

The commission proposes amendments to §114.260, concerning Transportation Conformity, and a proposed revision to the State Implementation Plan (SIP) concerning Transportation Conformity.

EXPLANATION OF PROPOSED RULE

The Texas transportation conformity rule and its associated SIP were adopted on October 19, 1994, in response to the Federal Clean Air Act (FCAA) requirements. The FCAA required states to submit a revision to their SIP no later than November 25, 1994 establishing enforceable criteria and procedures for making conformity determinations for metropolitan transportation plans, transportation improvement programs, and projects funded by the Federal Highway Administration (FHWA) or the Federal Transit Administration (FTA). Emissions estimates of transportation plans, programs, and projects must be found to conform with their corresponding emissions estimates or budgets contained in the applicable SIP before they are approved or funded by the United States Department of Transportation or the Metropolitan Planning Organizations (MPOs) in nonattainment and maintenance areas. Failure to demonstrate transportation conformity will result in a partial loss of federal highway funding. The Texas transportation conformity SIP and rule were approved by the United States Environmental Protection Agency (EPA) on November 8, 1995. Since their initial promulgation, the EPA has amended the federal transportation conformity rules three times; on August 7, 1995, November 14, 1995, and August 15, 1997. As a result of the August 15, 1997 amendments, Texas is required to amend the SIP and state transportation conformity rule to incorporate the federal amendments by August 15, 1998.

The proposed amendments will incorporate, by reference, the August 15, 1997, amendments to the federal transportation conformity rule (40 CFR, Part 51 Subpart T and Part 93 Subpart A) with the exception of §93.102(d) and §93.105. Section 93.102(d) established a grace period for new nonattainment areas and has been disallowed as a result of the Sierra Club versus the EPA federal court case on November 4, 1997. Section 93.105 requires states to develop their own consultation procedures subject to the EPA guidelines. Section 114.260 establishes the interagency and public consultation procedures consistent with the EPA guidelines.

Most of the amendments to the federal transportation conformity rule are organizational or are slightly less stringent in nature. However, the amendment that requires a nonattainment area to demonstrate transportation conformity to a nitrogen oxide (NO_x) motor vehicle emissions budget, regardless of the area's NO_x waiver status, is more stringent than the current Texas transportation conformity rule. The proposed revisions to §114.260 will adopt the new federal NO_x requirements by reference.

This proposed rule revision will also simplify the transportation control measure (TCM) requirements by deleting references to §114.270(d), which is the TCM Enforcement Rule. Instead of being required to develop new TCMs consistent with the transportation conformity process to make up an emissions reduction shortfall, the nonattainment and maintenance area MPOs would only be required to ensure timely TCM implementation and report the implementation and emissions reductions status of adopted TCMs annually to the commission. Finally, this proposed rule will clarify the transportation conformity determination process by identifying who makes the determinations, who issues the joint

conformity finding, and when the conformity is effective. MPOs and their governing bodies, or the Texas Department of Transportation, if applicable, would make the transportation conformity determinations. Upon completion of the transportation conformity review process, the FHWA and the FTA would issue a joint conformity finding, indicating the transportation conformity status of the documents under review. The transportation conformity determination would be effective on the date of the joint conformity finding.

FISCAL NOTE

Mr. Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the rule as proposed is in effect, there may be significant fiscal implications for state or local government as a result of administration or enforcement of the rule. One of the federal rules being adopted by reference requires nonattainment or maintenance areas to demonstrate transportation conformity to a NO_x mobile source emissions budget, regardless of the area's NO_x waiver status. Current MPO officials in Texas nonattainment areas predict that it will be extremely difficult to demonstrate transportation conformity for NO_x. If they cannot, highway sanctions will be imposed, resulting in a partial loss of federal highway funding for implementing agencies. Additional resources will be needed to develop NO_x mobile source emissions budgets and sufficient on-road mobile source NO_x emissions control strategies to ensure an area's compliance.

The other portions of the rule being amended will have minimal fiscal impact. All of the affected agencies are subject to the requirements of the current transportation conformity rule, so the effect of

the rule will be minimal. The rule amendment would not increase or decrease costs for these agencies.

There will be no significant fiscal implications to the commission.

PUBLIC BENEFIT

Mr. Minick has also determined that for each year of the first five years the rule as proposed is in effect, the public benefit of this rule will be the limitation of on-road mobile source emissions to those specified in the SIP, which will result in the reduction and/or stabilization of on-road mobile source emissions and contribute to cleaner air. There will be no economic costs to persons or small businesses as a result of administration or enforcement of the proposed rule.

DRAFT REGULATORY IMPACT ANALYSIS

The proposed rulemaking is a “major environmental rule” because it deals with the construction of highway and other transportation projects within the nonattainment and maintenance areas of the state, most of which are major metropolitan areas. Incorporation of the new federal transportation conformity requirements by reference means that all nonattainment and maintenance areas will be required to demonstrate conformance of a budget for NO_x or be subject to loss of highway or other transportation funding. Under the existing rules, the nonattainment areas have not been required to conform to the NO_x budget.

However, the proposed rulemaking does not meet the other criteria for being subject to §2001.0025 because it does not exceed a standard set by federal law, does not exceed an express requirement of

state law, does not exceed a requirement of a delegation agreement or contract to implement a state and federal program, is not being proposed solely under the general powers of the commission, and is not being proposed on an emergency basis to reduce risks to human health from environmental exposure. Therefore, the commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225, and has determined that the rulemaking is not subject to §2001.0025.

The commission invites public comment on the draft Regulatory Impact Analysis.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for this rule pursuant to Texas Government Code Annotated, §2007.043. The following is a summary of that assessment. The specific purpose of the rule amendment is to meet the federal requirement to incorporate recent EPA changes to the federal transportation conformity rule, which requires all transportation plans, programs, and projects in nonattainment or maintenance areas to conform to the SIP. Other proposed amendments would simplify and reduce TCM requirements and clarify the transportation conformity determination process. The rule amendment will substantially advance this specific purpose by incorporating the required sections of the federal transportation conformity rule, as amended on August 15, 1997, by reference and including specific language that simplifies TCM requirements and clarifies the transportation conformity determination process. Promulgation and enforcement of this rule amendment will not affect private real property which is the subject of the rule because the proposed

rule only serves to ensure that transportation plans, programs, and projects in nonattainment and maintenance areas conform with the SIP.

COASTAL MANAGEMENT PROGRAM

The commission has determined that this rulemaking action is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et. seq.), the rules of the Coastal Coordination Council (31 TAC Chapters 501-506), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 31 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3) relating to actions and rules subject to the CMP, agency rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission has reviewed this action for consistency, and has determined that this rulemaking is consistent with the applicable CMP goals and policies. The primary CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations at 40 CFR to protect and enhance air quality in the coastal area. This rule amendment merely adopts the changes the EPA has made to 40 CFR Parts 51 and 93, and therefore, is in agreement with the CMP policy governing air pollutant emissions. In compliance with 31 TAC §505.22(e), the commission affirms that this rule is consistent with CMP goals and policies. Interested persons may submit comments on the consistency of the proposed rules with the CMP during the public comment period.

PUBLIC HEARING

A public hearing on this proposal will be held May 13, 1998 at 3:00 p.m. in Building F, Room 5108 at the Texas Natural Resource Conservation Commission complex, located at 12100 North IH-35, Park Technology Center, Austin. Individuals may present oral statements when called upon in order of registration. Open discussion will not occur during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

SUBMITTAL OF COMMENTS

Written comments may be mailed to Ms. Heather Evans, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 98003-114-AI. Comments must be received by 5:00 p.m., May 25, 1998. For further information, please contact Cathy Stephens, Air Quality Planning and Assessment Division, (512) 239-1749 or Alan J. (Buddy) Henderson, Air Policy and Regulations Division, (512) 239-1510.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the commission at (512) 239-4900. Requests should be made as far in advance as possible.

STATUTORY AUTHORITY

The amendment is proposed under the Texas Clean Air Act (TCAA), Texas Health and Safety Code, §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA. Revisions to §114.260 are also proposed under TCAA, §382.011, which provides the commission with the authority to control the quality of the state's air; §382.012, which provides for the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; §382.016, concerning monitoring requirements and examinations of records; and §382.019, which provides the commission with the authority to adopt rules to control and reduce emissions from engines used to propel land vehicles.

SUBCHAPTER G : TRANSPORTATION PLANNING

§114.260. Transportation Conformity.

(a) Purpose. The purpose of this section is to implement the requirements set forth in Title 40 of the Code of Federal Regulations (40 CFR) Part 93, Subpart A [Part 51, Subpart T] (relating to Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded, or Approved Under Title 23 United States Code or the Federal Transit Laws [Act]), which are the regulations developed by the EPA under the FCAA Amendments of 1990, §176(c). It includes policy, criteria, and procedures to demonstrate [for demonstrating] and assure [assuring] conformity of transportation planning activities with the State Implementation Plan (SIP).

(b) Applicability. This section applies to transportation-related pollutants for which an area is designated nonattainment or is subject to a maintenance plan. The pollutants include ozone, carbon monoxide, nitrogen dioxide, particles with an aerodynamic diameter of [less than or equal to] ten micrometers (PM_{10}) and smaller, and the precursors of those pollutants. The affected nonattainment and maintenance areas are listed in §101.1 of this title (relating to Definitions).

(c) CFR incorporation. The Transportation Conformity Rules, as specified in 40 CFR 93, Subpart A, (62 FR 43780) dated August 15, 1997, are incorporated by reference with the exception of §93.102(d) and §93.105. The requirements of §93.105 are addressed in this section. [The provisions

promulgated in the following listed sections of 40 CFR, Part 51, Subpart T, dated November 24, 1993, are hereby incorporated by reference: §51.392, 51.394, 51.398, 51.400, 51.404, 51.406, 51.408, 51.410, 51.412, 51.414, 51.416, 51.418, 51.420, 51.422, 51.424, 51.426, 51.428, 51.430, 51.432, 51.434, 51.436, 51.438, 51.440, 51.442, 51.444, 51.446, 51.448, 51.450, 51.452, 51.454, 51.456, 51.458, 51.460, 51.462, and 51.464.]

(d) Consultation. Under 40 CFR, §93.105, [§51.402] regarding consultation, the following procedures shall be undertaken in nonattainment and maintenance areas before making conformity determinations and before adopting applicable SIP revisions.

(1) General factors.

(A) For the purposes of this subsection, concerning consultation, the affected agencies shall include:

(i) EPA;

(ii) Federal Highway Administration (FHWA);

(iii) Federal Transit Administration (FTA);

(iv) Texas Department of Transportation (TxDOT);

(v) metropolitan planning organizations (MPOs) in nonattainment or maintenance areas;

(vi) local publicly-owned transit services in nonattainment or maintenance areas (the designated recipient of FTA §9 funds);

(vii) Texas Natural Resource Conservation Commission (commission);

and

(viii) local air quality agencies in nonattainment or maintenance areas (recipients of FCAA, §105 funds). [;]

(B) All correspondence with the affected agencies in subparagraph (A) of this paragraph shall be addressed to the following designated points [point] of contact:

(i) MPO: executive director or designee;

(ii) commission: executive director or designee;

- (iii) TxDOT: Director of Transportation Planning and Programming
or designee;

- (iv) TxDOT: Director of Environmental Affairs Division or designee;

- (v) FHWA: Administrator of Texas Division or designee;

- (vi) FTA: Director of Office of Program Development or designee -
FTA Region 6 [, or designee];

- (vii) EPA: Regional Administrator or designee - EPA Region 6 [, or
designee];

- (viii) TxDOT District: District Engineer or designee;

- (ix) local publicly-owned transit services (the designated recipient of
FTA §9 funds): General Manager or designee;

- (x) local air quality agencies (recipients of FCAA §105 funds):
Director or designee; and

(xi) commission regions in nonattainment or maintenance areas:
regional director or designee.

(2) Roles and responsibilities of affected agencies.

(A) The MPO, in cooperation with TxDOT and publicly owned transit services, shall consult with the agencies in paragraph (1)(A) of this subsection in the development of Metropolitan Transportation Plans (MTPs), Transportation Improvement Programs (TIPs), projects, technical analyses, travel demand or other modeling, and data collection. Specifically, the MPOs shall:

(i) allow the commission's Air Quality Planning and Assessment [Mobile Source] Division Director, or a designated representative, to be a voting member of [participate in meetings of] technical committees on surface transportation and air quality in each nonattainment and maintenance area in order to consult directly with the particular committee during the development of the transportation plans, programs, and projects;

(ii) send information on time and location, an agenda, and supporting materials (including preliminary versions of MTPs and TIPs) for all regularly scheduled meetings on surface transportation or air quality to each of the agencies specified in paragraph (1)(B) of this

subsection. This [Such] information shall be provided in accordance with the locally adopted public involvement process as required by 23 CFR, Part 450, §450.316(b)(1);

(iii) (No change.)

(iv) for the purposes of regional emissions analysis, initiate a consultation process with the affected agencies specified in paragraph (1)(A) of this subsection during the development stage of new or revised MTPs and TIPs to determine which transportation projects should be considered regionally significant and which projects should be considered to have a significant change in design concept and scope from the effective MTP and TIP. Regionally significant projects will include, at a minimum, all facilities classified as principal arterial or higher, or fixed guideway systems or extensions that offer an alternative to regional highway travel. Also, these include minor arterials included in the travel demand modeling process which serve significant interregional and intra regional travel, and connect rural population centers not already served by a principal arterial, or connect with intermodal transportation terminals not already served by a principal arterial. A significant change in design concept and scope is defined as a revision of a project in the MTP or TIP that would significantly affect model speeds, vehicle miles traveled, or network connections. In addition to new facilities, examples [may] include changes in the number of through lanes or length of project (more than one mile), access control, addition of major intermodal terminal facilities (such as new international bridges, park-and-ride lots, and transfer terminals), addition/deletion of interchanges, or changing between free and toll facilities. When a significant change in the design and

scope of a project is proposed, the MPO shall document the rationale for the change and give the affected agencies specified in paragraph (1)(A) of this subsection a 30-day opportunity to comment on their rationale. The MPO shall consider the views of each agency that comments, and respond in writing before [prior to] any final action on these issues. If the MPO receives no comments within 30 days, the MPO may assume concurrence by the agencies specified in paragraph (1)(A) of this subsection;

(v) include in the TIP a list of projects exempted from the requirements of a conformity determination under 40 CFR, Part 93, §93.126 and 93.127 [Part 51, §51.460 and §51.462]. The MPO shall consult with the affected agencies specified in paragraph (1)(A) of this subsection in determining if a project on the list has potentially adverse emissions for any reason, including whether or not the exempt project will interfere with implementation of an adopted transportation control measure (TCM). The MPO shall respond in writing to all comments within 30 days on final MTP and TIP documents. In addition, if [If] no comments are received as part of the subsequent public involvement process for the TIP, the MPO may proceed with implementation of the exempt project;

(vi) notify the affected agencies specified in paragraph (1)(A) of this subsection in writing of any MTP or TIP revisions or amendments which add or delete the exempt projects identified in 40 CFR, §93.126 [§51.460];

(vii) as required by 40 CFR, §§93.116, and 93.123 [§51.424 and §51.454 of the final EPA transportation conformity rule], and in cooperation with TxDOT, make a preliminary identification of those projects located at sites in PM₁₀ nonattainment and maintenance areas that require quantitative PM₁₀ Hot Spot analyses. After these projects have been identified, the MPO shall submit a list of these projects and sufficient data to the agencies specified in paragraph (1)(A) of this subsection for review and comment;

(viii) - (ix) (No change.)

(x) [under §114.270 of this title (relating to Transportation Control Measures),] ensure [the] timely TCM implementation [of TCMs] and report [to the commission annually] on the implementation and emissions reductions status of adopted TCMs annually to the commission. [If alternative TCMs or other reduction measures are deemed necessary, and these are not already included in the SIP, the MPO shall develop new TCMs with equal or greater emissions reductions consistent with the MTP, TIP, SIP, and conformity requirements, pursuant to §114.270(d) of this title. Any changes in TCMs will be coordinated with the affected agencies specified in paragraph (1)(A) of this subsection];

(xi) - (xii) (No change.)

(B) the commission, as the lead air quality planning agency, shall work in consultation with the agencies specified in paragraph (1)(A) of this subsection in developing applicable transportation-related SIP revisions, air quality modeling, general emissions analysis, emissions inventory, and all related activities. Specifically, the commission shall:

(i) (No change.)

(ii) schedule public hearings in order to gather public input on the applicable transportation-related SIP revisions and notify the agencies specified in paragraph (1)(B) of this subsection of the hearings according to 40 CFR, §93.105 [§51.102];

(iii) (No change.)

(iv) after consultation with the MPO regarding TCMs [under §114.270(a) of this title], distribute to all agencies specified in paragraph (1)(B) of this subsection and other interested persons the list of TCMs proposed for inclusion in the SIP. In consultation with the agencies specified in paragraph (1)(A) of this subsection, the commission shall determine whether past obstacles to implementation of TCMs have been identified and are being overcome, and determine whether the MPOs and the implementing agencies are giving maximum priority to approval or funding for TCMs. Also, the commission shall consider, in consultation with the affected agencies, whether

delays in TCM implementation necessitate a SIP revision to remove TCMs or to substitute TCMs or other emission reduction measures.

(v) consult with the applicable agencies specified in paragraph (1)(A) of this subsection, in order to cooperatively choose conformity tests and methodologies for isolated rural nonattainment and maintenance areas, as required by 40 CFR, §93.109(g)(2)(iii).

(3) General procedures.

(A) - (B) (No change.)

(C) For the purposes of evaluating and choosing a model (or models) and associated methods and assumptions to be used in Hot-Spot and Regional Emissions Analyses, agencies specified in paragraph (1)(A) of this subsection shall participate in a working group identified as the Technical Working Group for Mobile Source Emissions (TWG). The frequency of meetings and agendas for the group will be cooperatively determined by the agencies specified in paragraph (1)(A) of this subsection. [the commission shall establish a working group identified as the Transportation and Air Quality Technical (TAQT) Technical Working Group (TWG). The TAQT Working Group shall include the agencies specified in paragraph (1)(A) of this subsection. The frequency of meetings and agendas for them will be determined by the commission in cooperation with the agencies specified

in paragraph (1)(A) of this subsection.] The function of this working group may be delegated to an existing group with similar composition and purpose.

(D) The commission, affected MPOs, affected local air quality agencies, and TxDOT shall cooperatively evaluate events which will trigger the need for new conformity determinations. New conformity determinations may be triggered by events established in 40 CFR, §93.104 [§51.400] as well as other events, including emergency relief projects that require substantial functional, locational, and capacity changes, or in the event of any other unforeseeable circumstances.

(E) The MPO and its governing body, or TxDOT if applicable, shall make conformity determinations for all MTPs, TIPS, regionally significant projects, and all other events as required by 40 CFR, Part 93, Subpart A and this section. Upon completion of the transportation conformity determination review process, FHWA and FTA will issue a joint conformity finding, indicating the transportation conformity status of the document(s) under review. The document(s) transportation conformity status is effective on the date of the joint conformity finding.

(4) Conflict resolution.

(A) The commission and the MPO (or TxDOT where appropriate) shall make a good-faith effort to address the major concerns of the other party in the event they are unable to

reach agreement on the conformity determination of a proposed MTP or TIP. The efforts shall include meetings of the agency executive directors, if necessary.

(B) In the event that the MPO or TxDOT determines that every effort has been made to address the commission's [commission] concerns, and that no further progress is possible, the MPO or TxDOT shall notify the commission executive director in writing to this effect. This subparagraph shall be cited by the MPO or TxDOT in any notification of a conflict which may require action by the Governor, or his or her delegate under subparagraph (C) of this paragraph.

(C) The commission has 14 calendar days from date of receipt of notification, as required in subparagraph (B) of this paragraph, to appeal to the Governor. If the commission appeals to the Governor, the final conformity determination must then have the concurrence of the Governor. The Governor may delegate his or her role in this process, but not to the commission or commission staff [of the commission], a local air quality agency, the Texas Transportation Commission or [staff of]TxDOT staff, or an MPO. This subparagraph shall be cited by the commission in any notification of a conflict which may require action by the Governor or his or her delegate. If the commission does not appeal to the Governor within 14 calendar days from receipt of written notification, the MPO or TXDOT may proceed with the final conformity determination.

(5) Public comment on conformity determinations. Consistent with the requirements of 23 CFR, Part 450, concerning public involvement, the agencies [specified in paragraph (1)(A)of this

subsection] making conformity determinations on transportation plans, programs, and projects shall establish a proactive public involvement process which provides opportunity for public review and comment. This process shall, at a minimum, provide reasonable public access to technical and policy information considered by the agency at the beginning of the public comment period and before [prior to] taking formal action on conformity determinations for all MTPs and TIPs, [.] as required by 23 CFR §450.316 (b) and this section. Any charges imposed for public inspection and copying should be consistent with the fee schedule contained in 49 CFR 7.95. In addition, these agencies shall address in writing any public comment claiming that a non-FHWA/FTA funded, regionally significant project has not been properly represented in the conformity determination for a MTP or TIP. Finally [Also], these agencies shall provide opportunity for public involvement in conformity determinations for projects where otherwise required by law.

(6) (No change.)