

The Texas Commission on Environmental Quality (commission) proposes an amendment to §114.260 and corresponding revisions to the Transportation Conformity State Implementation Plan (SIP) for Texas Nonattainment and Maintenance Areas.

If adopted, the revisions would 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 PROPOSED RULES

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 that incorporated conformity requirements was adopted October 19, 1994, and approved by EPA November 8, 1995. EPA has amended the federal transportation conformity rule eight times: August 7, 1995; November 14, 1995; August 15, 1997; April 10, 2000; August 6, 2002; July 1, 2004; May 6, 2005; and March 10, 2006. The commission previously incorporated the federal changes up to, and including, the 2004 amendments. The commission is now updating its SIP and rule to incorporate the May 6, 2005, and March 10, 2006, federal amendments. In addition to the 2005 and 2006 federal amendments, changes to the transportation conformity federal rule were enacted with passage of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), which was signed into law August 10,

2005. Furthermore, EPA issued guidance in May 1999, that a state should spell out in its SIP when a regionally significant, non-federal project is considered *adopted or approved* by a non-federal entity. The addition of these changes to the existing state rules would align the state rule with the current federal requirements and would address when a non-federal, regionally significant project is considered *adopted or approved* by a non-federal entity. Lastly, this proposed rulemaking would make administrative and grammatical changes and corrections to the existing rule language.

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 applies to areas designated nonattainment and those redesignated to attainment after 1990 with a maintenance plan developed under the FCAA. Conformity to the purpose of the SIP means that transportation activities would 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 amended the transportation conformity rule on May 6, 2005. The *Transportation Conformity Rule Amendments for the New PM<sub>2.5</sub> NAAQS: PM<sub>2.5</sub> Precursors* (70 FR 24280) specifies the transportation-related PM<sub>2.5</sub> precursors and when they apply in transportation conformity determinations in PM<sub>2.5</sub> (particulate matter) nonattainment and maintenance areas. The proposal would incorporate PM<sub>2.5</sub> precursors in the state rule and make a technical correction to a United States Department of

Transportation (U.S. DOT) planning regulation cross-reference. EPA's 2005 revisions were codified in 40 Code of Federal Regulations (CFR) Part 93. Sections revised were §§93.102, 93.105, and 93.119.

EPA also amended the transportation conformity rule on March 10, 2006: the *PM<sub>2.5</sub> and PM<sub>10</sub> Hot-Spot Analysis in Project Level Transportation Conformity Determinations for the New PM<sub>2.5</sub> and Existing PM<sub>10</sub> National Ambient Air Quality Standards Final Rule* (71 FR 12468). The proposal would delete the current quantitative PM<sub>10</sub> and PM<sub>2.5</sub> hot-spot analysis requirement from the state's conformity consultation requirements. The federal amendments were codified in 40 CFR Part 93. Sections revised were §§93.101, 93.105, 93.109, 93.116, 93.123, 93.125, 93.126, and 93.127.

The transportation conformity provisions in the SAFETEA-LU streamlined the requirements for state conformity SIPs. Prior to enactment of SAFETEA-LU, states were required to address all of the federal conformity rule's provisions in their conformity SIPs. Most of the sections of the federal rule were required to be copied verbatim from the federal rule into a state's SIP, as previously required under 40 CFR §51.390(d). Now, under SAFETEA-LU, states are required to address and tailor only the following three sections of the conformity rule in their conformity SIPs: 1.) 40 CFR §93.105, which addresses consultation procedures; 2.) 40 CFR §93.122(a)(4)(ii), which requires that written commitments to control measures that are not included in a Metropolitan Planning Organization's transportation plans must be obtained prior to a conformity determination and that such commitments must be fulfilled; and 3.) 40 CFR §93.125(c), which requires that written commitments to mitigation measures must be obtained prior to a project-level conformity determination and that project sponsors must comply with such commitments.

In May 1999, EPA issued guidance titled *Conformity Guidance on Implementation of March 2, 1999, Conformity Court Decision* addressing which projects could move forward during a conformity lapse. EPA recommended that states decide through the interagency consultation process when a regionally significant, non-federal project is considered *adopted or approved* by a non-federal entity that routinely receives funds from the FHWA or FTA. The interagency consultation group for Texas, the Technical Work Group (TWG), has agreed on language that is included in this proposed rulemaking. The commission is also proposing administrative and grammatical changes and corrections to the existing rule language in order to be consistent with current agency style and format. The commission is also proposing to renumber certain parts of §114.260 to make adjustments for the proposed deletions and additions throughout the rule.

## SECTION DISCUSSION

### *§114.260. Transportation Conformity.*

The proposed revisions to §114.260(a) would change the phrase *in the requirements* and replace it with *certain requirements*. The last sentence in this subsection would be changed from, *It includes policy, criteria, and procedures to demonstrate and assure conformity of transportation planning activities with the state implementation plan (SIP)* and replaced with, *This section addresses the consultation process and the written commitment requirements for control measures and mitigation measures that are used to help demonstrate and assure conformity of transportation planning activities to the state implementation plan (SIP)* to more clearly describe the transportation conformity streamlining provisions in SAFETEA-LU.

The proposed revisions to §114.260(b) would add the term *criteria* in the first sentence to change the phrase *transportation-related pollutants* to *transportation-related criteria pollutants*. The purpose of this change is to clarify that the applicable pollutants are criteria pollutants. The second sentence would add *transportation-related criteria* to form the phrase *transportation-related criteria pollutants*. The word *include* is replaced with *are* and the precursor pollutants are listed in a separate sentence, which is then amended by adding PM<sub>2.5</sub> as a precursor and referring to 40 CFR §93.102. The addition of PM<sub>2.5</sub> to the sentence reflects the substantive change in EPA's May 6, 2005, final rule, the *Transportation Conformity Rule Amendments for the New PM<sub>2.5</sub> National Ambient Air Quality Standard: PM<sub>2.5</sub> Precursors* (70 FR 24280). The purpose of referring to 40 CFR §93.102 is to indicate the applicable precursors to be analyzed depending on the characteristics of the nonattainment area. Finally, the last sentence is deleted because its reference to nonattainment area boundaries is not needed in the rule language.

The proposed revisions to §114.260(c) would delete the reference to 40 CFR Part 93, Subpart A, (62 FR 43780), and add the replacement reference 40 CFR §93.122(a)(4)(ii) and 40 CFR §93.125(c). The SAFETEA-LU amendments at 42 USC, §7506(c)(4)(E) direct that only these two sections plus CFR §93.105 need to be in the state conformity rule. The addition of these three sections would streamline the requirements for state conformity SIPs.

The proposal would revise §114.260(d)(2)(A)(i) to delete the rule language *Air Quality Planning and Implementation Division* and replace it with *executive director*. The proposal would revise §114.260(d)(2)(A)(ii) to delete the word *involvement* and replace it with *participation* and would change the 23 CFR reference §450.316(b)(1) to *Part 450*. The proposal would revise §114.260(d)(2)(A)(iii) to

delete *by the Metropolitan Planning Rule* and change the 23 CFR reference §450.316(b)(1) to *Part 450*.

The proposal would revise §114.260(d)(2)(A)(v) to delete the word *involvement* and replace it with *participation*, and would delete §114.260(d)(2)(A)(vii). The proposal would revise §114.260(d)(2)(B)(v) to correct the reference to 40 CFR §93.109(g)(2)(iii) with a reference to 40 CFR §93.109(1)(2)(iii). The proposal would revise §114.260(d)(3)(A) to delete the word *involvement* and replace it with *participation*.

The proposal would revise §114.260(d)(3)(C) to delete the words *identified as the Technical Working Group for Mobile Emissions* and would delete the last sentence, *The function of this working group may be delegated to an existing group with similar composition and purpose*. The proposal would revise §114.260(d)(5) to delete the word *involvement* and replace it with *participation* and renumber the CFR reference for the fee schedule for public inspection and copying. These proposed revisions would align the state rule with the federal rule; allow the executive director to delegate authority to staff without explicitly naming the designee; provide flexibility to the Technical Work Group; and bring existing rule language into agreement with Texas Register requirements, agency format guidelines, and guidance provided in the *Texas Legislative Council Drafting Manual, August 2006*.

The proposed new §114.260(e) would address when a regionally significant, non-federal project is considered *adopted* or *approved* by a non-federal agency. This section was added to clarify the approval and adoption process of a non-federal, regionally significant project. In the event of a transportation conformity lapse, the provision may allow certain project phases to continue.

The proposed amendment to §114.260(f) would delete the words *begins on* and replace them with *for transportation conformity determinations that begin the interagency consultation process after*. The

purpose of this change is to make clear that compliance with this rule revision applies at the beginning of the interagency consultation process.

The proposed revision would make administrative and grammatical changes and corrections to the existing rule language in order to be consistent with current agency style and format guidelines. The proposal would also renumber certain parts of §114.260 to make adjustments for the proposed deletions and additions throughout the rule.

#### FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeff Horvath, Analyst, Strategic Planning and Assessment Section, has determined that for the first five-year period the proposed rule is in effect, no fiscal implications are anticipated for the agency or other units of state or local government as a result of the administration or enforcement of the proposed rule.

The proposed rulemaking would incorporate recent federal transportation conformity revisions into the state's SIP, including those from the surface transportation reauthorization act of 2005, SAFETEA-LU. Transportation conformity is an FCAA requirement ensuring that federally supported highway and transit projects conform to each state's SIP.

In addition to the SAFETEA-LU revisions, the rulemaking would also incorporate previous federal transportation conformity revisions and guidance that includes: 1.) May 1999 EPA guidance that asked states to incorporate into their SIPs the process used to determine when a regionally significant, non-federal project is considered *adopted or approved* by a non-federal entity. This clarifies when certain

projects, like toll roads, can move forward during a conformity lapse; 2.) EPA rules that added transportation-related  $PM_{2.5}$  precursors to the transportation conformity regulations and made a technical correction to a cross-reference of the U.S. DOT planning regulations; and 3.) EPA rules that deleted a previous consultation requirement for quantitative  $PM_{10}$  and  $PM_{2.5}$  hot-spot analysis.

The transportation conformity rule is only being revised to reflect existing language in the federal transportation conformity rule and other federal transportation conformity-related rules and guidance. Therefore, no fiscal implications are anticipated for the agency or other units of state or local governments as a result of the enforcement and administration of the proposed rule.

#### PUBLIC BENEFITS AND COSTS

Mr. Horvath has also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be compliance with state and federal law, continued conformity with the SIP, and continued protection of public health and the environment through improved air quality.

The transportation conformity rule is only being revised to reflect existing language in the federal transportation conformity rule and other federal transportation conformity-related rules and guidance. Therefore, no fiscal implications are anticipated for businesses or individuals as a result of the enforcement and administration of the proposed rule.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

#### DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of the Texas Government Code, §2001.0225, and determined that the proposed rulemaking meets the definition of a *major environmental rule* as defined in that statute. 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 proposed amendments meet the definition of a *major environmental rule* because the transportation conformity requirements are specifically intended to protect the environment and/or reduce risks to human health, and may have material effects on 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. Federal transportation conformity requirements subject all nonattainment and maintenance areas to demonstrate conformity with specific emissions budgets, or be subject to loss of

highway or other transportation funding. The proposed amendments to §114.260 will incorporate recent federal transportation conformity revisions into the state's SIP, including those from the surface transportation reauthorization act of 2005, SAFETEA-LU. Transportation conformity is an FCAA requirement ensuring that federally supported highway and transit projects conform to each state's SIP. Additionally, the proposed amendments to §114.260 will reflect existing language in the federal transportation conformity rule and other federal transportation conformity-related rules and guidance.

The proposed rulemaking does not, however, meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 applies only 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 proposed rulemaking would implement requirements of the FCAA and SAFETEA-LU. Under 42 USC, §7506, each SIP must contain criteria and procedures for consultation, and enforcement and enforceability in accordance with the EPA's criteria and procedures for consultation, enforcement, and enforceability.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded *based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application.* The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

The FCAA does not always require specific programs, methods, or reductions in order to meet the goals of the FCAA; thus, states must develop programs and strategies to help ensure that those goals are met. However, in this instance, the FCAA is clear in requiring that states comply with EPA's criteria and procedures for consultation, enforcement, and enforceability. EPA's transportation conformity rule and SAFETEA-LU provide specific requirements and limited flexibility that must be met by states. Because of the ongoing need to address the requirements of 42 USC, §§7401, *et seq.*, the commission routinely proposes and adopts SIP rules. As discussed elsewhere in this preamble, states are required to incorporate requirements for transportation conformity in compliance with EPA's transportation conformity rule and SAFETEA-LU. The legislature is presumed to understand this federal scheme. If each rule proposed for

inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the proposed rule may have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code, but left this provision substantially unamended. It is presumed that *when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation.* *Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, *no writ*); *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied*); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of *substantial compliance*. The legislature specifically identified Texas Government Code, §2001.0225, as falling under this standard. The commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The specific intent of the proposed rulemaking is to incorporate recent federal transportation conformity revisions into the state's SIP, including those from SAFETEA-LU, in addition to reflecting already existing changes in the federal transportation conformity rule and other federal transportation conformity-related rules and guidance. There is no contract or delegation agreement that covers the topic that is the subject of this action. Therefore, the proposed rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law, or exceed a requirement of a delegation agreement. 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 (THSC), Chapter 382 (also known as the Texas Clean Air Act (TCAA)), and the Texas Water Code (TWC), which are cited in the STATUTORY AUTHORITY section of this preamble, including THSC, §§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 although the proposed rulemaking meets the definition of a *major environmental rule*, it does not meet any of the four applicability requirements.

The commission invites public comment on the draft regulatory impact analysis determination.

#### TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007 is applicable. The specific purpose of the proposed rulemaking is to incorporate recent federal transportation conformity revisions into the state's SIP, including those from SAFETEA-LU, in addition to reflecting already existing changes in the federal transportation conformity rule and other federal transportation conformity-related rules and guidance, as discussed elsewhere in this preamble. Under FCAA, 42 USC, §7506, each SIP must contain criteria and procedures for consultation, and enforcement and enforceability in accordance with the EPA's criteria and procedures for consultation, enforcement and enforceability.

The commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to this proposed rulemaking 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). For this reason, Texas Government Code, Chapter 2007 does not apply to this proposed rulemaking.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action 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 §281.45(a)(3) and 31 TAC §505.11(b)(2), concerning Actions and Rules Subject to the Coastal Management Program, 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 rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action 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)). This rulemaking action complies with 40 CFR Part 51, concerning Requirements for Preparation, Adoption, and Submittal of Implementation Plans, and Title 40 generally. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

The commission solicits comment on the consistency of the proposed rulemaking with the CMP during the public comment period.

#### ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on March 6, 2007, at 10:00 a.m. at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle in Building B, Room 201A. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Lola Brown, Office of Legal Services, at (512) 239-0348. Requests should be made as far in advance as possible.

#### SUBMITTAL OF COMMENTS

Written comments may be submitted to Lola Brown, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at <http://www5.tceq.state.tx.us/rules/ecomments/>. All comments should reference Rule Project Number 2006-046-114-EN. The comment period closes March 12, 2007. Copies of the proposed rule can be obtained from the commission's Web site at [http://www.tceq.state.tx.us/nav/rules/propose\\_adopt.html](http://www.tceq.state.tx.us/nav/rules/propose_adopt.html). For further information, please contact Marivel Rodriguez, Air Quality Division, (512) 239-2474.

## **SUBCHAPTER G: TRANSPORTATION PLANNING**

### **§114.260**

#### **STATUTORY AUTHORITY**

The rule will be proposed under TWC, §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and §5.105, concerning General Policy; and under THSC, TCAA, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; §382.011, which provides for general powers and duties under the TCAA; §382.012, which authorizes the commission to develop a general, comprehensive plan for the proper control of the state's air; §382.208, which authorizes the commission to work 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. The rule will also be proposed under the statutory requirement for transportation conformity found in §176(c) of the 1990 FCAA Amendments. In addition, 40 CFR Part 51, Subpart T and Part 93, Subpart A established criteria and procedures for determining whether transportation plans, programs, and projects in nonattainment and maintenance areas conform with the SIP.

The proposed revisions implement Texas Water Code, §5.103 and §5.103, and Texas Health and Safety Code, §§382.011, 382.012, and 382.208.

**§114.260. Transportation Conformity.**

(a) Purpose. The purpose of this section is to implement certain [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). This section addresses the consultation process and the written commitment requirements for control measures and mitigation measures that are used [It includes policy, criteria, and procedures] to help demonstrate and assure conformity of transportation planning activities with the state implementation plan (SIP).

(b) Applicability. This section applies to transportation-related criteria pollutants for which an area is designated nonattainment or is subject to a maintenance plan. The transportation-related criteria pollutants are [include] ozone, carbon monoxide, nitrogen dioxide, particles with an aerodynamic diameter of ten micrometers (PM<sub>10</sub>) and smaller, and particles with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers (PM<sub>2.5</sub>). [,] This section also applies to [and] the precursors of ozone, nitrogen dioxide, [and] PM<sub>10</sub>, and PM<sub>2.5</sub> as required in 40 CFR §93.102. [(For the official list and boundaries of nonattainment areas, see 40 CFR Part 81 and pertinent *Federal Register* notices.)]

(c) CFR incorporation. The written commitment requirements [transportation conformity rules,] as specified in 40 CFR §93.122(a)(4)(ii) and §93.125(c) [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 executive director [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 participation [involvement] process as required in [by] 23 CFR Part 450 [§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 in [by the Metropolitan Planning Rule,] 23 CFR Part 450 [§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 participation [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<sub>10</sub> nonattainment and maintenance areas that require quantitative PM<sub>10</sub> 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;]

(vii) [(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;

(viii) [(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;

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

(x) [(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

(xi) [(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(l)(2)(iii) [§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 participation [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 participation [involvement], the agencies making conformity determinations on transportation plans, programs, and projects must establish a proactive public

participation [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 §7.43 [§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) Regionally significant, non-federal projects. For the purposes of 40 CFR §93.121, adoption or approval of a regionally significant, non-federal project (a regionally significant project that does not require FHWA or FTA approval or funding) occurs when affected agencies that are recipients of federal funds designated under 23 USC or the federal transit laws take one of the following actions:

(1) board approval, action, or resolution (such approval, action, or resolution does not include MPO approval for the purposes of approving a project in a currently conforming MTP or TIP);

(2) issuance of administrative permits for the regionally significant project;

(3) action of official authorizing the regionally significant project to proceed;

(4) providing grants or loans for the construction of a regionally significant project; or

(5) contract execution for the regionally significant project.

(f) [(e)] Compliance date. Compliance with this section is required for transportation conformity determinations that begin the interagency consultation process after [begins on] the date of EPA approval of the transportation conformity SIP associated with this rule.