintenance area which uses an air quality dispersion model to determine the effects of emissions on air quality.

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

(a) Causes a new violation of a national ambient air quality standard (NAAQS) 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

(b) Contributes, in conjunction with other reasonably foreseeable actions, to a new violation of a NAAQS at a location in a nonattainment or maintenance area in a manner that would increase the frequency or severity of the new violation.

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

(6) "Criteria pollutant" means any pollutant for which there is established a NAAQS under 40 CFR part 50 as in effect on July 1, 1998.

(7) "Direct emissions" means those emissions of a criteria pollutant or its precursors that are caused or initiated by the federal action and occur at the same time and place as the action.

(8) "Emergency" means a situation where extremely quick action on the part of the federal agencies involved is needed and where the timing of such federal activities makes it impractical to meet the requirements of this chapter, such as natural disasters like hurricanes or earthquakes, civil disturbances such as terrorist acts, and military mobilizations.

(9) "Emissions budgets" are those portions of the total allowable emissions defined in an EPA-approved revision to 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 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 section 176 (c) (1) (B) of the act (42 USC 7506 (c) (1) (B)). An emissions budget may be expressed in terms of an annual period, a daily period, or other period established in the applicable implementation plan.

(10) "Emissions offsets", for purposes of s. NR 489.08, are emission reductions which are quantifiable, consistent with the attainment and reasonable further progress demonstrations of the

applicable implementation plan, surplus to reductions required by, and credited to, other applicable implementation plan provisions, enforceable under both state and federal law, and permanent within the time frame specified by the program. Emissions reductions intended to be achieved as emissions offsets under this chapter shall be monitored and enforced in a manner equivalent to that under EPA's new source review requirements.

(11) "Emissions that a federal agency has a continuing program responsibility for" means emissions that are specifically caused by an agency carrying out its authorities, and does not include emissions that occur due to subsequent activities, unless such activities are required by the federal agency. Where an agency, in performing its normal program responsibilities, takes actions itself or imposes conditions that result in air pollutant emissions by a non-federal entity taking subsequent actions, such emissions are covered by the meaning of a continuing program responsibility.

(12) "Federal action" means any activity engaged in by a department, agency or instrumentality of the federal government, or any activity that a department, agency or instrumentality of the federal government 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 to 1625). Where the federal action is a permit, license or other approval for some aspect of a non-federal undertaking, the relevant activity is the part, portion or phase of the non-federal undertaking that requires the federal permit, license or approval.

(13) "Federal agency" means, for purposes of this chapter, a federal department, agency or instrumentality of the federal government.

(14) "Increase the frequency or severity of any existing violation of any standard in any area" means to cause a nonattainment area to exceed a NAAQS 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.

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

(a) Are caused by the federal action, but may occur later in time or may be farther removed in distance from the action itself but are still reasonably foreseeable; and

(b) The federal agency can practicably control and will maintain control over due to a continuing program responsibility of the federal agency, including, but not limited to:

1. Traffic on or to, or stimulated or accommodated by, a proposed facility which is related to increases or other changes in the scale or timing of operations of the facility;

2. Emissions related to the activities of employees of contractors or federal employees;

3. Emissions related to employe commuting and similar programs to increase average vehicle occupancy imposed on all employers of a certain size in the locality;

4. Emissions related to the use of federal facilities under lease or temporary permit;

5. Emissions related to the activities of contractors or leaseholders that may be addressed by provisions that are usual and customary for contracts or leases or within the scope of contractual protection of the interests of the United States.

**Note:** This term does not have the same meaning as given to an indirect source of emissions under section 110 (a) (5) of the act (42 USC 7410 (a) (5)).

(16) "Local air quality modeling analysis" means an assessment of localized impacts on a scale smaller than the entire nonattainment or maintenance area, including, for example, congested roadway intersections and highways or transit terminals, which uses an air quality dispersion model to determine the effects of emissions on air quality.

(17) "Maintenance area" means any geographic region of the United States previously designated nonattainment pursuant to the 1990 amendments of the act, which took effect November 15, 1990, and subsequently redesignated to attainment subject to the requirement to develop a maintenance plan under section 175A of the act (42 USC 7505a).

(18) "Maintenance plan" means a revision to the applicable implementation plan, meeting the requirements of section 175A of the act (42 USC 7505a).

(19) "Metropolitan planning organization" or "MPO" is that organization designated as being responsible, together with the state, for conducting the continuing, cooperative and comprehensive planning process under 23 USC 134 and 49 USC 1607.

(20) "Milestone" has the meaning given in sections 182 (g) (1) and 189 (c) (1) of the act (42 USC 7511a (g) (1) and 7513a (c) (1)). A milestone consists of an emissions level and the date on which it is required to be achieved.

(21) "National ambient air quality standards" or "NAAQS" means those standards established pursuant to section 109 of the act (42 USC 7409) and include standards for carbon monoxide (CO), lead (Pb), nitrogen dioxide (NO<sub>2</sub>), ozone, particulate matter (PM<sub>10</sub>), and sulfur dioxide (SO<sub>2</sub>).

(22) "NEPA" means the national environmental policy act of 1969 (42 USC 4321 to 4347) as in effect on July 1, 1998.

(23) "Nonattainment area" means any geographic area of the United States which has been designated as nonattainment under section 107 of the act (42 USC 7407) and described in 40 CFR part 81 as in effect on July 1, 1998.

(24) "Precursors of a criteria pollutant" are:

(a) For ozone, nitrogen oxides (NO<sub>x</sub>), unless an area is exempted from NO<sub>x</sub> requirements under section 182 (f) of the act (42 USC 7511a (f)), and volatile organic compounds (VOC); and

(b) For PM<sub>10</sub>, those pollutants described in the PM<sub>10</sub> nonattainment area applicable implementation plan as significant contributors to the PM<sub>10</sub> levels.

(25) "Reasonably foreseeable emissions" are projected future indirect emissions that are identified at the time the conformity determination is made, where the location of such emissions is known to the extent adequate to determine the impact of such emissions, 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.

(26) "Regionally significant action" means a federal action for which the direct and indirect emissions of any pollutant represent 10% or more of a nonattainment or maintenance area's emissions inventory for that pollutant.

(27) "Regional water or wastewater projects" include 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.

(28) "Total of direct and indirect emissions" means the sum of direct and indirect emissions increases and decreases caused by the federal action, i.e., the net emissions considering all direct and indirect emissions. Any emissions decreases used to reduce the total shall be enforceable under federal law. The portion of emissions which are exempt or presumed to conform under s. NR 489.03 (3), (4), (5) or (6) are not included in the total of direct and indirect emissions, except as provided in s. NR 489.03 (10). The total of direct and indirect emissions includes emissions of criteria pollutants and emissions of precursors of criteria pollutants. The segmentation of projects for conformity analyses when emissions are reasonably foreseeable is not permitted by this chapter.

**History:** Cr. Register, September, 1995, No. 477, eff. 10-1-95; am. (12), (17), (22), Register, January, 1997, No. 493, eff. 2-1-97; am. (intro.), (6), (22) and (23), Register, November, 1999, No. 527, eff. 12-1-99.

**NR 489.03 Applicability.** (1) 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 to 1625, shall meet the procedures and criteria of the state implementation plan provision adopted under 40 CFR part 51 subpart T in lieu of the procedures in this chapter.

(2) For federal actions not covered by sub. (1), a conformity determination is required for each pollutant where the total of direct and indirect emissions in a nonattainment or maintenance area caused by a federal action would equal or exceed any of the rates in par. (a) or (b).

(a) For purposes of this subsection, the following rates apply in nonattainment areas:

	<u>Tons/Year</u>
Ozone (VOC or NO <sub>x</sub> )	
Serious nonattainment areas	50
Severe nonattainment areas	25
Extreme nonattainment areas	10
Other ozone nonattainment areas outside an ozone transport region	100
Rural transport, marginal and moderate nonattainment areas inside an ozone transport region	
VOC	50
NO <sub>x</sub>	100
Carbon monoxide	
All nonattainment areas	100
SO <sub>2</sub> or NO <sub>2</sub>	
All nonattainment areas	100
PM <sub>10</sub>	
Moderate nonattainment areas	100
Serious nonattainment areas	70
Pb	
All nonattainment areas	25

(b) For purposes of this subsection, the following rates apply in maintenance areas:

	<u>Tons/Year</u>
Ozone (NO <sub>x</sub> ), SO <sub>2</sub> or NO <sub>2</sub>	
All maintenance areas	100
Ozone (VOC)	
Maintenance areas inside an ozone transport region	50
Maintenance areas outside an ozone transport region	100
Carbon monoxide	
All maintenance areas	100
PM <sub>10</sub>	
All maintenance areas	100
Pb	
All maintenance areas	25

**Note:** There are no counties located in an ozone transport region in Wisconsin.

(3) The requirements of this chapter do not apply to:

(a) Actions where the total of direct and indirect emissions are below the emissions levels specified in sub. (2).

(b) The following actions, which would result in no emissions increase or an increase in emissions that is clearly de minimis:

1. Judicial and legislative proceedings.

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

3. Rulemaking and policy development and issuance.

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

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

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

7. The routine, recurring transportation of material and personnel.

8. 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 or for repair or overhaul.

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

10. With respect to existing structures, properties, facilities and lands where future activities conducted will 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.

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

12. Planning, studies and provision of technical assistance.

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

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

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

16. 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 department, agency or instrumentality of the United States.

17. Actions by the board of governors of the federal reserve system or any federal Reserve Bank to effect monetary or exchange rate policy.

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

19. 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.

20. 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.

21. Actions by the department of the treasury to effect fiscal policy and to exercise the borrowing authority of the United States.

(c) Actions where the emissions are not reasonably foreseeable, such as electric power marketing activities that involve the acquisition, sale and transmission of electric energy.

(d) 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 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 5 years.

(4) Notwithstanding the other requirements of this chapter, a conformity determination is not required for the following federal actions, or portion thereof:

(a) The portion of an action that includes major new or modified stationary sources that require a permit under the new source review (NSR) program, section 173 of the act (42 USC 7503), or the prevention of significant deterioration (PSD) program, title I, part C of the act (42 USC 7470 to 7492).

(b) Actions in response to emergencies or natural disasters such as hurricanes, earthquakes, etc., which are commenced on the order of hours or days after the emergency or disaster and, if applicable, which meet the requirements of sub. (5).

(c) Research, investigations, studies, demonstrations or training, other than those exempted under sub. (3) (b), where no environmental detriment is incurred or the particular action furthers air quality research, as determined by the department.

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

(e) Direct emissions from remedial and removal actions carried out under the comprehensive environmental response, compensation and liability act (CERCLA) and associated regulations to the extent such emissions either comply with the substantive requirements of the PSD or NSR permitting program or are exempted from other environmental regulation under the provisions of CERCLA and applicable regulations issued under CERCLA.

(5) Federal actions which are part of a continuing response to an emergency or disaster under sub. (4) (b) and which are to be taken more than 6 months after the commencement of the response to the emergency or disaster under sub. (4) (b) are exempt from the requirements of this chapter only if:

(a) The federal agency taking the actions makes a written determination that, for a specified period not to exceed an additional 6 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

(b) For actions which are to be taken after those actions covered by par. (a), the federal agency makes a new determination as provided in par. (a).

(6) Notwithstanding other requirements of this chapter, individual actions or classes of actions specified by individual federal agencies that have met the criteria set forth in either sub. (7) (a) or (b) and the procedures set forth in sub. (8) are presumed to conform, except as provided in sub. (10).

(7) The federal agency shall meet the criteria for establishing activities that are presumed to conform by fulfilling the requirements set forth in either par. (a) or (b):

(a) The federal agency shall clearly demonstrate using methods consistent with this chapter that the total of direct and indirect emissions from the type of activities which would be presumed to conform would not:

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

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

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

4. Delay timely attainment of any NAAQS or any required interim emission reductions or other milestones in any area including, where applicable, emission levels specified in the applicable implementation plan for purposes of:

a. A demonstration of reasonable further progress;

b. A demonstration of attainment; or

c. A maintenance plan; or

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

(8) In addition to meeting the criteria for establishing exemptions set forth in sub. (7) (a) or (b), the following procedures shall also be complied with by the federal agency for activities that are presumed to conform:

(a) The federal agency shall identify through publication in the federal register its list of proposed activities that are presumed to conform and the analysis, assumptions, emissions factors and criteria used as the basis for the presumptions;

(b) The federal agency shall notify the appropriate EPA regional office, state and local air quality agencies and, where applicable, the agency designated under section 174 of the act (42 USC 7504) and the MPO and provide at least 30 days for the public to comment on the list of proposed activities presumed to conform;

(c) 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

(d) The federal agency shall publish the final list of such activities in the federal register.

(9) Notwithstanding the other requirements of this chapter, when the total of direct and indirect emissions of any pollutant from a federal action does not equal or exceed the rates specified in sub. (2), but represents 10% or more of a nonattainment or maintenance area's total emissions of that pollutant, the action is defined as a regionally significant action and the requirements of ss. NR 489.01 and 489.05 to 489.10 shall apply for the federal action.

(10) Where an action presumed to be de minimis under sub. (3) (a) or (b) or otherwise presumed to conform under sub. (6) is a regionally significant action or where an action otherwise presumed to conform under sub. (6) does not in fact meet one of the criteria in sub. (7) (a), that action may not be considered de minimis or presumed to conform and the requirements of ss. NR 489.01 and 489.05 to 489.10 shall apply for the federal action.

(11) The provisions of this chapter shall apply in all nonattainment and maintenance areas.

**History:** Cr. Register, September, 1995, No. 477, eff. 10-1-95; am. (1), (2) (a), Register, January, 1997, No. 493, eff. 2-1-97.

**NR 489.04 Conformity analysis.** Any federal department, agency, or instrumentality of the federal government taking

an action subject to 40 CFR part 51 subpart W, as in effect on July 1, 1998, and this chapter shall make its own conformity determination consistent with the requirements of this chapter. In making its conformity determination, a federal agency 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, to the extent the proposed action and impacts analyzed are the same as the project for which a conformity determination is required, or develop its own analysis in order to make its conformity determination.

**History:** Cr. Register, September, 1995, No. 477, eff. 10-1-95; am. Register, November, 1999, No. 527, eff. 12-1-99.

**NR 489.05 Reporting requirements.** (1) A federal agency making a conformity determination under ss. NR 489.08 and 489.085 shall provide to the appropriate EPA regional office, the department, local air quality agencies and, where applicable, affected federal land managers and the MPO a 30-day notice which describes the proposed action and the federal agency's draft conformity determination on the action.

(2) A federal agency shall notify the appropriate EPA regional office, the department and local air quality agencies and, where applicable, affected federal land managers and the MPO within 30 days after making a final conformity determination under ss. NR 489.08 and 489.085.

**Note:** Federal agencies should send notifications of federal actions proposed for Wisconsin projects to the Wisconsin Department of Natural Resources, Bureau of Air Management, 101 South Webster Street, PO Box 7921, Madison WI 53707-7921. The appropriate EPA office to notify for Wisconsin projects is EPA-Region 5, 77 West Jackson Boulevard, Chicago IL 60604.

**History:** Cr. Register, September, 1995, No. 477, eff. 10-1-95; am. Register, November, 1999, No. 527, eff. 12-1-99.

**NR 489.06 Public participation and consultation.** (1) Upon request by any person regarding a specific federal action, a federal agency shall make available for review its draft conformity determination under ss. NR 489.08 and 489.085 with supporting materials which describe the analytical methods, assumptions and conclusions relied upon in making the applicability analysis and draft conformity determination.

(2) A federal agency shall make public its draft conformity determination under ss. NR 489.08 and 489.085 by placing a notice by prominent advertisement in a daily newspaper of general circulation in the areas 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.

(3) A federal agency shall document its response to all the comments received on its draft conformity determination under ss. NR 489.08 and 489.085 and make the comments and responses available, upon request by any person regarding a specific federal action, within 30 days of the final conformity determination.

(4) A federal agency shall make public its final conformity determination under ss. NR 489.08 and 489.085 for a federal action by placing a notice by prominent advertisement in a daily newspaper of general circulation in the areas affected by the action within 30 days of the final conformity determination.

**History:** Cr. Register, September, 1995, No. 477, eff. 10-1-95; am. Register, November, 1999, No. 527, eff. 12-1-99.

**NR 489.07 Frequency of conformity determinations.** (1) The conformity status of a federal action automatically lapses 5 years after the date a final conformity determination is reported under s. NR 489.05, unless the federal action has been completed or a continuous program has been commenced to implement that federal action within a reasonable time.

(2) Ongoing federal activities at a given site showing continuous progress are not new actions and do not require periodic redeterminations so long as the emissions associated with such activi-

ties are within the scope of the final conformity determination reported under s. NR 489.05.

(3) If, after the conformity determination is made, the federal action is changed so that there is an increase in the total of direct and indirect emissions above the levels in s. NR 489.03 (2), a new conformity determination is required.

**History:** Cr. Register, September, 1995, No. 477, eff. 10-1-95.

**NR 489.08 Criteria for determining conformity of general federal actions.** An action required under s. NR 489.03 to have a conformity determination for a specific pollutant will be determined to conform to the applicable implementation plan if, for each pollutant that exceeds the rates in s. NR 489.03 (2), or otherwise requires a conformity determination due to the total of direct and indirect emissions from the action, the action meets the requirements of s. NR 489.085 (2), and meets any of the following requirements:

(1) For any criteria pollutant, 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;

(2) For ozone or nitrogen dioxide, the total of direct and indirect emissions from the action are fully offset within the same non-attainment or maintenance area through a revision to the applicable implementation plan or a measure similarly enforceable under state and federal law that effects emission reductions so that there is no net increase in emissions of that pollutant;

(3) For any criteria pollutant, except ozone and nitrogen dioxide, the total of direct and indirect emissions from the action meets:

(a) The requirements specified in s. NR 489.085 (1), based on areawide air quality modeling analysis and local air quality modeling analysis; or

(b) The requirements specified in sub. (5) and, for local air quality modeling analysis, the requirements of s. NR 489.085 (1);

(4) For CO or PM<sub>10</sub>:

(a) Where the department determines, in accordance with ss. NR 489.05 and 489.06 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 meets the requirements specified in s. NR 489.085 (1), based on local air quality modeling analysis; or

(b) Where the department determines, in accordance with ss. NR 489.05 and 489.06 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 meets the requirements specified in s. NR 489.085 (1), based on areawide modeling, or meets the requirements of sub. (5); or

(5) For ozone or nitrogen dioxide, and for purposes of subs. (3) (b) and (4) (b), 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 an area's attainment or maintenance demonstration after 1990 and the state makes a determination as provided in subd. 1. or where the state makes a commitment as provided in subd. 2.:

**Note:** Any such determination or commitment shall be made in compliance with ss. NR 489.05 and 489.06.

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 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

budget specified in the applicable implementation plan and the department 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 emission 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.

**Note:** When a federal agency makes a conformity determination based on a state commitment under subd. 2., such a state commitment is automatically deemed a call for an implementation plan revision by EPA under section 110 (k) (5) of the act (42 USC 7410 (k) (5)), effective on the date of the federal conformity determination and requiring response within 18 months or any shorter time within which the state commits to revise the applicable implementation plan.

(b) The action, or portion thereof, as determined by the MPO, is specifically included in a current transportation plan and transportation improvement program which has been found to conform to the applicable implementation plan under 40 CFR part 51, subpart T or part 93, subpart A as in effect on July 1, 1998;

(c) The action, or portion thereof, fully offsets its emissions within the same nonattainment or maintenance area through a revision to the applicable implementation plan or an equally enforceable measure that achieves emission 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 attainment or maintenance demonstration since 1990, the total of direct and indirect emissions from the action for the future years, described in s. NR 489.09 (4), do not increase emissions with respect to the baseline emissions, and:

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

- a. The calendar year 1990;
- b. The calendar year that is the basis for the classification or, where the classification is based on multiple years, the year that is most representative in terms of the level of activity, if a classification is promulgated in 40 CFR part 81 as in effect on July 1, 1998; or
- c. The year of the baseline inventory in the PM<sub>10</sub> applicable implementation plan; and

2. The baseline emissions are the total of direct and indirect emissions calculated for the future years, described in s. NR 489.09 (4), using the historic activity levels, described in subd. 1., and appropriate emission factors for the future years; or

(e) Where the action involves regional water or wastewater projects, 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 s. NR 489.09 (1).

**History:** Cr. Register, September, 1995, No. 477, eff. 10-1-95; corrections made under s. 13.93 (2m) (b) 1. and 7., Stats., Register, January, 1997, No. 493; am. (intro.), (3) (a), (b), (4) (a), (b), (5) (b) and (d) 1. b., renum. (6) to (8) to be s. NR 489.085 (1) to (3), Register, November, 1999, No. 527, eff. 12-1-99.

**NR 489.085 Additional requirements for determining conformity of general federal actions.** (1) The area-wide and local air quality modeling analyses shall:

- (a) Meet the requirements in s. NR 489.09; and
- (b) Show that the action does not:
  1. Cause or contribute to any new violation of any NAAQS in any area; or
  2. Increase the frequency or severity of any existing violation of any NAAQS in any area.

(2) Notwithstanding any other requirements of this section and s. NR 489.08, an action subject to this chapter 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 such action is otherwise in compliance with all relevant requirements of the applicable implementation plan.

(3) Any analyses required under this section and s. NR 489.08 shall be completed, and any mitigation requirements necessary for a finding of conformity shall be identified in compliance with s. NR 489.10, before the determination of conformity is made.

**History:** Renum. (1) to (3) from NR 489.08 (6) to (8) and am. (2) and (3), Register, November, 1999, No. 527, eff. 12-1-99.

**NR 489.09 Procedures for conformity determinations of general federal actions.** (1) The analyses required under this chapter shall be based on the latest planning assumptions.

(a) 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 developed by the MPO, or other agency authorized to make such estimates for the area. The conformity determination shall also be based on assumptions and estimates about current and future background concentrations that are included in the current applicable implementation plan and based on the latest assumptions and estimates about other federal actions.

(b) 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 MPO or other agency authorized to make such estimates for the area.

(2) The analyses required under this chapter 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 and written approval of the EPA regional administrator is obtained for any modification or substitution, they may be modified or another technique substituted on a case-by-case basis or, where appropriate, on a generic basis for a specific federal agency program.

(a) 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 implementation plans in the state or area shall be used for the conformity analysis as specified below in subsd. 1. and 2.:

1. A new motor vehicle emissions model shall be used after EPA publishes in the federal register a notice of its availability.

2. A grace period of 3 months shall apply during which the motor vehicle emissions model previously specified by EPA as the most current version may be used. Conformity analyses for which the analysis was begun during the grace period or no more than 3 years 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, if a final determination as to conformity is made within 3 years of such analysis.

(b) 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, incorporated by reference in s. NR 484.05, 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.

(3) The air quality modeling analyses required under this chapter shall be based on the applicable air quality models, databases, and other requirements specified in the most recent version of the Guideline on Air Quality Models in Appendix W of 40 CFR part 51, incorporated by reference in s. NR 484.04, unless:

(a) The guideline techniques are inappropriate, in which case the model may be modified or another model substituted on a case-by-case basis or, where appropriate, on a generic basis for a specific federal agency program; and

(b) Written approval of the administrator is obtained for any modification or substitution.

(4) The analyses required under this chapter 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:

(a) The act mandated attainment year or, if applicable, the last year for which emissions are projected in the maintenance plan;

(b) The year during which the total of direct and indirect emissions from the action for each pollutant analyzed is expected to be the greatest on an annual basis; and

(c) Any year for which the applicable implementation plan specifies an emissions budget.

**History:** Cr. Register, September, 1995, No. 477, eff. 10-1-95.

**NR 489.10 Mitigation of air quality impacts.** (1) 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 such measures and tracking of such emission reductions, and enforcement of such measures shall be described, including an implementation schedule containing explicit timelines for implementation.

(2) 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 determinations. Such written commitment shall describe such mitigation measures and the nature of the commitment, in a manner consistent with sub. (1).

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

(4) 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 sub. (1).

(5) When necessary because of changed circumstances, mitigation measures may be modified so long as the new mitigation measures continue to support the conformity determination in accordance with ss. NR 489.08 to 489.09 and this section. Any proposed change in the mitigation measures is subject to the reporting requirements of s. NR 489.05 and the public participation requirements of s. NR 489.06.

(6) Written commitments to mitigation measures shall be obtained prior to a positive conformity determination and such commitments shall be fulfilled.

(7) After this implementation plan revision is approved by EPA, 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.

**History:** Cr. Register, September, 1995, No. 477, eff. 10-1-95; am. (5), Register, November, 1999, No. 527, eff. 12-1-99.

**NR 489.11 Savings provision.** The federal conformity regulations under 40 CFR part 51 subpart W and part 93 as in effect on July 1, 1998, in addition to any existing applicable state requirements, establish the conformity criteria and procedures necessary to meet the requirements of section 176 (c) of the act (42 USC 7506 (c)) until such time as this conformity implementation plan revision is approved by EPA. Following EPA approval of this revision to the applicable implementation plan, or a portion thereof, the approved state criteria and procedures govern conformity determinations and the federal conformity regulations contained in 40 CFR part 93 apply only for the portion, if any, of the state's conformity provisions that is not approved by EPA. In addition, any previously applicable implementation plan requirements relating to conformity remain enforceable until the state revises its applicable implementation plan to specifically remove them and that revision is approved by EPA.

**History:** Cr. Register, September, 1995, No. 477, eff. 10-1-95; am. Register, November, 1999, No. 527, eff. 12-1-99.