

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
Four Penn Center
1600 John F. Kennedy Boulevard
Philadelphia, Pennsylvania 19103-2852

SUBJECT: Technical Support Document (TSD) - Review of the 1997 8-Hour Ozone national ambient air quality standards (NAAQS) Conformity Determination for the Fiscal Year (FY) 2023-2026 Transportation Improvement Program (TIP) and the 2045 Metropolitan Transportation Plan (MTP) for the Kent County Portion of the Philadelphia-Wilmington-Atlantic City, PA-DE-NJ 8-Hour Ozone NAAQS nonattainment area submitted by the Dover/Kent County Metropolitan Planning Organization (DKCMPO)

FROM: Gregory Becoat
Planning & Implementation Branch (3AD30)

TO: Administrative Record of the Environmental Protection Agency (EPA) Review of the 1997 8-Hour Ozone national ambient air quality standards (NAAQS) Conformity Determination for the Fiscal Year (FY) 2023-2026 Transportation Improvement Program (TIP) and the 2045 Metropolitan Transportation Plan (MTP) for the Kent County Portion of the Philadelphia-Wilmington-Atlantic City, PA-DE-NJ 8-Hour Ozone NAAQS nonattainment area submitted by the Dover/Kent County Metropolitan Planning Organization (DKCMPO)

THRU: Michael Gordon, Chief
Planning & Implementation Branch (3AD30)

I. Background

The purpose of this document is to review the 1997 8-hour ozone NAAQS conformity determination of the FY 2023-2026 TIP and the 2045 MTP as prepared by the Dover/Kent County Metropolitan Planning Organization Council (DKCMPO). The purpose is to determine whether or not the conformity determination meets the requirements of the Clean Air Act (CAA) and the applicable regulations promulgated thereunder at 40 CFR part 93. On July 15, 2022, EPA Region III received the FY 2023-2026 TIP and 2045 MTP conformity determination requesting EPA to review.

The amendments to the FY 2023-2026 TIP and 2045 MTP were completed in order to adhere to the transportation conformity rule requirements. The conformity determinations were reviewed in accordance with the procedures and criteria of the Transportation Conformity Rule contained in 40 CFR part 93, sections 93.108, 93.110, 93.112, 93.113(b), and (c).

Transportation conformity is required under section 176(c) of the CAA to ensure that federally supported highway and transit projects, and other activities are consistent with (conform to) the purpose of the state implementation plan (SIP). The CAA requires federal actions in nonattainment and maintenance areas to “conform to” the goals of the SIP. This means that such

actions will not cause or contribute to violations of a NAAQS; worsen the severity of an existing violation; or delay timely attainment of any NAAQS or any interim milestone. Actions involving FHWA or Federal Transit Administration (FTA) funding or approval are subject to the Transportation Conformity Rule (40 CFR part 93, subpart A). Under this rule, metropolitan planning organizations (MPOs) in nonattainment and maintenance areas coordinate with state air quality and transportation agencies (EPA, FHWA, and FTA) to demonstrate that their metropolitan transportation plans and TIPs conform to applicable SIPs. This is typically determined by showing that estimated emissions from existing and planned highway and transit systems are less than or equal to the motor vehicle emission budgets (MVEBs) contained in a SIP.

On April 30, 2004 (69 FR 23858), EPA published air quality area designations for the 1997 8-hour ozone NAAQS. In that rulemaking action, EPA designated Kent County, Delaware (DE) as part of the larger Philadelphia-Wilmington-Atlantic City, PA-DE-NJ-MD nonattainment area with an attainment date of 2009. On May 21, 2013, EPA published a rule revoking the 1997 8-hour ozone NAAQS, for the purposes of transportation conformity, effective one year after the effective date of the 2008 8-hour ozone NAAQS area designations (77 FR 30160). On February 16, 2018, the United States Court of Appeals for the District of Columbia Circuit in *South Coast Air Quality Mgmt. District v. EPA* (“South Coast II,” 882 F.3d 1138) held that transportation conformity determinations must be made in areas that were either nonattainment or maintenance for the 1997 8-hour ozone NAAQS and attainment for the 2008 8-hour ozone NAAQS when the 1997 8-hour ozone NAAQS was revoked. These conformity determinations are required after February 16, 2019. Kent County, DE was maintenance at the time of the 1997 8-hour ozone NAAQS revocation on April 6, 2015 and was also designated attainment for the 2008 8-hour ozone NAAQS on May 21, 2012. As a result, the DKCMPO is no longer required to demonstrate conformity through regional emissions analysis for Kent County, DE. However, other conformity requirements, including the latest planning assumptions, interagency and public consultation, and fiscal constraint must still be addressed in the conformity assessment under the 1997 8-hour ozone NAAQS for Kent County, DE.

II. EPA’s Evaluation

For all areas where transportation conformity applies, Table 1 – Conformity Criteria, found in 40 CFR 93.109(b), lists the conformity criteria that apply for transportation plans, TIPs, and projects in 40 CFR 93. This conformity determination analysis must use the latest planning assumptions (40 CFR 93.110). In addition, other requirements must be met and documented in the transportation plan and TIP conformity determination including fiscal constraint (40 CFR 92.108), interagency consultation and public participation (40 CFR 93.112), and timely implementation of Transportation Control Measures (TCMs) in approved SIPs (40 CFR 93.113). Table 1 below demonstrates how the document prepared by DKCMPO satisfies the requirements for conformity determinations.

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| <p>Table 1. EPA’s Evaluation of the Conformity Determinations of the Plan and TIP Submitted by the Delaware Division Office of the Federal Highway Administration for Kent County, DE to EPA on July 15, 2022.</p> |
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| CRITERIA APPLICABLE TO PLAN AND/OR TIP | | | |
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| SECTION OF 40 CFR PART 93 | CRITERIA | Y/N | COMMENTS |
| 93.108 | Is the transportation plan fiscally constrained? | Y | EPA is deferring to FHWA, which has determined that the plan is fiscally constrained. |
| 93.110 (a-f) | Is the conformity determination based upon the latest planning assumptions? | N/A | The use of latest planning assumptions in 10 CFR 93.110 of the conformity rule generally applies to a regional emissions analysis. In the 1997 ozone NAAQS areas, the use of latest planning assumptions requirement applies to assumptions about transportation control measures (TCMs) in an approved SIP. However, the DKCMPO SIP maintenance plan does not include any TCMs. |
| 93.112 | Did the MPO make the conformity determination according to the consultation procedures of the conformity rule or the state's conformity SIP? | Y | <p>Consultation procedures were followed in accordance with DKCMPO consultation procedures. These procedures are based on the procedures of the state conformity SIP.</p> <p><u>Interagency Consultation</u> DKCMPO has consulted with all appropriate agencies. This includes the Delaware Department of Transportation, Delaware Transit Corporation, Delaware Department of Natural Resources and Environmental Control, Kent County, City of Dover, FHWA, FTA, and EPA.</p> <p><u>Public Consultation</u> DKCMPO has provided opportunities for public comment on the Conformity Determination.</p> |
| 93.113(b) and 93.113(c) | Are TCM's being implemented in a timely manner? | N/A | There are no TCMs in any applicable SIPs. |

III. Conclusion

Pursuant to FHWA's July 15, 2022 request, EPA has reviewed the air quality conformity determination for the FY 2023-2026 TIP and 2045 MTP submitted by DKCMPO. EPA has determined that the conformity determination for the 1997 8-hour ozone NAAQS for Kent County, DE meets the requirements of the CAA and the applicable regulations promulgated at 40 CFR part 93 as long as FHWA determines that the TIP and plan demonstrate fiscal constraint.