

The Texas Commission on Environmental Quality (commission) proposes the repeal of §101.30.

If adopted, the repeal would 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 Proposed Repeal

This rulemaking would 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 This provision was superseded by federal regulation.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 December 12, 1994, the commission adopted §101.30. 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, 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 40 CFR 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 would not impact program continuity, but it would 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 proposal would repeal §101.30, Conformity of General Federal Actions to State Implementation Plans, to meet the requirements of the SAFETEA-LU that eliminated the requirement for states to adopt and submit general conformity SIP revisions.

Fiscal Note: Costs to State and Local Government

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

enforcement of the proposed rule.

The proposed rulemaking would repeal §101.30. The repeal of the Conformity of General Federal Actions to State Implementation Plans rule would align certain agency air quality rules and definitions with federal regulations. The proposed repeal would eliminate references in state rules to repealed federal rules and is therefore not anticipated to have fiscal implications for units of state or local government. The agency may experience operational efficiencies in that the proposed rule may eliminate the need for any future state rule revisions that would be required due to changes in federal regulations, but these efficiencies are not expected to be significant.

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 change seen in the proposed rule will conform with federal rules and regulations.

No fiscal implications are anticipated for businesses or individuals as a result of administration or enforcement of the proposed rule. The proposed rulemaking would align certain general conformity air quality rules and definitions with federal regulations by repealing the Conformity of General Federal Actions to State Implementation Plans rule. This provision has been superseded by federal regulation.

Small Business and Micro Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of administration or enforcement of the proposed rule. The proposed rulemaking would align certain general conformity air quality rules and definitions with federal regulations and is not expected to affect any business, large or small.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required, because the proposed rule does not adversely affect small or micro-businesses for the first five years that the proposed rule is in effect.

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 analysis

requirements of Texas Government Code, §2001.0225, and determined that the proposed 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 invites public comment regarding the draft regulatory impact analysis determination during the public comment period. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the

address listed under the SUBMITTAL OF COMMENTS section of this preamble.

Takings Impact Assessment

The commission conducted a takings impact evaluation for the proposed rule in accordance with Texas Government Code, §2007.043. The specific purpose of the proposed rulemaking is to meet federal general conformity rules by repealing state SIP-approved rules that are now unnecessary and reference rules repealed by the SAFETEA-LU. The proposed 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 proposed repeal is an action reasonably taken to fulfill an obligation mandated by federal regulations. Therefore, this proposed rulemaking action will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found that the proposal 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 proposed rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the proposed rulemaking will not affect any coastal natural resource areas. The CMP goals applicable to the proposed 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 would be authorized in those affected counties, and it is possible that ozone levels would be reduced as a result of the proposed rulemaking. The CMP policy applicable to this proposed 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 proposal would not have a detrimental effect on SIP emissions reduction obligations relating to maintenance of the ozone National Ambient Air Quality Standard. This proposed rulemaking action complies with the CFR. Therefore, in compliance with 40 CFR §505.22(e), this proposed rulemaking action is consistent with CMP goals and policies. Promulgation and enforcement of the proposed rule would not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rulemaking is consistent with these CMP goals and policies, and because the proposed rule does not create or have a direct or significant adverse effect on any coastal natural resource areas.

Written comments on the consistency of this rulemaking may be submitted to the

contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on May 31, 2011, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members 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 Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Michael Parrish, 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.texas.gov/rules/ecomments/>. File size restrictions may apply to

comments being submitted via the eComments system. All comments should reference Rule Project Number 2010-047-101-EN. The comment period closes June 6, 2011.

Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.texas.gov/nav/rules/propose_adopt.html. For further information, please contact Amy Muttoni, Air Quality Planning Section, at 512-239-6351.

SUBCHAPTER A: GENERAL RULES

[\$101.30]

Statutory Authority

The repeal is proposed 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 proposed 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 proposed 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.]

[(a) Purpose.]

[(1) The purpose of this rule is to implement FCAA, §176(c), as amended (42 United States Code (USC) §§7401 et seq.) and regulations under 40 Code of Federal Regulations (CFR) Part 51, Subpart W, with respect to the conformity of general federal actions with the applicable state implementation plan (SIP). Under those authorities, no department, agency, or instrumentality of the federal government shall engage in; support in any way or provide financial assistance for; license or permit; or approve any activity which does not conform to an applicable SIP. This rule sets forth policy, criteria, and procedures for demonstrating and assuring conformity of such action to the applicable SIP.]

[(2) Under FCAA, §176(c) and 40 CFR Part 51, Subpart W, a federal agency must make a determination that a federal action conforms to the applicable SIP in accordance with the requirements of this rule before the action is taken, with the exception of federal actions where either:]

[(A) a NEPA analysis was completed as evidenced by a final environmental assessment (EA), environmental impact statement (EIS), or finding of no significant impact (FONSI) that was prepared prior to January 31, 1994; or]

[(B) prior to January 31, 1994, an EA was commenced or a contract was awarded to develop the specific environmental analysis; and sufficient

environmental analysis is completed by March 15, 1994, so that the federal agency may determine that the federal action is in conformity with the specific requirements and the purposes of the applicable SIP pursuant to the agency's affirmative obligation under the FCAA, §176(c); and a written determination of conformity under the FCAA, §176(c) has been made by the federal agency responsible for the federal action by March 15, 1994.]

[(3) Notwithstanding any provision of this rule, a determination that an action is in conformity with the applicable SIP does not exempt the action from any other requirements of the applicable SIP, the NEPA, or the FCAA.]

[(b) Definitions. Unless specifically defined in the TCAA or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms which are defined by the TCAA, the following terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.]

[(1) Affected federal land manager--The federal agency or the federal official charged with direct responsibility for management of an area designated as Class I under the FCAA (42 USC §7472) that is located within 100 kilometers of the proposed federal action.]

[(2) Applicable state implementation plan (SIP)--The portion (or portions) of the SIP, or most recent revision thereof, which has been approved under the FCAA, §110 or promulgated under the FCAA, §110(c) (Federal Implementation Plan or FIP), or promulgated or approved pursuant to regulations promulgated under the FCAA, §301(d) and which implements the relevant requirements of the FCAA.]

[(3) Areawide air quality modeling analysis--An assessment on a scale that includes the entire nonattainment or maintenance area which uses an air quality dispersion model to determine the effects of emissions on air quality.]

[(4) Cause or contribute to a new violation--A federal action that:]

[(A) causes a new violation of a national ambient air quality standard (NAAQS) at a location in a nonattainment or maintenance area which would otherwise not be in violation of the standard during the future period in question if the federal action were not taken; or]

[(B) contributes, in conjunction with other reasonably foreseeable actions, to a new violation of a NAAQS at a location in a nonattainment or maintenance area in a manner that would increase the frequency or severity of the new violation.]

[(5) Cause by, as used in the terms "direct emissions" and "indirect emissions"--Emissions that would not otherwise occur in the absence of the federal action.]

[(6) Direct emissions--Those emissions of a criteria pollutant or its precursors that are caused or initiated by the federal action and occur at the same time and place as the action.]

[(7) Emergency--A situation where extremely quick action on the part of the federal agencies involved is needed, and where the timing of such federal activities makes it impractical to meet the requirements of this rule, such as natural disasters like hurricanes or earthquakes, and civil disturbances such as terrorist acts and military mobilizations.]

[(8) Emissions budgets--Those portions of the total allowable emissions defined for a certain date in a revision to the applicable SIP for the purpose of meeting reasonable further progress milestones, attainment demonstrations, or maintenance demonstrations; for any criteria pollutant or its precursors allocated by the applicable implementation to mobile sources, to any stationary source or class of stationary sources, to any federal action or class of actions, to any class of area sources, or to any

subcategory of the emissions inventory. An emissions budget may be expressed in terms of an annual period, a daily period, or other period established in the applicable SIP.]

[(9) Emissions offsets, for purposes of subsection (h) of this section-- Emissions reductions which are quantifiable; consistent with the applicable SIP attainment and reasonable further progress demonstrations; surplus to reductions required by and credited to other applicable SIP provisions; enforceable under both state and federal law; and permanent within the time frame specified by the program. Emissions reductions intended to be achieved as emissions offsets under this rule must be monitored and enforced in a manner equivalent to that under EPA's new source review requirements.]

[(10) Emissions that a federal agency has a continuing program responsibility for--Emissions that are specifically caused by an agency carrying out its authorities, but does not include emissions that occur due to subsequent activities, unless such activities are required by the federal agency. Where an agency, in performing its normal program responsibilities, takes actions itself or imposes conditions that result in air pollutant emissions by a nonfederal entity taking subsequent actions, such emissions are covered by the meaning of a continuing program responsibility.]

[(11) Federal action--Any activity engaged in by a department, agency, or instrumentality of the federal government, or any activity that a department, agency, or instrumentality of the federal government supports in any way; provides financial assistance for; licenses, permits, or approves. Activities related to transportation plans, programs, and projects developed, funded, or approved under Title 23 USC or the Federal Transit Act (49 USC §§1601 et seq.) are not considered to be federal actions under general conformity. Where the federal action is a permit, license, or other approval for some aspect of a nonfederal undertaking, the relevant activity is the part, portion, or phase of the nonfederal undertaking that required the federal permit, license, or approval.]

[(12) Federal agency--A federal department, agency, or instrumentality of the federal government.]

[(13) Increase the frequency or severity of any existing violation of any standard in any area--To cause a nonattainment area to exceed a standard more often or to cause a violation at a greater concentration than previously existed or would otherwise exist during the future period in question, if the project were not implemented.]

[(14) Indirect emissions--This term does not have the same meaning as given to an indirect source of emissions under FCAA, §110(a)(5), but for general conformity are those emissions of a criteria pollutant or its precursors that:]

[(A) are caused by the federal action, but may occur later in time and/or may be farther removed in distance from the action itself but are still reasonably foreseeable; and]

[(B) the federal agency can practicably control and will maintain control over due to a continuing program responsibility of the federal agency, including, but not limited to:]

[(i) traffic on or to, or stimulated or accommodated by, a proposed facility which is related to increases or other changes in the scale or timing of operations of such facility;]

[(ii) emissions related to the activities of employees of contractors or federal employees;]

[(iii) emissions related to employee commutation and similar programs to increase average vehicle occupancy imposed on all employers of a certain size in the locality;]

[(iv) emissions related to the use of federal facilities under lease or temporary permit; or]

[(v) emissions related to the activities of contractors or leaseholders that may be addressed by provisions that are usual and customary for contracts or leases or within the scope of contractual protection of the interests of the United States.]

[(15) Local air quality modeling analysis--An assessment of localized impacts on a scale smaller than the entire nonattainment or maintenance area, including, for example, congested roadway intersections and highways or transit terminals, which uses an air quality dispersion model to determine the effects of emissions on air quality.]

[(16) Milestone--Has the meaning given in FCAA, §182(g)(1) and §189(c)(1): an emissions level and the date on which it is required to be achieved.]

[(17) Precursors of a criteria pollutant are:]

[(A) for ozone, nitrogen oxides (NO_x) (unless an area is exempted from NO_x requirements under FCAA, §182(f)) and volatile organic compounds (VOC); and]

[(B) for particulate matter (PM₁₀), those pollutants described in the PM₁₀ nonattainment area applicable SIP as significant contributors to the PM₁₀ levels.]

[(18) Reasonably foreseeable emissions--Projected future indirect emissions that are identified at the time the conformity determination is made; the location of such emissions is known to the extent adequate to determine the impact of such emissions; and the emissions are quantifiable, as described and documented by the federal agency based on its own information and after reviewing any information presented to the federal agency.]

[(19) Regionally significant action--A federal action for which the direct and indirect emissions of any pollutant represent 10% or more of a nonattainment or maintenance area's emissions inventory for that pollutant.]

[(20) Regional water or wastewater projects--Projects which include construction, operation, and maintenance of water or wastewater conveyances, water or wastewater treatment facilities, and water storage reservoirs which affect a large portion of a nonattainment or maintenance area.]

[(21) Total of direct and indirect emissions--The sum of direct and indirect emissions increases and decreases caused by the federal action; i.e., the "net" emissions considering all direct and indirect emissions. Any emissions decreases used to reduce such total shall have already occurred or shall be enforceable under state and federal law. The portion of emissions which are exempt or presumed to conform under subsection (c)(3), (4), (5), or (6) of this section are not included in the "total of direct and indirect emissions," except as provided in subsection (c)(10) of this section. The "total of direct and indirect emissions" includes emissions of criteria pollutants and emissions of precursors of criteria pollutants. The segmentation of projects for conformity analyses, when emissions are reasonably foreseeable, is not permitted by this rule.]

[(c) Applicability.]

[(1) Conformity determinations for federal actions related to transportation plans, programs, and projects developed, funded, or approved under

Title 23 USC or the Federal Transit Act (49 USC §§1601 et seq.) shall meet the procedures and criteria of §114.260 of this title (relating to Transportation Conformity), and the Transportation Conformity SIP, in lieu of the procedures set forth in this rule.]

[(2) For federal actions not covered by paragraph (1) of this subsection, a conformity determination is required for each pollutant where the total of direct and indirect emissions in a nonattainment or maintenance area caused by a federal action would equal or exceed any of the rates in subparagraphs (A) or (B) of this paragraph.]

[(A) For purposes of paragraph (2) of this subsection, the following rates apply in nonattainment areas:]

[Figure: 30 TAC §101.30(c)(2)(A)]

[(B) For purposes of paragraph (2) of this subsection, the following rates apply in maintenance areas:]

[Figure: 30 TAC §101.30(c)(2)(B)]

[(3) The requirements of this rule shall not apply to:]

[(A) actions where the total of direct and indirect emissions are below the emissions levels specified in paragraph (2) of this subsection;]

[(B) the following actions which would result in no emissions increase or an increase in emissions that is clearly de minimis:]

[(i) judicial and legislative proceedings;]

[(ii) continuing and recurring activities, such as permit renewals, where activities conducted will be similar in scope and operation to activities currently being conducted;]

[(iii) rulemaking and policy development and issuance;]

[(iv) routine maintenance and repair activities, including repair and maintenance of administrative sites, roads, trails, and facilities;]

[(v) civil and criminal enforcement activities, such as investigations, audits, inspections, examinations, prosecutions, and the training of law enforcement personnel;]

[(vi) administrative actions such as personnel actions, organizational changes, debt management or collection, cash management, internal agency audits, program budget proposals, and matters relating to the administration and collection of taxes, duties, and fees;]

[(vii) the routine, recurring transportation of material and personnel;]

[(viii) routine movement of mobile assets, such as ships and aircraft, in home port reassignments and stations (when no new support facilities or personnel are required) to perform as operational groups, or for repair or overhaul;]

[(ix) maintenance dredging and debris disposal where no new depths are required, applicable permits are secured, and disposal will be at an approved disposal site;]

[(x) with respect to existing structures, properties, facilities, and lands where future activities conducted will be similar in scope and operation to activities currently being conducted at the existing structures, properties, facilities, and lands, actions such as relocation of personnel, disposition of federally-owned existing structures, properties, facilities, and lands, rent subsidies, operation and maintenance

cost subsidies, the exercise of receivership or conservatorship authority, assistance in purchasing structures, and the production of coins and currency;]

[(xi) the granting of leases, licenses such as for exports and trade, permits, and easements where activities conducted will be similar in scope and operation to activities currently being conducted;]

[(xii) planning, studies, and provision of technical assistance;]

[(xiii) routine operation of facilities, mobile assets, and equipment;]

[(xiv) transfers of ownership, interests, and titles in land, facilities, and real and personal properties, regardless of the form or method of the transfer;]

[(xv) the designation of empowerment zones, enterprise communities, or viticultural areas;]

[(xvi) actions by any of the federal banking agencies or the Federal Reserve Banks, including actions regarding charters, applications, notices, licenses, the supervision or examination of depository institutions or depository institution holding companies, access to the discount window, or the provision of financial services to banking organizations or to any department, agency, or instrumentality of the United States;]

[(xvii) actions by the Board of Governors of the Federal Reserve System or any Federal Reserve Bank to effect monetary or exchange rate policy;]

[(xviii) actions that implement a foreign affairs function of the United States;]

[(xix) actions (or portions thereof) associated with transfers of land, facilities, title, and real properties through an enforceable contract or lease agreement where the delivery of the deed is required to occur promptly after a specific, reasonable condition is met, such as promptly after the land is certified as meeting the requirements of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and where the federal agency does not retain continuing

authority to control emissions associated with the lands, facilities, titles, or real properties;]

[(xx) transfers of real property, including land, facilities, and related personal property from a federal entity to another federal entity and assignments of real property, including land, facilities, and related personal property from a federal entity to another federal entity for subsequent deeding to eligible applicants; or]

[(xxi) actions by the Department of the Treasury to effect fiscal policy and to exercise the borrowing authority of the United States;]

[(C) actions where the emissions are not reasonably foreseeable, such as the following actions:]

[(i) initial outer continental shelf lease sales which are made on a broad scale and are followed by exploration and development plans on a project level;]

[(ii) electric power marketing activities that involve the acquisition, sale, and transmission of electric energy;]

[(D) individual actions which implement a decision to conduct or carry out a program that has been found to conform to the applicable SIP, such as prescribed burning actions which are consistent with a land management plan that has been found to conform to the applicable SIP.]

[(4) Notwithstanding the other requirements of this rule, a conformity determination is not required for the following federal actions (or portion thereof).]

[(A) the portion of an action that includes major new or modified stationary sources that require a permit under the new source review (NSR) program (FCAA, §173) or the prevention of significant deterioration (PSD) program (Title I, Part C of the FCAA);]

[(B) actions in response to emergencies or natural disasters such as hurricanes, earthquakes, etc., which are commenced on the order of hours or days after the emergency or disaster and, if applicable, which meet the requirements of paragraph (5) of this section;]

[(C) research, investigations, studies, demonstrations, or training other than those exempted under paragraph (3)(B) of this subsection, where no

environmental detriment is incurred or the particular action furthers air quality research, as determined by the state agency primarily responsible for the SIP.]

[(D) alteration and additions of existing structures as specifically required by new or existing applicable environmental legislation or environmental regulations, e.g., hush houses for aircraft engines and scrubbers for air emissions.]

[(E) direct emissions from remedial and removal actions carried out under the CERCLA and associated regulations to the extent such emissions either comply with the substantive requirements of the NSR/PSD permitting program or are exempted from other environmental regulation under the provisions of CERCLA and applicable regulations issued under CERCLA.]

[(5) Federal actions which are part of a continuing response to an emergency or disaster under paragraph (4)(B) of this subsection and which are to be taken more than six months after the commencement of the response to the emergency or disaster under paragraph (4)(B) of this subsection are exempt from the requirements of this section only if:]

[(A) the federal agency taking the actions makes a written determination that, for a specified period not to exceed an additional six months, it is

impractical to prepare the conformity analyses which would otherwise be required and the actions cannot be delayed due to overriding concerns for public health and welfare, national security interests, and foreign policy commitments; or]

[(B) for actions which are to be taken after those actions covered by paragraph (5)(A) of this subsection, the federal agency makes a new determination as provided in paragraph (5)(A) of this subsection.]

[(6) Notwithstanding other requirements of this rule, individual actions or classes of actions specified by individual federal agencies that have met the criteria set forth in either paragraph (7)(A) or (B) of this subsection and the procedures set forth in paragraph (8) of this subsection are presumed to conform, except as provided in paragraph (10) of this subsection.]

[(7) The federal agency must meet the criteria for establishing activities that are presumed to conform by fulfilling the requirements set forth in either subparagraph (A) or (B) of this paragraph:]

[(A) the federal agency must clearly demonstrate using methods consistent with this rule that the total of direct and indirect emissions from the type of activities which would be presumed to conform would not:]

[(i) cause or contribute to any new violation of any standard
in any area;]

[(ii) interfere with provisions in the applicable SIP for
maintenance of any standard;]

[(iii) increase the frequency or severity of any existing
violation of any standard in any area; or]

[(iv) delay timely attainment of any standard or any required
interim emission reductions or other milestones in any area including, where applicable,
emission levels specified in the applicable SIP or purposes of:]

[(I) a demonstration of reasonable further progress;]

[(II) a demonstration of attainment; or]

[(III) a maintenance plan; or]

[(B) the federal agency shall provide documentation that the total of direct and indirect emissions from such future actions would be below the emission rates for a conformity determination that are established in paragraph (2) of this subsection, based, for example, on similar actions taken over recent years.]

[(8) In addition to meeting the criteria for establishing exemptions set forth in paragraph (7)(A) or (B) of this subsection, the following procedures must also be complied with to presume that activities will conform:]

[(A) the federal agency shall identify through publication in the Federal Register its list of proposed activities that are presumed to conform and the analysis, assumptions, emissions factors, and criteria used as the basis for the presumptions;]

[(B) the federal agency shall notify the appropriate EPA Regional Office, the commission, local air quality agencies and, where applicable, the Texas Department of Transportation (TxDOT) and the MPO, and provide at least 30 days for the public to comment on the list of proposed activities presumed to conform;]

[(C) the federal agency shall document its response to all the comments received and make the comments, response, and final list of activities available to the public upon request; and]

[(D) the federal agency shall publish the final list of such activities in the Federal Register.]

[(9) Notwithstanding the other requirements of this rule, when the total of direct and indirect emissions of any pollutant from a federal action does not equal or exceed the rates specified in paragraph (2) of this subsection, but represents 10% or more of a nonattainment or maintenance area's total emissions of that pollutant, then the action is defined as a regionally significant action and the requirements of subsections (a) and (e)-(j) of this section shall apply for the federal action.]

[(10) Where an action otherwise presumed to conform under paragraph (6) of this subsection is a regionally significant action or does not in fact meet one of the criteria in paragraph (7)(A) of this subsection, that action shall not be considered de minimis or presumed to conform and the requirements of subsections (a) and (e)-(j) of this section shall apply for the federal action.]

[(11) The provisions of this section shall apply in all nonattainment and maintenance areas.]

[(12) Any measures used to affect or determine applicability of this rule, as determined under this subsection, must result in projects that are in fact de minimis, must result in such de minimis levels prior to the time the applicability determination is made, and must be state and federally enforceable. Any measures that are intended to reduce air quality impacts for this purpose must be identified (including the identification and quantification of all emission reductions claimed); and the process for implementation (including any necessary funding of such measures and tracking of such emission reductions) and enforcement of such measures must be described, including an implementation schedule containing explicit timelines for implementation. Prior to a determination of applicability, the federal agency making the determination must obtain written commitments from the appropriate persons or agencies to implement any measures which are identified as conditions for making such determinations. Such written commitment shall describe such mitigation measures and the nature of the commitment, in a manner consistent with the previous sentence. After this implementation plan revision is approved by EPA, enforceability through the applicable SIP of any measures necessary for a determination of applicability will apply to all persons who agree to reduce direct and indirect emissions associated with a federal action for a conformity applicability determination.]

[(d) Conformity Analysis. Any federal department, agency, or instrumentality of the federal government taking an action subject to 40 CFR, Part 51, Subpart W and this section shall make its own conformity determination consistent with the requirements of this rule. In making its conformity determination, a federal agency must consider comments from any interested parties. Where multiple federal agencies have jurisdiction for various aspects of a project, a federal agency may choose to adopt the analysis of another federal agency (to the extent the proposed action and impacts analyzed are the same as the project for which a conformity determination is required) or develop its own analysis in order to make its conformity determination.]

[(e) Reporting Requirements.]

[(1) A federal agency making a conformity determination under subsection (h) of this section shall provide to the appropriate EPA Regional Office, the commission, local air quality agencies and, where applicable, affected federal land managers, TxDOT and the MPO, a 30-day notice which describes the proposed action and the federal agency's draft conformity determination on the action.]

[(2) A federal agency shall notify the appropriate EPA Regional Office, the commission, local air quality agencies and, where applicable, affected federal land

managers, TxDOT and the MPO within 30 days after making a final conformity determination under subsection (h) of this section.]

[(3) As a matter of policy, the state will not make any determination under subsection (h)(1)(E)(i)(I) of this section or any commitment under subsection (h)(1)(E)(i)(II) of this section, unless the federal agency provides to the commission information on all projects or other actions which may affect air quality or emissions in any area to which this rule is applicable, whether such project or action is determined to be subject to this rule under subsection (c) of this section. As a matter of policy, the emissions budget that would otherwise be available for projects of any federal agency under subsection (h) of this section shall be reduced by 50% (or other percentage as the state determines) in the case of any federal agency that does not provide to the commission information on all projects or other actions which may affect air quality or emissions in any area to which this rule is applicable, regardless of whether such project or action is determined to be subject to this rule under subsection (c) of this section.]

[(f) Public Participation and Consultation.]

[(1) Upon request by any person regarding a specific federal action, a federal agency shall make available for review its draft conformity determination under subsection (h) of this section with supporting materials which describe the analytical

methods, assumptions, and conclusions relied upon in making the applicability analysis and draft conformity determination.]

[(2) A federal agency shall make public its draft conformity determination under subsection (h) of this section by placing a notice by prominent advertisement in a daily newspaper of general circulation in the areas affected by the action and by providing 30 days for written public comment prior to taking any formal action on the draft determination. This comment period may be concurrent with any other public involvement, such as occurs in the NEPA process.]

[(3) A federal agency shall document its response to all the comments received on its draft conformity determination under subsection (h) of this section and make the comments and responses available, upon request by any person regarding a specific federal action, within 30 days of the final conformity determination.]

[(4) A federal agency shall make public its final conformity determination under subsection (h) of this section for a federal action by placing a notice by prominent advertisement in a daily newspaper of general circulation in the areas affected by the action within 30 days of the final conformity determination.]

[(g) Frequency of Conformity Determinations.]

[(1) The conformity status of a federal action automatically lapses five years from the date a final conformity determination is reported under subsection (e) of this section, unless the federal action has been completed or a continuous program has been commenced to implement that federal action within a reasonable time.]

[(2) Ongoing federal activities at a given site showing continuous progress are not new actions and do not require periodic redetermination so long as the emissions associated with such activities are within the scope of the final conformity determination reported under subsection (e) of this section.]

[(3) If, after the conformity determination is made, the federal action is changed so that there is an increase in the total of direct and indirect emissions above the levels in subsection (c)(1) of this section, a new conformity determination is required.]

[(h) Criteria for Conformity Determination of General Federal Actions.]

[(1) An action required under subsection (c) of this section to have a conformity determination for a specific pollutant will be determined to conform to the applicable plan if, for each pollutant that exceeds the rates of subsection (c)(2) of this

section, or otherwise requires a conformity determination due to the total of direct and indirect emissions from the action, the action meets the requirements of paragraph (3) of this subsection, and meets any of the following requirements:]

[(A) for any criteria pollutant, the total of direct and indirect emissions from the action are specifically identified and accounted for in the applicable SIP attainment or maintenance demonstration;]

[(B) for ozone or NO₂ , the total of direct and indirect emissions from the action are fully offset within the same nonattainment or maintenance area through a revision to the applicable SIP or a measure similarly enforceable under state and federal law that effects emission reductions so that there is no increase in emissions of that pollutant;]

[(C) for any criteria pollutant, except ozone and NO₂, the total of direct and indirect emissions from the action shall meet the requirements:]

[(i) specified in paragraph (2) of this subsection, based on areawide air quality modeling analysis and local air quality modeling analysis; or]

[(ii) specified in paragraph (1)(E) of this subsection and, for local air quality modeling analysis, the requirement of paragraph (2) of this subsection;]

[(D) for CO or PM10 :]

[(i) where the commission determines, in accordance with subsections (e) and (f) of this section and consistent with the applicable SIP, that an areawide air quality modeling analysis is not needed, the total of direct and indirect emissions from the action meet the requirements specified in paragraph (2) of this subsection, based on local air quality modeling analysis; or]

[(ii) where the commission determines, in accordance with subsections (e) and (f) of this section and consistent with the applicable SIP, that an areawide air quality modeling analysis is appropriate, and that a local air quality modeling analysis is not needed, the total of direct and indirect emissions from the action meet the requirements specified in paragraph (2) of this subsection, based on areawide modeling, or meet the requirements of paragraph (1)(E) of this subsection;]

[(E) for ozone or nitrogen dioxide, and for purposes of paragraphs (1)(C)(ii) and (1)(D)(ii) of this subsection, each portion of the action or the action as a whole meets any of the following requirements:]

[(i) where EPA has approved a revision to an area's attainment or maintenance demonstration after 1990, and the state makes a determination as provided in subclause (I) of this clause, or where the state makes a commitment as provided in subclause (II) of this clause. Any such determination or commitment shall be made in compliance with subsections (e) and (f) of this section.]

[(I) The total of direct and indirect emissions from the action, or portion thereof, is determined and documented by the commission to result in a level of emissions which, together with all other emissions in the nonattainment or maintenance area, would not exceed the emissions budgets specified in the applicable SIP.]

[(II) The total of direct and indirect emissions from the action, or portion thereof, is determined by the commission to result in a level of emissions which, together with all other emissions in the nonattainment or maintenance area, would exceed an emissions budget specified in the applicable SIP and the commission makes a written commitment to EPA which includes the following:]

[-a-) a specific schedule for adoption and submittal of a revision to the applicable SIP which would achieve the needed emission reductions prior to the time emissions from the federal action would occur;]

[-b-) identification of specific measures for incorporation into the applicable SIP which would result in a level of emissions which, together with all other emissions in the nonattainment or maintenance area, would not exceed any emissions budget specified in the applicable SIP;]

[-c-) a demonstration that all existing applicable SIP requirements are being implemented in the area for the pollutants affected by the federal action, and that local authority to implement additional requirements has been fully pursued;]

[-d-) a determination that the responsible federal agencies have required all reasonable mitigation measures associated with their action. As a matter of commission policy, a commitment will be made only if the commission determines that the project sponsors and responsible federal agencies have sought all available emissions offsets and made all reasonably available modifications of the action to reduce emissions; and]

[-e-) written documentation including all air quality analyses supporting the conformity determination.]

[(III) Where a federal agency made a conformity determination based on a state commitment under subclause (II) of this clause, such a state commitment is automatically deemed to call for a SIP revision by EPA under the FCAA, §110(k)(5), effective on the date of the federal conformity determination and requiring response within 18 months or any shorter time within which the state commits to revise the applicable SIP;]

[(ii) the action or portion thereof, as determined by the MPO, is specifically included in a current transportation plan and transportation improvement program which have been found to conform to the applicable SIP under §114.260 of this title (relating to Transportation Conformity), or the Transportation Conformity SIP, or 40 CFR Part 93, Subpart A;]

[(iii) the action, or portion thereof, fully offsets its emissions within the same nonattainment or maintenance area through a revision to the applicable SIP, or an equally enforceable measure that effects emission reductions equal to or greater than the total of direct and indirect emissions from the action so that there is no net increase in emissions of that pollutant;]

[(iv) where EPA has not approved a revision to the relevant SIP, attainment demonstration, or maintenance demonstration since 1990, the total of direct and indirect emissions from the action for the future years as described in subsection (i)(4) of this section do not increase emissions with respect to the baseline emissions, and:]

[(I) the baseline emissions reflect the historical activity levels that occurred in the geographic area affected by the proposed federal action during:]

[-a-) calendar year 1990;]

[-b-) the calendar year that is the basis for the classification (or, where the classification is based on multiple years, the year that is most representative in terms of the level of activity), if a classification is promulgated in 40 CFR Part 81; or]

[-c-) the year of the baseline inventory in the applicable PM10 SIP;]

[(II) the baseline emissions are the total of direct and indirect emissions calculated for the future years, described in subsection (i)(4) of this section using the historic activity levels described in subclause (I) of this clause and appropriate emission factors for the future years; or]

[(v) where the action involves regional water or wastewater projects, such projects are sized to meet only the needs of population projects that are in the applicable SIP, based on assumptions regarding per capita use that are developed or approved in accordance with subsection (i)(1) of this section.]

[(2) The areawide and/or local air quality modeling analyses must:]

[(A) meet the requirements in subsection (i) of this section; and]

[(B) show that the action does not:]

[(i) cause or contribute to any new violation of any standard in any area; or]

[(ii) increase the frequency or severity of any existing violation of any standard in any area.]

[(3) Notwithstanding any other requirements of this section, an action subject to this rule may not be determined to conform to the applicable SIP, unless the total of direct and indirect emissions from the action is in compliance or consistent with all relevant requirements and milestones contained in the applicable SIP, such as elements identified as part of the reasonable further progress schedules, assumptions specified in the attainment or maintenance demonstration, prohibitions, numerical emission limits, and work practice requirements; and such action is otherwise in compliance with all relevant requirements of the applicable SIP.]

[(4) Any analyses required under this section shall be completed, and any mitigation requirements necessary for a finding of conformity shall be identified in compliance with subsection (j) of this section, before the determination of conformity is made.]

[(i) Procedures for Conformity Determination of General Federal Actions.]

[(1) The analyses required under this rule shall be based on the latest planning assumptions.]

[(A) All planning assumptions (including, but not limited to, per capita water and sewer use, vehicle miles traveled per capita or per household, trip generation per household, vehicle occupancy, household size, vehicle fleet mix, vehicle ownership, wood stoves per household, and the geographic distribution of population growth) shall be derived from the estimates of current and future population, employment, travel, and congestion most recently developed by the MPO or the state agency authorized under state law to make such estimates.]

[(B) Any revisions to these estimates used as part of the conformity determination, including projected shifts in geographic location or level of population, employment, travel, and congestion, shall be approved by the MPO or other agency authorized to make such estimates for the area.]

[(2) The analyses required under this rule must be based on the latest and most accurate emission estimation techniques available as described below, unless such techniques are inappropriate. If such techniques are inappropriate and written approval of the EPA Regional Administrator is obtained for any modification or substitution, they may be modified or another technique substituted on a case-by-case basis or, where appropriate, on a generic basis for a specific federal agency program.]

[(A) For motor vehicle emissions, the most current version of the motor vehicle emissions model specified by EPA for use in the preparation or revision of implementation plans in the state or area shall be used for the conformity analysis as specified below:]

[(i) the EPA must have published in the Federal Register a notice of availability of any new motor vehicle emissions model; and]

[(ii) a grace period of three months shall apply during which the motor vehicle emissions model previously specified by EPA as the most current version may be used. Conformity analyses for which the analysis was begun during the grace period, or no more than three years before the Federal Register notice of availability of the latest emission model, may continue to use the previous version of the model specified by EPA.]

[(B) For nonmotor vehicle sources, including stationary and area source emissions, the latest emission factors specified by EPA in the "Compilation of Air Pollutant Emission Factors (AP-42)" shall be used for the conformity analysis unless more accurate emissions data are available, such as actual stack test data for stationary sources which are part of the conformity analysis.]

[(3) The air quality modeling analyses required under this rule must be based on the applicable air quality models, data bases, and other requirements specified in the most recent version of the "Guideline on Air Quality Models (Revised)" (1986), including supplements (EPA publication number 450/2-78-027R), unless:]

[(A) the guideline techniques are inappropriate, in which case the model may be modified or another model substituted on a case-by-case basis or, where appropriate, on a generic basis for a specific federal agency program; and]

[(B) written approval of the EPA Regional Administrator is obtained for any modification or substitution.]

[(4) The analyses required under this rule shall be based on the total of direct and indirect emissions from the action and shall reflect emission scenarios that are expected to occur under each of the following cases:]

[(A) the FCAA mandated attainment year or, if applicable, the farthest year for which emissions are projected in the maintenance plan;]

[(B) the year during which the total of direct and indirect emissions from the action for each pollutant analyzed is expected to be the greatest on an annual basis; and]

[(C) any year for which the applicable implementation plan specifies an emissions budget.]

[(j) Mitigation of air quality impacts.]

[(1) Any measures that are intended to mitigate air quality impacts shall be identified (including the identification and quantification of all emissions reductions claimed); and the process for implementation (including any necessary funding of such measures and tracking of such emissions reductions), and enforcement of such measures shall be described, including an implementation schedule containing explicit timelines for implementation.]

[(2) Prior to determining that a federal action is in conformity, the federal agency making the conformity determination shall obtain written commitments from the appropriate persons or agencies to implement any mitigation measures which are identified as conditions for making conformity determinations. Such written

commitment shall describe such mitigation measures and the nature of the commitment, in a manner consistent with paragraph (1) of this subsection.]

[(3) Persons or agencies voluntarily committing to mitigation measures to facilitate positive conformity determinations shall comply with the obligations of such commitments.]

[(4) In instances where the federal agency is licensing, permitting, or otherwise approving the action of another governmental or private entity, approval by the federal agency shall be conditioned on the other entity meeting the mitigation measures set forth in the conformity determination, as provided in paragraph (1) of this subsection.]

[(5) When necessary because of changed circumstances, mitigation measures may be modified so long as the new mitigation measures continue to support the conformity determination in accordance with subsections (h) and (i) of this section and this paragraph. Any proposed change in the mitigation measures is subject to the reporting requirements of subsection (e) of this section and the public participation requirements of subsection (f) of this section.]

[(6) Written commitments to mitigation measures shall be obtained prior to positive conformity determination and such commitments must be fulfilled.]

[(7) After this implementation plan revision is approved by EPA, any agreements, including mitigation measures, necessary for a conformity determination will be both state and federally enforceable. Enforceability through the applicable SIP will apply to all persons who agree to mitigate direct and indirect emissions associated with a federal action for a conformity determination.]

[(k) Savings Provisions. The federal conformity rules under 40 CFR, Part 51, Subpart W establish the conformity criteria and procedures necessary to meet the requirements of the FCAA §176(c) until such time as this conformity SIP revision is approved by EPA. Following EPA approval of this SIP revision (or a portion thereof), the approved (or approved portion of the) state criteria and procedures would govern conformity determinations, and the federal conformity regulations contained in 40 CFR, Part 93 would apply only for the portion, if any, of the state's conformity provisions that is not approved by EPA.]