The Texas Commission on Environmental Quality (commission) adopts an amendment to §114.260 and corresponding revisions to the Transportation Conformity State Implementation Plan (SIP) for Texas Nonattainment and Maintenance Areas. Section 114.260 is adopted *with change* to the proposed text as published in the December 3, 2004, issue of the *Texas Register* (29 TexReg 11262).

The amendment and revised SIP narrative will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the SIP.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The Federal Clean Air Act (FCAA) Amendments of 1990 as codified in 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 (FHWA) or the Federal Transit Administration (FTA). Final rules regarding conformity requirements were published by EPA on November 24, 1993. The Texas SIP revision, which originally incorporated conformity requirements, was adopted October 19, 1994, and approved by EPA on November 8, 1995. EPA has amended the federal transportation conformity rule six times: August 7, 1995; November 14, 1995; August 15, 1997; April 10, 2000; August 6, 2002; and July 1, 2004. The commission previously incorporated the federal changes up to and including the 2002 amendments. The commission is now updating its rule to incorporate the July 1, 2004, federal amendments. The addition of these changes to the existing state rules will allow metropolitan planning organizations in Texas nonattainment areas to take advantage of the flexibility in the recent federal amendments during their required June 2005 conformity determinations.

Transportation conformity is required under FCAA, §176(c), to ensure that federally supported highway and transit project activities are consistent with the purpose of the state's SIP. Conformity currently applies under EPA's rules to areas that are designated nonattainment, and those redesignated to attainment after 1990 (maintenance areas) with plans developed under the FCAA. Conformity to the purpose of the SIP means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment of the relevant National Ambient Air Quality Standards (NAAQS). EPA's transportation conformity rule establishes the criteria and procedures for determining whether transportation activities conform to the SIP.

EPA has amended the transportation conformity rule to finalize several provisions that were proposed June 30, 2003 and November 5, 2003. The transportation conformity rule, as amended, includes criteria and procedures for implementing conformity in accord with the new eight-hour ozone NAAQS and particles with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers ($PM_{2.5}$) NAAQS. The final EPA rule also addresses a March 2, 1999, ruling by the United States Court of Appeals for the District of Columbia Circuit (*Environmental Defense Fund v. EPA, et al., 167 F. 3d 641, D.C. Cir. 1999*). Specifically, the court's ruling affected provisions of the rule that pertained to funding of metropolitan transportation plans (MTPs) and transportation improvement programs (TIPs); use of the motor vehicle emission budget (MVEB) prior to SIP approval; federal transportation projects in areas without a conforming MTP and TIP; timing of conformity consequences following an EPA SIP disapproval; and use of submitted safety margins in areas with approved SIPs submitted prior to November 24, 1993. Lastly, the EPA final rule incorporates into the transportation conformity rule the EPA and Department of Transportation (DOT) guidance that has been utilized in place of certain regulatory provisions of the rule since the *Environmental Defense Fund v. EPA* court decision. DOT is EPA's federal partner in implementing the transportation conformity regulation.

The primary changes to 40 Code of Federal Regulations (CFR) Part 93 regarding transportation conformity include the following. 40 CFR §93.101 adds new definitions for one-hour ozone NAAQS; eight-hour ozone NAAQS; donut areas; isolated rural nonattainment and maintenance areas; and limited maintenance plan, and by revising definitions for control strategy implementation plan revisions and milestones. 40 CFR §93.102 adds a new term to the list of criteria pollutants, particles with $PM_{2.5}$. Section 93.102 incorporates into the rule a one-year grace period before conformity is required in areas designated as nonattainment for a given air quality standard for the first time. 40 CFR §93.104 streamlines conformity frequency requirements. 40 CFR §93.106 states that there will be a two-year grace period for transportation plan requirements in certain ozone and carbon monoxide (CO) areas. Principal changes to 40 CFR §93.109 include the applicability of conformity for one-hour nonattainment or maintenance areas up until the effective date of revocation of the one-hour ozone NAAQS; eight-hour nonattainment areas with and without MVEBs; $PM_{2.5}$ nonattainment and maintenance areas; areas with limited maintenance plans; and areas with insignificant motor vehicle emissions. 40 CFR §93.110 clarifies that conformity determinations will be based on the latest planning assumptions at the time a conformity analysis begins, rather than at the time of DOT's conformity finding. 40 CFR §93.116 is amended so that project-level hotspot analyses in metropolitan nonattainment and maintenance areas must consider the full time frame of an area's transportation plan at the time the analysis is conducted. This also applies to hotspot analyses for new projects in isolated, rural nonattainment and maintenance areas. Regional emissions analyses in isolated rural areas also cover a 20-year time frame, consistent with the general requirements in metropolitan and donut areas.

40 CFR §93.117 concerns FTA and FHWA project requirements to be in compliance with a SIP's $PM_{2.5}$ control measures. 40 CFR §93.118 concerns motor vehicle emissions budgets. The final rule, for example, modifies several provisions under 40 CFR §93.118 of the conformity regulation to specify that EPA must affirmatively find submitted budgets adequate before they can be used in a conformity determination. The final rule also establishes the process by which EPA will review and make adequacy findings for submitted SIPs, as described in the June 30, 2003 proposal. 40 CFR §93.119 concerns interim emission tests in areas without MVEBs. Before an adequate or approved SIP budget is available, conformity of the transportation plan, TIP, or project not from a conforming plan and TIP is generally demonstrated with the interim emission tests, as described in revised 40 CFR §93.119. Primary changes to 40 CFR §93.120 include the point in time at which conformity consequences apply when EPA disapproves a control strategy SIP without a protective finding. Specifically, the final rule deletes the 120-day grace period from 40 CFR §93.120(a)(2), so that a conformity ''freeze'' occurs immediately upon the effective date of EPA's final disapproval of a SIP and its budgets without a protective finding. EPA is amending 40 CFR §93.121(a) of the conformity rule so that regionally significant non-federal projects can no longer be advanced during a conformity lapse, unless they have received all necessary state and local approvals prior to the lapse. Second, EPA is adding a new 40 CFR §93.121(c) to the rule to address regionally significant non-federal projects in areas where EPA has found a pollutant or precursor to be regionally insignificant. 40 CFR §93.122 concerns procedures for determining regional transportation-related emissions, and principally involves the addition of subsection (c), which sets a two-year grace period for regional emissions analysis requirements in certain ozone and CO areas. Minor amendments were also made to 40 CFR §§93.124 - 93.126.

SECTION DISCUSSION

§114.260, Transportation Conformity

Administrative and grammatical changes are adopted throughout the section to bring the existing rule language into agreement with guidance provided in the *Texas Legislative Council Drafting Manual*, November 2004.

The adopted amendment to §114.260(a) incorporates the acronym USC for the term United States Code.

The adopted amendments to §114.260(b) include an incorporation of the phrase "particles with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers ($PM_{2.5}$)." This phrase refers to the new NAAQS for fine particles adopted by EPA. Another adopted amendment to §114.260(b) specifies that the section is only applicable to the precursors of ozone, nitrogen dioxide, and particles with an aerodynamic diameter of ten micrometers (PM_{10}). This distinction is made because EPA is not finalizing requirements for addressing $PM_{2.5}$ precursors in transportation conformity at this time. The last adopted amendment to subsection (b) points to the CFR rather than the Texas Administrative Code for the official list and boundaries of nonattainment areas. This change is made to ensure that the most up-to-date list is incorporated.

The adopted amendments to §114.260(c) update the date through which the transportation conformity rules are amended, i.e., from August 6, 2002 to July 1, 2004. In addition, the adopted amendments to subsection (c) adopt by reference the federal amendments, except for 40 CFR §93.105. The federal requirements in §93.105 are addressed in the commission's rule in §114.260(d).

The adopted amendment to §114.260(d)(1)(A)(vi) removes the words, "formerly §9," as this citation is now more commonly referred to as FTA §5307.

The adopted amendment to §114.260(d)(1)(A)(vii) removes the words "TCEQ or." The amendment would delete the language to be consistent with current agency style and format.

The adopted amendment to §114.260(d)(1)(A)(viii) substitutes the reference to "FCAA, §105," with a reference to "42 USC, §7405" because FCAA, §105 has been codified into the USC.

The adopted amendment to §114.260(d)(1)(B)(ix) removes the words, "formerly §9," as this citation is now more commonly referred to as FTA §5307.

The adopted amendment to §114.260(d)(1)(B)(x) substitutes the reference to "FCAA, §105," with a reference to "42 USC, §7405" because FCAA, §105 has been codified into the USC.

The adopted amendment to §114.260(d)(2)(A)(i) replaces, "Strategic Assessment" Division director, with "Air Quality Planning and Implementation" Division director because the Strategic Assessment Division has been renamed.

The adopted amendment to §114.260(d)(2)(A)(viii) corrects the spelling of "emissions."

The adopted amendment to §114.260(d)(2)(C) replaces the phrase, "Title 23 United States Code," with "23 USC," and changes "Federal Transit Laws," to "federal transit laws" to be consistent with current agency style and format.

The adopted amendment to §114.260(d)(4)(B) replaces "TCEQ" with "commission's" to be consistent with current agency style and format.

The adopted amendments to §114.260(d)(4)(C) and (6) correct the capitalization of the term "governor" and add a catchline to bring the existing rule language into agreement with *Texas Register* requirements and guidance provided in the *Texas Legislative Council Drafting Manual*, November 2004.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking considering the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does 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 section incorporates the requirements of the amended federal transportation conformity rule and revises the SIP to include the federal transportation conformity requirements to ensure that federally supported highway and transit project activities are consistent with the purpose of the SIP. While this rulemaking is intended to protect the environment by ensuring that federally supported highway and transit project activities are consistent with the SIP, the commission finds that the rule will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety in the state, since no fiscal implications are anticipated as a result of administration or enforcement of the rule.

Additionally, the revision to Chapter 114 is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the rule does not meet any of the four applicability requirements. 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; 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.

Specifically, the revision to Chapter 114 was developed to meet the specific requirement of FCAA, §176(c), which requires that federally supported highway and transit project activities are consistent with the purpose of a SIP. In addition, states are primarily responsible for ensuring attainment and maintenance of NAAQS once the EPA has established them. Under 42 USC, §7410, and related provisions, states shall submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, one purpose of this rulemaking action is to meet the air quality standards established under federal law as NAAQS. Specifically, the requirement to have federally supported highway and transit project activities conform to the SIP ensures that transportation activities do not interfere with the attainment and maintenance of the NAAQS. There is no contract or delegation agreement that covers the topic that is the subject of this action. Therefore, the rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, nor adopted solely under the general powers of the agency. Finally, this rulemaking action was not developed solely under the general powers of the agency, but is authorized by specific sections of Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act (TCAA)), and Texas Water Code (TWC) that are cited in the STATUTORY AUTHORITY section of this preamble, including Texas Health and Safety Code, §§382.002, 382.011, 382.012, 382.017, and 382.208. Therefore, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the rulemaking does not meet any of the four applicability requirements. The commission received no public comment on the proposed regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact analysis for the rulemaking action under Texas Government Code, §2007.043. The specific purpose of the rulemaking action is to incorporate the requirements of the amended federal transportation conformity rule. The incorporation of the requirements of the amended federal transportation conformity rule will assure that highway and transit project activities are consistent with the Texas SIP. This rule will not place a burden on private, real property.

Texas Government Code, §2007.003(b)(13), states that Chapter 2007 does not apply to an action that: 1) is taken in response to a real and substantial threat to public health and safety; 2) is designed to significantly advance the health and safety purpose; and 3) does not impose a greater burden than is necessary to achieve the health and safety purpose. This rulemaking action is not subject to Texas Government Code, Chapter 2007, because it is reasonably taken to fulfill an obligation mandated by federal law. The 1990 Amendments to the FCAA, §176(c), require that federally supported highway and transit project activities are consistent with the purpose of a SIP.

In addition, states are primarily responsible for ensuring attainment and maintenance of NAAQS once the EPA has established them. Under 42 USC, §7410, and related provisions, states shall submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, one purpose of this rulemaking action is to meet the air quality standards established under federal law as NAAQS. Specifically, the requirement to have federally supported highway and transit project activities conform to the SIP ensures that transportation activities do not interfere with the attainment and maintenance of the NAAQS.

Consequently, the commission's assessment indicates that Texas Government Code, Chapter 2007, does not apply to this rule because this is an action that is reasonably taken to fulfill an obligation mandated by federal law, which is exempt under Texas Government Code, §2007.003(b)(4). Therefore, the rule does not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that it is an action identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, or will affect an action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, and therefore required that applicable goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission prepared a consistency determination for the rules under 31 TAC §505.22 and found that the rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). The CMP policy applicable to this rulemaking is the policy that commission rules comply with regulations in 40 CFR, to protect and enhance air quality in coastal areas (31 TAC §501.14(q)). The rulemaking and SIP revision will ensure that federally funded highway and transit activities will conform to the SIP, and comply with 40 CFR Part 50, National Primary and Secondary Air Quality Standards, and 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. This rulemaking is consistent with CMP goals and policies, in compliance with 31 TAC §505.22(e). The commission invited, but received, no public comment on the CMP.

PUBLIC COMMENT

A public hearing was held December 21, 2004, in Austin, Texas. No comments were received at the hearing. The comment period closed January 3, 2005. No comments were received.

SUBCHAPTER G: TRANSPORTATION PLANNING

§114.260

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; Texas Health and Safety Code, TCAA, §382.002, which provides that the policy and purpose of the TCAA are to safeguard the state's air resources from pollution; and TCAA, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendment is also adopted under TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; and §382.208, which requires the commission to develop and implement transportation programs necessary to demonstrate and maintain attainment of NAAQS and to protect the public from exposure to hazardous air contaminants from motor vehicles.

The adopted amendment implements TCAA, §382.002, relating to Policy and Purpose; §382.011, relating to General Powers and Duties; §382.012, relating to State Air Control Plan; and §382.208, relating to Attainment Program.

§114.260. Transportation Conformity.

(a) Purpose. The purpose of this section is to implement the requirements set forth in 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 (USC) or the Federal Transit Laws), which are the regulations developed by the United States Environmental Protection Agency (EPA) under the Federal Clean Air Act 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, particles with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers ($PM_{2.5}$), and the precursors of ozone, nitrogen dioxide, and PM_{10}. (For the official list and boundaries of nonattainment areas, see 40 CFR Part 81 and pertinent *Federal Register* notices.)

(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 July 1, 2004, are adopted by reference with the exception of §93.105. The requirements of §93.105 are addressed in subsection (d) of this section.

(d) Consultation. Under 40 CFR §93.105, regarding consultation, the following procedures must 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 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 funds);

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

(viii) local air quality agencies in nonattainment or maintenance areas (recipients of 42 USC, §7405 funds).

(B) All correspondence with the affected agencies in subparagraph (A) of this paragraph must 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 funds): general manager or designee;

(x) local air quality agencies (recipients of 42 USC, §7405 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 Implementation 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 contacts specified in paragraph (1)(B) of this subsection. This information must 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 contacts 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 contacts 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 that 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 that 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 emissions 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 that 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 that 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 that cross the borders of MPOs or nonattainment and maintenance areas. The affected MPOs will enter into a Memorandum of Agreement (MOA) that 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 that 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) shall 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 23 USC 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 apply.

(B) Because the validity of the regional emissions analysis depends on transportation modeling assumptions that 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 that 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 must 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 commission's executive director in writing to this effect. This subparagraph must be cited by the MPO or TxDOT in any notification of a conflict that 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 must be cited by the commission in any notification of a conflict that 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 must establish a proactive public involvement process that provides opportunity for public review and comment. This process must, 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) Good-faith effort made by the consulting agencies. 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 begins on the date of EPA approval of the transportation conformity SIP associated with this rule.