

The Texas Commission on Environmental Quality (TCEQ or commission) adopts the repeal of §101.30 *without change* to the proposed text as published in the May 6, 2011, issue of the *Texas Register* (36 TexReg 2817). The text will not be republished.

The adopted repeal will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Adopted Rule

This rulemaking action will align certain general conformity air quality rules and definitions with federal regulations by repealing §101.30, Conformity of General Federal Actions to State Implementation Plans. This provision was superseded by federal regulation.

On November 16, 1994, the commission adopted Chapter 101, Subchapter A, §101.30, Conformity of General Federal Actions to State Implementation Plan. The purpose of the rule was to establish the criteria and procedures for general conformity determinations, as required by 40 Code of Federal Regulations (CFR) §51.851. In August 2005, the United States Congress passed the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) that eliminated the requirement for states to adopt and submit general conformity SIP revisions. On April 5, 2010, the EPA adopted revisions to the general conformity regulations in 40

CFR Parts 51 and 93 (75 *Federal Register* 17254, April 5, 2010). The revisions made the adoption and submittal of the general conformity SIP optional for the state and deleted all of 40 CFR Part 51, Subpart W except for §51.851. 40 CFR §51.851 was revised to clarify that if a state chooses to submit a general conformity SIP, it must be consistent with the requirements of 40 CFR Part 93, Subpart B. These changes became effective on July 6, 2010.

The EPA's April 2010 revisions also added four new sections to 40 CFR Part 93: §§93.161, 93.163, 93.164, and 93.165. Under the new 40 CFR §93.161, federal agencies may negotiate a facility-wide emissions budget to be incorporated into the SIP. After the EPA approves the SIP revision, any action at the facility can be presumed to conform if the emissions from the proposed action along with all other emissions at the facility are within the approved facility-wide emissions budget. Therefore, a conformity determination would not be necessary. The new 40 CFR §93.163 allows alternate schedules for mitigating emissions increases. Federal agencies and states can negotiate a program for some emissions mitigation to occur in future years, and states can use this approach to accommodate short-term increases in emissions if the state believes that a substantial long-term reduction in emissions will result from a federal action. The new 40 CFR §93.164 allows the emissions of one precursor of a criteria pollutant to be offset by the reduction in the emissions of another precursor of that pollutant. For example, emissions of volatile organic compounds could be offset by a reduction in emissions of

nitrogen oxides. Finally, the new 40 CFR §93.165 incorporates the use of early emissions reduction credits into the regulations. This section also provides other federal agencies with regulations and guidance similar to the Airport Early Emissions Reduction Credit program established by the United States Congress in the Federal Aviation Administration Reauthorization Act of 2003.

The general conformity requirements in §101.30 mirror the federal requirements in 40 CFR Part 93, Subpart B and Part 51, Subpart W, and specifically reference the now repealed Part 51, Subpart W. Amended 40 CFR Part 93, Subpart B continues to subject certain federal actions to general conformity requirements without the need for identical state rules and SIPs. Therefore, repealing the state rule will not impact program continuity, but it will eliminate references in the state rule to repealed federal rules and the need for future state rule revisions as a result of amendments to federal regulations.

Section Discussion

The adoption repeals §101.30, Conformity of General Federal Actions to State Implementation Plans.

Final Regulatory Impact Analysis

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the

rulemaking action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. "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 repeal of §101.30 is not intended to protect the environment or reduce risks to human health from environmental exposure to air pollutants. The repeal is necessary to meet the requirements of the SAFETEA-LU that eliminated the requirement for states to adopt and submit general conformity SIP revisions and repeals the federal general conformity rules referenced by §101.30. Therefore, the commission finds that it is not a "major environmental rule." Additionally, the repeal does not 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. Federal agencies are still subject to general conformity demonstrations under federal rules.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period, and no comments were received.

Takings Impact Assessment

The commission conducted a takings impact evaluation for the adopted rulemaking in

accordance with Texas Government Code, §2007.043. The specific purpose of the adopted rulemaking is to meet federal general conformity rules by repealing state SIP-approved rules that are now unnecessary and that reference rules repealed by the SAFETEA-LU. The adopted repeal will not burden private, real property because general conformity requirements apply only to federal actions that potentially impact nonattainment areas in the state. General conformity requirements are mandated by federal law, specifically 42 United States Code, §7506(c)(1). Through this repeal, conformity requirements are now implemented exclusively through federal rule. Consequently, the adopted repeal is an action reasonably taken to fulfill an obligation mandated by federal regulations. Therefore, this adopted rulemaking action will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found that the adoption is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code §§33.201 *et seq.*, and therefore, must be consistent with all applicable CMP goals and policies. The commission reviewed this adopted rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the adopted rulemaking does not affect any coastal natural resource areas. The CMP goals applicable to the adopted rulemaking is the goal to protect, preserve, restore,

and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. No new sources of air contaminants are authorized in those affected counties. The CMP policy applicable to this adopted rulemaking action is the policy that commission rules comply with regulations in the CFR to protect and enhance air quality in the coastal area (40 CFR §501.32). This rulemaking adoption does not have a detrimental effect on SIP emissions reduction obligations relating to maintenance of the ozone National Ambient Air Quality Standards. This adopted rulemaking action complies with the CFR. Therefore, in compliance with 40 CFR §505.22(e), this adopted rulemaking action is consistent with CMP goals and policies. Promulgation and enforcement of the adopted repeal does not violate or exceed any standards identified in the applicable CMP goals and policies, because the adopted rulemaking is consistent with these CMP goals and policies, and because the adopted repeal does not create or have a direct or significant adverse effect on any coastal natural resource areas.

The commission invited public comment regarding the consistency with the CMP during the public comment period and no comments were received.

Public Comment

A public hearing was offered on May 31, 2011. The hearing was not officially opened because no party indicated a desire to give comment. The public comment period opened May 6, 2011, and closed June 6, 2011. The commission did not receive any oral

or written comments.

Response to Comments

The commission did not receive any oral or written comments on the General Conformity Rule repeal.

SUBCHAPTER A: GENERAL RULES

§101.30

Statutory Authority

The repeal is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the TWC. The repeal is also adopted under Texas Health and Safety Code (THSC), Texas Clean Air Act (TCAA), §382.011, which authorizes the commission to administer the requirements of the TCAA; THSC, §382.013, which authorizes the commission to designate air quality control regions to provide adequate implementation of air quality standards; and THSC, §382.017 which authorizes the commission to adopt rules consistent with the policy and purpose of the TCAA.

The repeal implements TWC, §§5.102, 5.103, and 5.105; and THSC, §§382.011, 382.013, and 382.017.

§101.30. Conformity of General Federal Actions to State Implementation Plans.