The Texas Commission on Environmental Quality (commission) adopts amendments to §§114.21, 114.260, and 114.452 and the corresponding revisions to the state implementation plan (SIP). Section 114.21 is adopted *with change* to the proposed text as published in the February 7, 2003 issue of the *Texas Register* (28 TexReg 1043), and §114.260 and §114.452 are adopted *without changes* and will not be republished. The amendments and revised SIP narrative will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the SIP.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The statutory citation, "Texas Dealer Law, Article 6686, Vernon's Civil Statutes, Title 43, Texas Administrative Code" referenced in §114.21(d) has been repealed by legislative action and recodified in Texas Transportation Code, §503.001 with some changes to the terms used in the original citation. Therefore, the current citation as referenced in §114.21(d) to define the terms "wholesale dealer" and "retail dealer" is no longer valid. In addition, when the statutory language was recodified in the Texas Transportation Code, some terms were combined and their definitions broadened, which will allow the adopted revisions in §114.21(d) to simply reference the term "dealer" instead of the previous two specific terms.

Section 114.21(e)(2) previously required that certain signed statements be retained by certain sellers of vehicles, but did not specify the length of time. Because the documents pertain to the possible need to fix the emissions systems on the sold vehicles, and because there are mechanisms in place to require testing of the emissions systems in ozone nonattainment areas on an annual basis, the commission finds that the records should be retained for only two years.

The Federal Clean Air Act (FCAA) Amendments of 1990 (42 United States Code (USC), §§7401 *et seq*.) required each state to submit a revision to its SIP by 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 or the Federal Transit Administration. Final rules regarding conformity requirements were published by EPA November 24, 1993. The Texas SIP revision which incorporated conformity requirements was adopted October 19, 1994, and was approved by EPA November 8, 1995. EPA has amended the federal transportation conformity rule five times: August 7, 1995; November 14, 1995; August 15, 1997; April 10, 2000; and August 6, 2002. The commission previously incorporated the federal changes up to and including the 1997 amendment. The commission is now updating its rule to incorporate the latest federal amendments.

The Houston/Galveston ozone nonattainment area (HGA) is classified as Severe-17 under 42 USC, §§7401 *et seq*. Therefore, the area is required to attain the one-hour ozone standard of 0.12 parts per million (ppm) by November 15, 2007. Division 6, Lawn Service Equipment Operating Restrictions, of Subchapter I, adopted by the commission in 2000, was part of the HGA Post-1996 Rate-of-Progress (ROP)/Attainment Demonstration SIP that was designed to meet the one-hour ozone standard. Implementation of this control strategy is necessary in order for the HGA nonattainment area to comply with the requirements of the FCAA and achieve attainment for ozone. However, the commission finds that for two reasons the lawn service equipment operating restrictions should be amended to allow those in the lawn and garden industry more time to submit their emission reduction plans.

First, the commission finds that, due to flaws in the Nonroad Assessment Tool and Estimator (NATE) model, the lawn care industry does not have sufficient time to create an emission reduction plan before the current May 31, 2003 deadline. The NATE model was designed to aid the lawn and garden industry in development of emission reduction plans. However, programming flaws were discovered after the NATE model was made available to the public. These flaws have been corrected, and the program is now back on the commission Web site. Second, the commission is approving a delay of the compliance requirements associated with the lawn and garden rules until 2004 to provide commission staff with the time needed to reexamine the need for the rules as part of the mid-course review of the entire HGA SIP. If it is determined that these rules are not needed or can be replaced by more effective emission reduction strategies, the new deadline reduces the expenditure of unnecessary resources in planning for compliance. Because the adopted amendment to §114.452 only concerns the date by which emission reduction plans must be submitted to the commission, no changes in the amount of emission benefits that were originally estimated to be achieved by the lawn and garden rules are anticipated.

SECTION BY SECTION DISCUSSION

The amendment to §114.21(c)(2) changes the name of the agency to its new name. The amendment to §114.21(d) replaces the terms “wholesale dealers” and “retail dealers” with the term “dealer” and identifies the statutory citation defining this term as "Texas Transportation Code, §503.001." The amendment makes reformatting and textual revisions that appropriately reflect the new broader term. This revision is necessary because the current statutory citation is no longer valid. The “Texas Dealer Law, Article 6686, Vernon’s Texas Civil Statutes, Title 43, Texas Administrative Code” was repealed by legislative action and the regulatory language was recodified with changes in Texas Transportation Code, §503.001. In the amendment to §114.21(e)(2), a period of two years is added for the retention

of certain records, rather than the previous indefinite period. Because the documents pertain to the possible need to fix the emissions systems on the sold vehicles, and because there are mechanisms in place to require testing of the emissions systems in ozone nonattainment areas on an annual basis, the commission finds that the records should be retained for only two years. Section 114.21(a)(1) has been changed from proposal to correct a typographical error.

The amendment to §114.260(c) incorporates the date (August 6, 2002) that EPA last amended the federal transportation conformity rule. The changes to federal regulations that are incorporated into the rule include the following. 40 Code of Federal Regulations (CFR) §93.102 was amended by adding as subsection (d) a grace period for new nonattainment areas. 40 CFR §93.102 implements an FCAA amendment, enacted October 27, 2000, that provides a one-year grace period before conformity is required in areas that are designated nonattainment for a given air quality standard for the first time. 40 CFR §93.104(e)(2), relating to the frequency of conformity determinations, was amended to change the point by which a conformity determination must be made following a state's submission of a control strategy implementation plan or maintenance plan for the first time (an "initial" SIP submission). 40 CFR §93.104(e)(2) requires conformity to be determined within 18 months of EPA's affirmative finding that the SIP's motor vehicle emission budgets are adequate. Prior to this action, the conformity rule required a new conformity determination within 18 months of the submission of an initial SIP. In order to take advantage of these positive changes and to provide consistency between state and federal conformity requirements, the commission adopts all of the current federal rules with the exception of 40 CFR §93.105, which is met through the remainder of the state conformity rule. The commission removes the reference in the rule to 40 CFR §93.102(d) because this reference was originally included in the rule to acknowledge that the grace period at that time had been invalidated by a court challenge.

However, the new 40 CFR §93.102(d) is now authorized by congressional action, and the commission adopts by reference the grace period which it provides.

The amendments to §114.260(d) correct typographical errors, change the language to be consistent with current agency style and format, and update the name of the agency and the title of the Strategic Assessment Division director. The amendments to §114.260(e) clarify that compliance with the rule must begin upon the date of EPA approval of the SIP and rule revisions under FCAA, §176(c)(4)(C) and remove outdated references to previous adoption dates. The commission notes however, that the one-year conformity grace period currently applies as a statutory matter for all newly designated nonattainment areas, since this grace period was required as a matter of law once the FCAA was amended, and therefore does not require EPA approval before it is effective.

The amendments to §114.452 include changes to make the text consistent with the current agency style and format for rules and to correct typographical errors. The amendment to §114.452(c) changes the deadline to submit an emission reduction plan from May 31, 2003 to May 31, 2004. The affected area still includes the following counties within the HGA nonattainment area: Brazoria, Fort Bend, Galveston, Harris, and Montgomery. The effective date of the lawn and garden rules remains April 1, 2005. The intent of this amendment is to change the deadline by which emission reduction plans must be submitted to the commission. The amendment to §114.452(c) also changes the deadline for plan approval from May 31, 2004 to March 31, 2005 to account for the later submission deadline but still provide for approval prior to the compliance date. Amended §114.452(c) states "… commercial operators or persons not exempt under subsection (b) of this section who submit an emissions reduction plan by May 31, 2004 (which is approved by the executive director and the EPA no later than March

31, 2005) are exempt from operating hour restrictions upon implementation of these rules in 2005, and are permitted to operate during the restricted hours." In addition to changing the submission deadline the commission also deleted the sentence which states that the executive director may allow plans to be submitted after May 31, 2003. This change is made in order to resolve the conflict between this date and the new deadline of May 31, 2004.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the amendments do not meet the definition of a "major environmental rule." A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The amended sections make minor amendments to the anti-tampering rules, adopt by reference federal changes to the transportation conformity rules, and extend the deadline for filing an emission reduction plan for compliance with the lawn and garden rules. These amendments do not require additional emission controls or new capital expenses.

In addition, Texas Government Code, §2001.0225, only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4)

adopt a rule solely under the general powers of the agency instead of under a specific state law. The amendments to Chapter 114 are not subject to the regulatory analysis provisions of §2001.0225(b), because the amended rules do not meet any of the four applicability requirements.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact assessment for the adopted rules. Promulgation and enforcement of the rules will not burden private real property. The amended sections will not affect private property in a manner which restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Therefore, the adopted rules do not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined the rulemaking relates to an action or actions 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*.), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 30 TAC §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and has determined that the amendments are consistent with the applicable CMP goal expressed in 31 TAC §501.12(1) of protecting and preserving the quality and values of coastal natural resource areas, and the policy in 31 TAC §501.14(q), which requires that the commission protect air quality in coastal areas. The

amendments update definitions related to motor vehicle dealers to correspond to changes made in statute, set a retention period for certain records, incorporate updates to federal rules on transportation conformity, and delay by one year the deadline by which lawn and garden companies must submit emission reduction plans to the commission. No new contaminants will be authorized by these amendments, although the submittal of emission reduction plans will be delayed on the use of lawn and garden equipment in the HGA nonattainment area.

PUBLIC COMMENT

Public hearings on this proposal were held in Houston on February 27, 2003, and in Austin on February 28, 2003, but no oral comments were received. The public comment period ended at 5:00 p.m. on February 28, 2003. Written comments were submitted by EPA and the Houston-Galveston Area Council (HGAC), indicating that they supported the amendments to §114.260.

RESPONSE TO COMMENTS

EPA stated that the draft revisions to the SIP and the rules had been received and reviewed. EPA commented that it supported the changes to §114.260 and did not have comments on the amendments to the other sections.

The commission appreciates the support for this rulemaking.

HGAC stated that it had previously provided comments in favor of having the 18-month conformity period begin when EPA finds that the motor vehicle emissions budgets in the SIP are adequate, rather than when a budget is initially submitted. HGAC commented that the method of beginning the period

with submission of the budget can result in having to start the conformity process prior to the EPA adequacy finding because of the length of time needed to make a conformity determination and stated that in one case this requirement resulted in wasted resources when EPA found the budgets inadequate. HGAC further commented that revised §114.260 allows a more logical, streamlined conformity process without the potential of a futile exercise by a metropolitan planning organization, and without affecting attainment.

The commission appreciates the support for this rulemaking.

HGAC commented that the one-year grace period for areas newly designated as nonattainment areas provides a good window for conducting a full conformity analysis. HGAC further commented that the grace period provides for better public review, which is integral to the conformity process.

The commission appreciates the support for this rulemaking.

SUBCHAPTER B: MOTOR VEHICLE ANTI-TAMPERING REQUIREMENTS

§114.21

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under Texas Clean Air Act (TCAA), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendment is also adopted under TCAA, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to develop a general, comprehensive plan for control of the state's air; §382.019, which provides the commission the authority to adopt rules to control and reduce emissions from engines used to propel land vehicles; and §382.208, which provides the commission the authority to coordinate with federal, state, and local transportation planning agencies to develop and implement transportation programs and other measures necessary to demonstrate and maintain attainment of the national ambient air quality standard (NAAQS) and to protect the public from exposure to hazardous air contaminants from motor vehicles.

§114.21. Exemptions.

(a) The following exemptions shall apply to specified motor vehicles or motor vehicle engines.

(1) Motor vehicles or motor vehicle engines which are intended solely or primarily for legally sanctioned motor competitions, for research and development uses, or for instruction in a bona fide vocational training program where the use of a system or device would be detrimental to the purpose for which the vehicle or engine is intended to be used are exempt from the provisions of §114.20(a), (b), and (d) of this title (relating to Maintenance and Operation of Air Pollution Control Systems or Devices Used to Control Emissions from Motor Vehicles).

(2) Motor vehicles or motor vehicle engines intended solely or primarily for research and development uses, or for instruction in a bona fide vocational training program where the introduction of leaded gasoline or the circumvention of an emission control system or device is necessary for the intended purposes of the program are exempt from the provisions of §114.20(e) of this title.

(b) Vehicles belonging to members of the U.S. Department of Defense (DoD) participating in the DoD Privately Owned Vehicle Import Control Program or other persons being transferred to a foreign country are exempt from the provisions of §114.20(a), (b), and (d) of this title if the following conditions are met.

(1) Only the catalytic converter, oxygen sensor, and/or the fuel filler inlet restrictor are removed from the vehicle.

(2) The vehicle is delivered to the appropriate port for overseas shipment within 30 days after the emission control device(s) is removed.

(3) If the vehicle is returned to the United States, all systems or devices used to control emissions from the vehicle are restored to good operable condition within 30 days of pick-up of the vehicle from the appropriate port of importation.

(4) Documentation shall be kept with the vehicle at all times while the vehicle is operated in Texas which provides sufficient information to demonstrate compliance with all appropriate qualifications and conditions of this exemption, including the following:

(A) the unique vehicle identification number (VIN) of the subject vehicle;

(B) the agency, company, or organization which employs the owner of the subject vehicle;

(C) the country to which the owner of the subject vehicle is being transferred;

(D) the dates when applicable alterations were performed on the subject vehicle;

(E) the date when the subject vehicle is scheduled to be delivered to the appropriate port for shipment out of the United States; and

(F) the date when the subject vehicle is picked up from the port of importation upon returning to the United States.

(c) Motor vehicles are exempt from the provisions of §114.20(a), (b), and (d) of this title if the following conditions apply:

(1) the motor vehicles are registered as farm vehicles with the Vehicle Titles and Registration Division of the Texas Department of Transportation, are intended solely or primarily for use on a farm or ranch, and their air pollution control devices or systems were removed or made inoperable prior to June 1, 2000; or

(2) the motor vehicles were granted an exemption from the provisions of §114.20(a) and (b) of this title by the commission or its predecessor agency prior to June 1, 2000.

(A) A copy of the exemption shall be kept with the vehicle at all times and shall be available for inspection by representatives of the commission, the Texas Department of Public Safety (DPS), or any other law enforcement agency upon request. The approved exclusion shall also be presented to the certified vehicle inspector before each annual vehicle safety inspection of the vehicle as administered by the DPS.

(B) The exemption shall be void and all pollution control systems and devices replaced on the vehicle and/or engine covered by the exclusion when the vehicle changes ownership or is no longer used for the purpose identified in the exclusion application. The executive director shall be informed in writing prior to the change of ownership or usage.

(d) The following vehicle transactions involving a "dealer" as defined in Texas Transportation Code, §503.001, are exempt from the requirements of §114.20(c) of this title:

(1) sales or transfers from one dealer to another; and

(2) sales, transfers, or trade-ins from an individual to a dealer.

(e) Federal, state, and local agencies or their agents which sell abandoned, confiscated, or seized vehicles and any commercial vehicle auction facilities are exempt from the provisions of §114.20(c) of this title if the following conditions are met.

(1) The DPS motor vehicle safety inspection certificates must be removed from the vehicle and destroyed before the vehicle may be offered for sale or displayed for public examination.

(2) All potential buyers of the vehicle must be informed that deficiencies may be present in the vehicle pollution control systems on the vehicle. The buyer must also be informed of the liabilities to the buyer under §114.20 of this title and §114.50 of this title (relating to Vehicle Emissions Inspection Requirements) of operating the vehicle prior to the adequate restoration of all pollution

control systems or devices on the vehicle as originally equipped. The seller of the vehicle shall provide to the buyer a written acknowledgment of the receipt of this information which must be signed by the buyer prior to completion of the sales transaction. The seller shall retain a copy of this signed acknowledgment for two years and shall make it available, upon request.

(f) The owner of a motor vehicle which has been totally disabled by accident, age, or malfunction and which will no longer be operated is exempt from the provisions of §114.20(c) of this title if the DPS motor vehicle safety inspection certificate is removed and destroyed before the vehicle is offered for sale or displayed for public examination.

SUBCHAPTER G: TRANSPORTATION PLANNING

§114.260

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under TCAA, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendment is also adopted under TCAA, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to develop a general, comprehensive plan for control of the state's air; §382.019, which provides the commission the authority to adopt rules to control and reduce emissions from engines used to propel land vehicles; and §382.208, which provides the commission the authority to coordinate with federal, state, and local transportation planning agencies to develop and implement transportation programs and other measures necessary to demonstrate and maintain attainment of NAAQS and to protect the public from exposure to hazardous air contaminants from motor vehicles.

§114.260. Transportation Conformity.

(a) Purpose. The purpose of this section is to implement the requirements set forth in Title 40 Code of Federal Regulations (CFR) Part 93, Subpart A (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), which are the regulations developed by the EPA under the FCAA Amendments of 1990, §176(c). It includes policy, criteria, and procedures to demonstrate and assure 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 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 Part 93, Subpart A, (62 FR 43780) dated August 15, 1997 and amended through August 6, 2002, are incorporated by reference with the exception of §93.105. The requirements of §93.105 are addressed in this section.

(d) Consultation. Under 40 CFR §93.105, 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 §5307 (formerly §9 funds);

(vii) Texas Commission on Environmental Quality (TCEQ or commission);

(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 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;

(vii) EPA: regional administrator or designee - EPA Region 6;

(viii) TxDOT District: district engineer or designee;

(ix) local publicly owned transit services (the designated recipient of FTA §5307 (formerly §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 Strategic Assessment Division director, or a designated representative, to be a voting member 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 information shall be provided in accordance with the locally adopted public involvement process as required by 23 CFR §450.316(b)(1);

(iii) after preparation of final draft versions of MTPs and TIPs, and before adoption and approval by the affected governing body, ensure that the agencies specified in paragraph (1)(B) of this subsection receive a copy, and that they are included in the local area's public participation process as required by the Metropolitan Planning Rule, 23 CFR §450.316(b)(1). Upon approval of MTPs and TIPs, MPOs shall distribute final approved copies of the documents to the agencies specified in paragraph (1)(B) of this subsection;

(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 intraregional 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 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 the rationale. The MPO shall consider the views of each agency that comments, and respond in writing before 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 §93.126 and §93.127. 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 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;

(vii) as required by 40 CFR §93.116 and §93.123, and in cooperation with TxDOT, make a preliminary identification of those projects located at sites in PM_{10} nonattainment and maintenance areas that require quantitative PM_{10} 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) before adoption of any new or substantially different methods or assumptions used in the hot spot or regional emmissions analysis, provide an opportunity for the agencies specified in paragraph (1)(A) of this subsection to review and comment;

(ix) in coordination with TxDOT and the local transit agencies, disclose all known, regionally significant, non-federal projects, even if the sponsor has not made a final decision on its implementation; include all disclosed, or otherwise known, regionally significant non-federal projects in the regional emissions analysis for the nonattainment area; respond in writing to any comments that known plans for a regionally significant non-federal project have not been properly reflected in the regional emissions analysis; and have recipients of federal funds determine annually that their regionally significant non-federal projects are included in a conforming MTP or TIP, or are included in a regional emissions analysis of the MTP and TIP. The MPO shall consult with project sponsors to determine the non-federal projects' location and design concept and scope to be used in the

regional emissions analysis, particularly for projects for which the sponsor does not report a single intent because the sponsor's alternatives selection process is not yet complete. If the MPO assumes a design concept and scope which is different from the sponsor's ultimate choice, the next regional emissions analysis for a conformity determination must reflect the most recent information regarding the project's design concept and scope;

(x) ensure timely TCM implementation and report on the implementation and emissions reductions status of adopted TCMs annually to the commission;

(xi) cooperatively share the responsibility for conducting conformity determinations on transportation activities which cross the borders of MPOs or nonattainment and maintenance areas. The affected MPOs will enter into a Memorandum of Agreement (MOA) which will define the effective boundary and the respective responsibilities of each MPO for regional emissions analysis. The MPOs will be responsible within their respective metropolitan area boundaries and, at their option, beyond to the boundaries of the nonattainment/maintenance areas, for regional emissions analysis. Adjacent MPOs or nonattainment/maintenance areas or basins will share information concerning air quality modeling assumptions and emission rates that affect both areas; and

(xii) for the purpose of determining the conformity of all projects outside the metropolitan planning area, but within the nonattainment or maintenance area, enter into an MOA involving the MPO and TxDOT for cooperative planning and analysis of projects.

(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) set agendas and schedule meetings to seek advice and comments from all agencies specified in paragraph (1)(A) of this subsection during preparation of applicable transportation-related SIP revisions;

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

(iii) provide copies of final documents, including applicable adopted or approved transportation-related SIP revisions and supporting information, to all agencies specified in paragraph (1)(B) of this subsection;

(iv) after consultation with the MPO regarding TCMs, 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; and

(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).

(C) Any group, entity, or individual planning to construct a regionally significant transportation project which is not an FHWA-FTA project (including projects for which alternative locations, design concept and scope, or the no-build option are still being considered) must disclose project plans to the MPO on a regular basis and disclose any changes to those plans immediately. This requirement also applies to recipients of funds designated under Title 23 United States Code or the Federal Transit Laws.

(3) General procedures.

(A) The MPO, TxDOT, or the commission, as applicable, shall respond to comments of affected agencies on MTPs, TIPs, projects, or SIP revisions in accordance with the public involvement procedures that govern the involved action. The MPO, TxDOT, or the commission, as applicable, shall include all comments and the replies to those comments with final documents when they are submitted for adoption by the agency's governing board. In the event that comments are not adequately resolved, the procedures outlined in paragraph (4) of this subsection regarding conflict resolution shall apply.

(B) Because the validity of the regional emissions analysis depends on transportation modeling assumptions which need periodic updates, the MPO, with the assistance of TxDOT and local publicly owned transit agencies, will conduct meetings with the agencies specified in paragraph (1)(A) of this subsection to cooperatively establish research and data collection efforts and regional model development (e.g., household/transportation surveys).

(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. The frequency of meetings and agendas for them will be cooperatively determined by 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 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 (including consultation, public participation, and all other requirements of this section), FHWA and FTA will issue a joint conformity finding, indicating the transportation conformity status of the document(s) under review. The effective date of the conformity determination for an area is the date of the joint conformity finding made by FHWA-FTA.

(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 concerns, and that no further progress is possible, the MPO or TxDOT shall notify the TCEQ 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, a local air quality agency, the Texas Transportation Commission or 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 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 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 an MTP or TIP. Finally, these agencies shall provide opportunity for public involvement in conformity determinations for projects where otherwise required by law.

(6) In formulating an enforcement policy regarding a violation of this subsection (relating to the consultation process) the commission may consider any good-faith effort made by the consulting agencies to comply.

(e) Compliance date. Compliance with this section shall begin on the date of EPA approval of the transportation conformity SIP associated with this rule.

SUBCHAPTER I: NON-ROAD ENGINES

DIVISION 6: LAWN SERVICE EQUIPMENT OPERATING RESTRICTIONS

§114.452

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under TCAA, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendment is also adopted under TCAA, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to develop a general, comprehensive plan for control of the state's air; §382.019, which provides the commission the authority to adopt rules to control and reduce emissions from engines used to propel land vehicles; and §382.208, which provides the commission the authority to coordinate with federal, state, and local transportation planning agencies to develop and implement transportation programs and other measures necessary to demonstrate and maintain attainment of NAAQS and to protect the public from exposure to hazardous air contaminants from motor vehicles.

§114.452. Control Requirements.

(a) No handheld or non-handheld lawn and garden service equipment powered by spark-ignition engines of 25 horsepower (hp) and below shall be started or operated between the hours of 6:00 a.m. and noon, during the time period from April 1 to October 31, in the counties listed in §114.459 of this title (relating to Affected Counties and Compliance Dates), except as specified in subsections (b) and (c) of this section.

(b) The following uses of lawn and garden service equipment powered by spark-ignition engines of 25 hp and below are exempt from the requirements of this division:

(1) any use at a domestic residence by the owner of, or a resident at, that domestic residence;

(2) any use by a noncommercial operator; or

(3) any use that is exclusively for emergency operations to protect human health and safety or the environment, including equipment being used in the repair of facilities, devices, systems, or infrastructure that have failed, or are in danger of failing, in order to prevent immediate harm to public health, safety, or the environment.

(c) Commercial operators or persons not exempt under subsection (b) of this section who submit an emissions reduction plan by May 31, 2004, (which is approved by the executive director and

the EPA no later than March 31, 2005) are exempt from operating hour restrictions upon implementation of these rules in 2005, and are permitted to operate during the restricted hours. In any event, a plan must be approved prior to the use of that plan for compliance with the requirements of this division. In order to be approved, the plan must demonstrate nitrogen oxide and volatile organic compound reductions equivalent to those required by the rules being requested for exemption, and must contain adequate enforcement provisions.

(d) Commercial operator is defined as any person who receives payment or compensation in exchange for operating lawn and garden service equipment powered by spark-ignition engines of 25 hp or below where the payment or compensation is required to be reported as income by the United States Internal Revenue Code. This term also includes any employees or contractors of any person as defined in the Texas Health and Safety Code, §382.003(10).