

The Texas Natural Resource Conservation Commission (commission or TNRCC) adopts amendments to ' 114.5 (Transportation Planning Definitions); the repeal of existing ' 114.270 (Transportation Control Measures); and new ' 114.270 (Transportation Control Measures). The commission also adopts corresponding revisions to the state implementation plan (SIP) sections concerning transportation control measures (TCMs). The commission adopts these actions to ' 114.5, ' 114.270, and the associated SIP in order to revise the rule to meet the United States Environmental Protection Agency (EPA) guidance requirements and allow nonattainment area metropolitan planning organizations (MPOs) to substitute TCMs without a SIP revision. Section 114.270 is adopted with changes to the proposed text as published in the November 26, 1999 issue of the *Texas Register* (24 TexReg 10508). Section 114.5 and the repeal of existing ' 114.270 are adopted without changes to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

TCMs are transportation projects and related activities that are designed to achieve on-road mobile source emissions reductions and are included as control measures in the SIP. Allowable types of TCMs are listed in ' 108 (Air Quality Criteria and Control Techniques) of the Federal Clean Air Act (FCAA), 1970, as amended, (42 United States Code (USC), ' 7408) and defined in the federal transportation conformity rule found in Title 40 Code of Federal Regulations (40 CFR), Part 93 (Determining Conformity of Federal Actions to State or Federal Implementation Plans). In general, a TCM is a transportation related project that reduces vehicle use or changes traffic flow and/or congestion conditions. A project that adds single-occupancy-vehicle roadway capacity or is based on improvements in vehicle technology or fuels is not eligible as a TCM. Nonattainment area MPOs work in conjunction with the commission to develop TCMs for inclusion in the SIP. The MPOs are responsible for ensuring the TCM emission reduction targets and time lines are met.

The current TCM rule allows TCMs to be grouped and quantified by categories, without project specific descriptions and associated estimated emissions reductions. Nonattainment area MPOs can substitute TCMs within, but not between, categories without a SIP revision. The EPA objected to the current TCM rule because it does not require the listing of specific TCM projects or allow for public comment on TCM substitutions. The EPA SIP guidance for TCMs requires states to provide EPA with a complete description of the TCM and its estimated emission reduction benefits. MPOs are often reluctant to list specific TCMs in the SIP because specific project locations and emission reductions are often subject to change. Under the current rule, a SIP revision is required to substitute TCMs between categories, and a SIP revision triggers a transportation conformity determination which may not have been necessary otherwise. There are also adverse transportation conformity consequences if TCMs are not completed on schedule.

The adopted rule will require TCM project specific descriptions and estimated emissions reductions to be included in the SIP. The adopted TCM rule will also allow nonattainment area MPOs to substitute TCMs without a SIP revision if the substitution results in equal or greater emission reductions. The TCM substitution process explained in this rule is the only way in which a TCM may be substituted without constituting a SIP revision for transportation conformity purposes. The TCM substitution process will require interagency consultation and a public comment period. The commission is responsible for conducting the public participation process and approving the substitute TCM. The TCM substitution process parallels the rulemaking and SIP revision processes for the purpose of public participation. The adopted rule will meet EPA TCM requirements and will allow the MPOs, after interagency consultation,

to substitute TCMs without SIP revisions. This flexibility may also encourage MPOs to list more TCMs in the SIP and facilitate reaching SIP emission reduction requirements.

SECTION BY SECTION RULE DISCUSSION

The amendment to the definition of TCM in ' 114.5 will mirror the federal definition found in 40 CFR ' 93.101 (Definitions).

The existing rule in ' 114.270 is repealed and a new ' 114.270 is adopted because of the extensive changes to the section. The new section states the purpose of the rule in ' 114.270(a), and specifies that the rule applies to nonattainment or maintenance areas in ' 114.270(b). The purpose of the rule is to implement TCM requirements, address the roles and responsibilities of the MPOs and implementing transportation agencies in nonattainment and maintenance areas, and provide a method for TCM substitution of without a SIP revision. The rule applies to MPOs and agencies that implement TCMs in designated nonattainment or maintenance areas, as defined in 30 TAC ' 101.1 (Definitions).

General requirements are addressed in ' 114.270(c). These requirements indicate that all TCMs shall be developed, coordinated, funded, approved, implemented, tracked, evaluated, and monitored in accordance with ' 114.260, Transportation Conformity; 40 CFR 93, Conformity to State or Federal Implementation Plans of Transportation Plans, Programs and Projects Developed, Funded or Approved Under Title 23 USC or the Federal Transit Laws, as amended; the FCAA; and the EPA TCM SIP approval criteria listed in the EPA guidance document ATransportation Control Measures: State Implementation Plan Guidance,@ EPA 450/2-89-020, September 1990. This section was added in response to a comment from the EPA indicating that these documents are the regulatory criteria for TCMs.

Nonattainment and maintenance area MPO responsibilities are addressed in ' 114.270(d). The MPOs are responsible for ensuring that all responsibilities required by ' 114.270(c) are fulfilled. Paragraphs (1)-(5) and (8) of the proposed subsection (c) have been deleted because they reiterate the requirements of new ' 114.270(c). New ' 114.270(d)(1) was added to specify that the MPO responsibilities are stated in subsection (c). Section 114.270(c)(6) has been renumbered to ' 114.270(d)(2) and requires MPOs to maintain complete and accurate records on TCMs for five years and make these records available to appropriate agencies. Section 114.270(d)(2) has been revised to indicate that the records must be maintained for all TCMs and be maintained on a rolling basis. Section 114.270(c)(7) has been renumbered to ' 114.270(d)(3), which has been revised to indicate that the records will also be made available to the public. The proposed ' 114.270(c)(8) has been deleted because it reiterated the requirements of ' 114.270(c) and (f).

Responsibilities for an implementing agency are addressed in ' 114.270(e). Paragraph (1) has been added to indicate that implementing agencies are responsible to ensure that all responsibilities required by ' 114.270(c) are fulfilled. Paragraph (2) has been revised to indicate that implementing agencies will have the responsibility to provide to the MPO the following information upon request: 1) a complete description of the TCMs and their associated emission reduction benefits; 2) evidence that the TCMs were properly adopted by a jurisdiction with legal authority to commit to and execute the program(s); 3) evidence that funding has been, or will be, obligated to implement the TCMs; and 4) a description of the monitoring program to assess the TCM=s effectiveness. The proposed paragraph (4) was renumbered to

paragraph (2)(D) and was revised in response to an EPA comment by removing the phrase Aand to allow for necessary in-place corrections or alterations.@

The TCM substitution process is outlined in ' 114.270(f). The adopted rule provides a TCM substitution process that allows nonattainment area MPOs to change the TCMs used as SIP control strategies without a SIP revision if the substitution results in equal or greater emission reductions. Substitute TCM(s) must be implemented in the same time frame as the original TCM(s). If the implementation date has already passed, measures that require funding must be included in the first year of the next transportation improvement program plan and metropolitan transportation plan adopted by the MPO. The substitute measures must be fully implemented within two years of the original implementation date in order to meet the requirement for timely TCM implementation under ' 114.260. In order for the commission to approve substitute measures, MPOs must provide evidence of adequate personnel, funding, and authority under state or local law to implement, monitor, and enforce the measures. Commitments to implement the substitute measures must be made by the agency with legal authority for implementation. Section 114.270(f) was revised for clarification purposes in response to comments from the EPA. Subsection (f) was also revised in several places to indicate that the commission will approve, rather than adopt, substitute measures and that the commission approval shall not constitute a SIP revision for the purpose of transportation conformity.

The analysis of the substitute measures is addressed in ' 114.270(f)(2), which indicates that the analysis must be consistent with the methodology used for evaluating measures in the SIP. If emissions models and/or transportation models have changed since measures in the SIP were evaluated, the TCM to be replaced and the substitute TCM must be evaluated using the latest modeling techniques. Key methodologies and assumptions that must be consistent are EPA approved regional and hot-spot models, the area transportation model, and population and employment growth projections.

Section 114.270(f)(3) indicates that the MPO will convene a committee (or working group) to identify and evaluate possible substitute measures. The committee shall include members from all affected jurisdictions, the commission, and state and local transportation agencies. Subparagraph (3)(A) was revised in response to the EPA comment to include local air agencies as members of the working group. The working group will also consult with EPA Region 6. This consultation may be accomplished by sending copies of all draft and final documents, agendas, and reports to EPA Region 6. The MPO, commission, and EPA Region 6 must concur with the appropriateness and equivalency of the substitute TCM.

Section 114.270(f)(4) was revised in response to EPA=s comment to clarify the parties which must concur.

Section 114.270(f)(5) was revised in response to comments to clarify that the commission will approve the substitute measures and conduct the public hearing and comment process. A public comment period with reasonable (30-days) notice must be held on the substitute TCMs before they can be approved by the commission and included in the SIP. After the comment period closes, the commission will submit to EPA Region 6 a summary of comments received, along with the response to comments. EPA will notify the commission within 14 days if its concurrence with the substitution has changed as a result of public comments. Paragraph (5) has also been revised to indicate that the TCM substitution process parallels the

rulemaking and SIP processes for the purpose of public participation; however, commission approval of a substitute TCM shall not constitute a SIP revision for the purpose of transportation conformity. Subparagraphs (C)-(F) of paragraph (5) have been deleted, because they do not reflect the public participation requirements associated with the rulemaking and SIP processes.

Section 114.270(f)(7) was revised in response to comments to clarify that EPA will notify the commission within 14 days of receipt summary of comments and responses from the commission. If EPA fails to notify the commission within 14 days, EPA is deemed to concur.

Section 114.270(f)(9) states that the commission will maintain documentation of approved TCM substitutions. The documentation will provide a description of the substitute and original TCMs, including requirements and schedules. The documentation will also include a description of the substitution process, including committee or working group members, the public hearing and comment period, EPA's concurrence, and approval by the commission. The documentation will be submitted to EPA following approval by the commission of the substitute measure and will be made available to the public as an attachment to the SIP.

Section 114.270(f)(10) was deleted in response to comments that it limited the commission enforcement authority. Section 114.270(f)(10) had indicated that the commission would seek a financial penalty against the MPO or implementing agency only in the case of an egregious or knowing violation of the provisions of this section.

SECTION BY SECTION SIP ANALYSIS

The existing Vehicle Miles Traveled (VMT) Offset section (VI. B. 8. b.) was revised to update the date and section reference to the transportation control measure rule found in 30 TAC ' 114.270. No change to the technical portion of the VMT Offset SIP is being adopted in this revision. The section was also administratively reformatted to conform to the new SIP format being used by the commission.

The adopted new Transportation Control Measure section (VI. B. 8. c.) states the requirements relating to TCMs, addresses the roles and responsibilities of the MPOs and implementing transportation agencies in nonattainment and maintenance areas, and provides a method for the substitution of TCMs without a SIP revision. The SIP applies to MPOs and agencies that implement TCMs in designated nonattainment or maintenance areas.

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 is not subject to ' 2001.0225 because it does not meet 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 amendments to Chapter 114 are not anticipated to 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 because the amendments are procedural in nature, are intended to conform state TCM rules to EPA guidance, and

allow nonattainment area MPOs to substitute TCMs without a SIP revision. In addition, the rulemaking action does not meet the applicability requirements of a major environmental rule. The rulemaking action does not exceed a standard set by federal law, and has been completed to satisfy the federal requirement set out in 40 CFR 93.113 which requires timely implementation of TCMs in order for serious and above ozone nonattainment areas to demonstrate transportation conformity. In addition, the rulemaking action neither exceeds an express requirement of state law, nor exceeds a requirement of a delegation agreement. Finally, the rule conforms to EPA rules and guidance regarding TCM requirements.

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for these rules in accordance with Texas Government Code, § 2007.043. The following is a summary of that assessment. The specific purpose of the rulemaking action is to implement requirements relating to TCMs as required by 42 USC, § 7482(c)(5). TCMs are transportation-related projects that are designed to reduce on-road mobile source emissions and are included in the area's SIP. These requirements address the roles and responsibilities of the MPOs and implementing transportation agencies in nonattainment and maintenance areas and provide a method for the substitution of TCMs without a SIP revision. The adopted rule will require TCM project specific descriptions and estimated emissions reductions to be included in the SIP. The adopted rule will also allow nonattainment area MPOs to substitute TCMs without a SIP revision if the substitution(s) result(s) in equal or greater emissions reductions. The TCM substitution process will require interagency consultation and a public comment period.

The adopted rule change will meet EPA TCM requirements and will allow the MPOs to substitute TCMs without SIP revisions. This flexibility may also encourage MPOs to list more TCMs in the SIP and may facilitate achievement of SIP emissions reduction requirements.

Therefore, this revision does not constitute a takings under Chapter 2007 of the Texas Government Code.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission determined that the adopted rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, § 33.201 et seq.), and the commission rules in 30 TAC Chapter 281, Subchapter B, (Consistency with the CMP). The commission reviewed this adopted action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the adopted action is consistent with the applicable CMP goals and policies. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations at 40 CFR to protect and enhance air quality in the coastal area. This rule is implementing, within the state, a portion of 40 CFR 93 which is protective of the air quality in the coastal area because it requires transportation plans to conform to the SIP. Therefore, the rule is in agreement with the CMP policy governing air pollutant emissions.

There were no comments regarding the consistency of the proposed rule with the CMP during the public comment period.

HEARING AND COMMENTERS

A public hearing on this proposal was held in Austin on December 21, 1999. There were no attendees at the public hearing. The comment period was originally scheduled to close on December 27, 1999, but at the request of EPA, the comment period was extended (24 TexReg 12146, dated December 31, 1999) until January 28, 2000. Two comment letters were received from the Texas Department of Transportation (TxDOT), one comment letter was received from EPA, and one comment letter was received from an individual. Both TxDOT letters generally supported the proposal and welcomed the increased flexibility in the rules. EPA did not express support or opposition to the proposal, however, it submitted several changes that must be made to the rule language in order for the proposal to be approvable.

ANALYSIS OF TESTIMONY

TxDOT commented in support of the proposal and stated that the proposed amendments would simplify TCM substitution procedures.

The commission appreciates TxDOT=s support.

EPA noted that EPA has not promulgated a TCM rule and its criteria for review of the proposal came from the FCAA, the federal transportation conformity rule, and EPA policies relating to SIPs, TCMs, and nonattainment areas.

The commission revised ' 114.270 by adding a new subsection (c) and renumbering the remaining proposed subsections. This section indicates that all TCMs shall be developed, coordinated, funded, approved, implemented, tracked, evaluated, and monitored in accordance with 30 TAC ' 114.260, Transportation Conformity; 40 CFR 93, Conformity to State or Federal Implementation Plans of Transportation Plans, Programs and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit Laws, as amended; the FCAA; and the EPA TCM SIP approval criteria listed in the EPA guidance document ATransportation Control Measures: State Implementation Plan Guidance,@ EPA 450/2-89-020, September 1990. The intent of this section is to clarify MPO and implementing agency responsibilities and ensure that TCMs will be approvable by EPA. The remaining subsections have been renumbered and several paragraphs have been deleted, because they reiterate the requirements of the new ' 114.270(c). The commission does not believe that it is appropriate to establish TCM requirements based on EPA SIP, TCM, and nonattainment area policies because these EPA policies are subject to various interpretations and changes.

An individual commented that the proposed changes allow local MPOs, rather than the commission, to hold public hearings regarding changes to TCMs. The individual noted that changing the TCMs in the SIP should be a state responsibility. The individual also mentioned that MPOs do not have the responsibility under the FCAA to ensure that the SIP has workable TCMs that get implemented.

The commission agrees that changing the TCMs in the SIP should be a state responsibility. The commission renumbered ' 114.270(e)(5) as ' 114.270(f)(5) and revised the language to clarify that public hearings regarding changes to TCMs will be conducted by the commission. The commission agrees that MPOs do not have the responsibility under the FCAA to ensure that the SIP has

workable TCMs; however, ' 176(c)(2)(C) of the FCAA does give MPOs the responsibility of ensuring the timely implementation of TCMs.

An individual commented that allowing the withdrawal of TCMs by MPOs will allow MPOs to weaken or modify TCMs that work and substitute or dismantle TCMs with less commission oversight. The individual gave examples of high-occupancy vehicle (HOV) lanes being converted to congestion pricing, single occupancy vehicle lanes and toll roads being selected instead of rail lines or HOV lanes and also stated that the proposal encouraged the wrong type of transportation option.

The commission notes that ' 114.270(e), renumbered as ' 114.270(f), allows TCMs to be withdrawn only if they are substituted with another TCM of equal or greater emissions reductions that will be implemented in the same time period as the original TCM. MPOs, therefore, are not allowed to weaken, dismantle, or modify TCMs that work without guaranteeing that the substitute TCM will achieve the emissions reduction target. The commission=s oversight has not been lessened; the commission must approve the TCM substitution. The commission does not have the authority to select transportation projects or determine transportation options as referenced in the commenter=s examples. However, the commission notes that ' 114.270(f) would not allow the MPOs to select and substitute an alternative TCM unless the project=s SIP emissions reductions target is met by the substitute TCM. The rule changes should encourage transportation options that are beneficial to air quality.

An individual commented that citizens need to be able to appeal to EPA if TNRCC continues to abdicate its responsibilities in the realm of TCMs. The individual noted that a formal process that includes changing TCMs through the SIP makes citizen input a more powerful tool. The individual referred to the following statements in the SIP: A Nonattainment area MPOs objected to the current TCM rule because it does not provide a method of substituting TCMs between categories without a SIP revision. SIP revisions trigger transportation conformity determinations that may not have been necessary otherwise. There are also adverse transportation conformity consequences if all TCMs are not completed on schedule.@ The individual referred to these statements as evidence of TNRCC=s avoidance of its responsibilities. The individual also noted that TCM substitutions through SIP revisions give EPA and TNRCC a hammer to force more complete and periodic conformity determinations so that mid-course corrections, monitoring, and auditing of MPO progress can be done.

The commission notes that the rule includes a formal public comment period which allows citizens to have the same opportunities for input as that for a SIP revision. As part of its TCM responsibilities, the commission will conduct the public hearing and comment period. The statements referred to as evidence of the commission=s avoidance of its responsibilities were included to explain why MPOs are often reluctant to include TCMs in the SIP. Frequently, TCMs are planned transportation projects that will be implemented regardless of whether they are included as TCMs in the SIP, so it is not necessary to include them in the SIP to ensure implementation. Transportation projects are also often subject to change; for example, the planned project limits or implementation dates may be changed before implementation due to new information or delays in the process. Requiring SIP revisions to accommodate project changes discourages MPOs from committing to SIP TCMs, since the SIP revision triggers a transportation

conformity determination. Transportation conformity determinations are resource intensive, so MPOs often do not want to include transportation projects as SIP TCM commitments. The commission believes that the required frequency of conformity determinations is sufficient to allow for mid-course corrections and monitoring of MPO progress and that increased frequency of conformity determinations triggered by TCM related SIP revisions only discourages the inclusion of TCMs as SIP commitments.

An individual stated that the idea that the rule change is predicated by EPA is false, because all the EPA wants is a listing of specific TCM projects and allowance of public comment on TCM substitutions. The individual stated that this could be accomplished by changing the SIP and holding an official TNRCC public hearing.

The commission notes that the current ' 114.270 allows TCMs to be grouped and quantified by category. A rule revision was needed to require the listing and quantification of specific TCM projects in the SIP. The commission agrees that public comment on TCM substitutions could be accomplished through the SIP revision process; however, SIP revisions trigger transportation conformity determinations that may not otherwise be required. The transportation conformity process is very resource intensive and time consuming, which discourages MPOs from making TCM SIP commitments. The commission believes that it is detrimental to air quality efforts to discourage MPOs from making TCM SIP commitments, and therefore believes it in the best interest of the state to allow TCM substitutions without a SIP revision.

EPA objected to the wording of the preamble, SIP narrative, and ' 114.270(c)(1). EPA stated that the wording implied that the MPOs will identify a list of TCMs and their emissions reductions for inclusion in the SIP, but the SIP commitment would only be for a specified number of those TCMs and a specified amount of emissions reductions. EPA also stated that this approach is not acceptable or consistent with the TCM substitution process specified in ' 114.270(e) and would be confusing in the future. EPA also suggested modifying the language in ' 114.270(c)(1) by deleting Afrom which a specified number of TCMs will be implemented and a specified amount of emissions reduction will be achieved.@ EPA further suggested that the section be modified to include ATCM implementation schedule and completion date@ instead of ATCM completion date.@

The intent of this wording was to provide additional flexibility to MPOs to facilitate the inclusion of TCMs in the SIP. The commission notes that the EPA had previously agreed to this concept; however, the commission agrees that the concept could be confusing in the future. The commission believes that TCM requirements can be best addressed by the new ' 114.270(c) as stated previously. The commission has deleted ' 114.270(c)(1) accordingly. The preamble and SIP narrative have also been revised.

EPA stated that the last sentence in the bracket in ' 114.5(3) must be deleted since it is not an appropriate definition for TCMs.

The commission notes that brackets define deleted text; therefore all text within the brackets in ' 114.5(3) is deleted.

EPA stated that ' 114.5 does not define the terms MPO and implementing agency and that these terms must either be defined in this section or cross references given to the definitions elsewhere in TNRCC rules.

The commission notes that ' 114.5 of the proposal contains definitions (1) and (2), with the notation of (No Change), which means that these definitions have not changed as a result of this proposal. Definition (1) is the term Aimplementing agency@ and definition (2) is the term AMPO.@ Listing the definitions as ANo Change@ is *Texas Register* practice for the proposal. The actual language for these definitions may be found on the commission web site or the Secretary of State web site, on the page where the current rules are located.

An individual recommended revising ' 114.270(a) to add TNRCC as a responsible party to ensure that TCMs are looked at via the substitution mechanism.

The commission disagrees that it is not a responsible party to ensure TCMs are reviewed via the substitution mechanism. The commission renumbered ' 114.270(e) as ' 114.270(f) and revised ' 114.270(f)(5) to indicate that the public comment period will be conducted by the commission. Section 114.270(f)(1)(D) indicates that the commission is responsible for approving the substitute TCM. The commission is also included in the working group required by ' 114.270(f)(3) and must concur with the TCM substitution as indicated by the current ' 114.270(f)(4). These provisions ensure that the commission will look at and allow TCMs only via the substitution mechanism described herein and that no further revisions to the SIP will be necessary as a result of the TCM substitution.

An individual noted that nothing in ' 114.270(c) deals with MPOs failing to carry out their responsibilities or subverting TCMs. The commmenter also stated that monitoring, tracking, auditing, and enforcement must be built in by TNRCC to ensure compliance.

The commission has added a new ' 114.270(c), which indicates that all TCMs shall be developed, coordinated, funded, approved, implemented, tracked, evaluated, and monitored in accordance with ' 114.260, Transportation Conformity; Title 40 Code of Federal Regulations, Part 93 (40 CFR 93), Conformity to State or Federal Implementation Plans of Transportation Plans, Programs and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit Laws, as amended; the FCAA, 42 USC 1970, as amended; and the EPA guidance document ATransportation Control Measures: State Implementation Plan Guidance,@ EPA 450/2-89-020, September 1990. The commission believes that the new section will ensure adequate monitoring, tracking, auditing, and enforcement of TCMs and no further revisions are necessary.

EPA indicated that the commission needs to re-examine ' 114.270(c)(2) to determine whether the paragraph covers all aspects of TCM evaluation and tracking, because 40 CFR 93.113 addresses timely implementation of TCMs and may not be inclusive of TCM evaluation and tracking as a general requirement for the MPO.

The commission deleted the language in ' 114.270(c)(2) as proposed and replaced it with the new ' 114.270(c) language. The commission believes the new language will ensure adequate TCM evaluation and tracking.

EPA commented that ' 114.270(c)(3) should indicate that both the commitments from implementing agencies and evidence of these commitments will be a part of the control strategy SIPs and will be submitted to EPA for approval.

The commission has deleted ' 114.270(c)(3) and replaced it with the new ' 114.270(c). The commission believes that the new section will ensure that adequate evidence of commitments from implementing agencies is included in the SIP. The commission also notes that the EPA TCM SIP guidance document referenced in subsection (c) does not require implementing agencies= commitments to be included in the SIP; it merely requires evidence that the TCM was properly approved by a jurisdiction with legal authority to commit to and execute the measure to be included in the SIP.

EPA requested that ' 114.270(c)(6) be revised to clarify that the MPO is required to keep a continuous record of the TCMs and suggested adding the phrase Aon a rolling basis@ to the phrase Amaintain complete and accurate records for at least five years.@

The commission agrees that the clarifying language should be added to ' 114.270(c)(6) to indicate that the MPO is required to keep a continuous record of the TCMs and has added the phrase Aon a rolling basis@ accordingly. The commission has also renumbered ' 114.270(c)(6) as ' 114.270(d)(2).

An individual stated that ' 114.270(c)(6) needs to define effectiveness. The individual also commented that, under ' 114.270(c)(6)(A), TNRCC must show the TCM is working as envisioned and emissions are being reduced. The individual further noted that there are currently no specific emissions targets for individual transportation projects and indicated that this needs to be changed so that individual projects= emissions characteristics are known. The individual also stated that each TCM should be evaluated at buildout, capacity, or maximum operating levels.

The commission notes that ' 114.270(c)(6) has been renumbered as ' 114.270(d)(1) and believes that ' 114.270(d)(2)(A)-(D) adequately defines TCM effectiveness. The commission also notes that ' 114.270(d)(2)(C) requires an annual estimate of the emission reductions achieved from implementation of the TCM and a comparison of the actual and projected reductions. This requirement ensures examination of the TCM to determine that it is working as envisioned and emissions are reduced. The commission agrees that there are currently no specific emissions targets for individual transportation projects and notes that this was one of the reasons for the rule change. The new ' 114.270(c) requires project-specific emissions estimations. The commission agrees that TCMs should be evaluated at buildout, capacity, or maximum operation levels, if these levels are reflective of real or expected conditions.

EPA commented that ' 114.270(c)(6)(D) is in conflict with ' 114.270(e), the TCM substitution process, and indicated that the rule should clarify that any modification or replacement of a SIP TCM must comply

with the provisions of ' 114.270(e), since the MPO does not have any unilateral authority to make modifications to the SIP TCMs.

The commission notes that ' 114.270(c)(6) requires the MPOs to maintain records of TCMs and indicates what must be included in those records. Accordingly, ' 114.270(c)(6)(D) (renumbered as ' 114.270(d)(2)(D)), merely indicates that MPOs must keep records of any modifications to the TCM since the last annual report and/or projected modifications for the next reporting period to compensate for a shortfall in the implementation of the TCM or in the associated emissions reductions. Section 114.270(d)(2)(D) does not allow the MPO to modify TCMs, and therefore is not in conflict with ' 114.270(f).

Both EPA and an individual commented that ' 114.270(c)(7) should require that the MPO=s record on the TCMs be available to the public as well as local, state, and federal agencies.

The commission agrees and has revised ' 114.270(c)(7) accordingly, as well as renumbered ' 114.270(c)(7) as ' 114.270(d)(3).

EPA noted that ' 114.270(c)(8)(B) refers to coordination with the same or other implementing agencies and indicated that the rule must clearly identify the agencies so that the MPO can complete its coordination. EPA also noted that ' 114.270(e) requires the MPO and other specifically named agencies to consult and determine the TCM equivalency.

The commission has deleted ' 114.270(c)(8)(B), since the requirements of the TCM substitution process found in ' 114.270(f) define TCM substitution procedures.

An individual commented that the term Aequivalent@ must be defined in ' 114.270(c)(8)(B) and suggested using Aequal or greater in emissions reductions@ instead of Aequivalent to.@

The commission has deleted ' 114.270(c)(8)(B), since the requirements of the TCM substitution process found in ' 114.270(f) define TCM substitution procedures.

EPA commented that if local implementing agencies referred to in ' 114.270(d)(1)-(4) means City Councils or County Commissioners, then EPA questioned the availability of technical experts at this level to address evaluation and determine the effectiveness of the TCMs. EPA commented that the TCM evaluation and effectiveness determination should be the responsibility of the MPOs.

Implementing agency is defined in ' 114.5 as an entity, transportation provider, organization, agency, or individual responsible for the design, procurement of funds, construction, operation, maintenance, management, monitoring, and, in conjunction with the metropolitan planning organization, compliance with transportation control measures. City councils or county commissioners are not explicitly defined as implementing agencies. The commission renumbered ' 114.270(d) as ' 114.270(e) and revised the language to clarify that implementing agencies are responsible for providing information to the MPO. In addition under ' 114.260, the MPO is

responsible for reporting TCM implementation and emission reduction status to the commission. The MPO, therefore, is also responsible for TCM evaluation and effectiveness determination.

EPA stated that ' 114.270(d)(4) is not consistent with ' 114.270(e) and must be revised, since implementing agencies do not have any authority to allow for necessary in-place corrections or alterations of TCMs.

The commission agrees with the EPA. The commission renumbered ' 114.270(d)(4) as ' 114.270(e)(4) and deleted the phrase Aand to allow for necessary in-place corrections or alterations.@

EPA stated that the first full sentence of ' 114.270(e) must be modified and suggested the wording be revised to read, Aif a TCM is included in the SIP and infeasible to be implemented in the time frame specified in the applicable SIP.@

The commission renumbered ' 114.270(e) as ' 114.270(f) and in response to the EPA suggestion, modified the first full sentence to read Aif a TCM cannot be implemented by the implementation date specified in the SIP.@ TCMs are, by definition, included in the SIP.

An individual stated that TNRCC should be responsible for the interagency consultation process referenced in ' 114.270(e), since TNRCC is responsible for the SIP and its contents.

The current ' 114.270(f) requires the parties in the interagency consultation process established under ' 114.260 to determine whether a TCM continues to be appropriate. The commission is an active participant in the interagency consultation process specified in ' 114.260, as is the EPA, the Federal Highways Administration, the TxDOT, the MPO, the local transit agency, and the local air quality agency. The commission believes these parties to be the appropriate mix of transportation and air quality stakeholders for the working group. The commission also notes that the responsibility for final concurrence that a TCM is no longer appropriate is assigned to the commission and the MPO. The commission agrees that it is responsible for the SIP and its contents, but notes that MPOs are primarily responsible for ensuring timely TCM implementation, so MPO concurrence on a TCM=s appropriateness is essential.

EPA suggested that ' 114.270(e)(1)(C) be revised to state Afull implementation not later than two years from the scheduled. . . .@

The commission agrees with the EPA. The commission renumbered ' 114.270(e)(1)(C) as ' 114.270(f)(1)(C) and revised the language accordingly.

An individual suggested adding Amonitor@ before Aand enforce@ in ' 114.270(e)(1)(D) to ensure that adequate tracking is done. The individual also indicated that the tracking should be done by TNRCC and not the MPOs.

The commission renumbered ' 114.270(e)(1)(D) as ' 114.270(f)(1)(D) and added Amonitor@ before Aand enforce.@ The commission does not have the resources to adequately monitor all TCMs in the state=s nonattainment areas, and therefore believes that this function is best delegated to the MPOs.

An individual commented that Aconsistent@ should be removed from ' 114.270(e)(2) and be replaced by Aequal to in results or better,@ since discretion needs to be reduced, not increased.

The commission disagrees. The term Aconsistent@ indicates that the same methodology must be used for evaluating both the original and substitute TCM, which ensures that an accurate comparison between the two is made. The term Aequal to in results or better@ is subject to interpretation and does not ensure that accurate comparisons will be made.

In reference to ' 114.270(e)(2)(A), EPA stated that the commission must define inhalable particulate matter if it has not been defined elsewhere in state rules. EPA also stated that they prefer the term particulate matter.

The commission notes that the term Ainhalable particulate matter@ is the EPA definition of PM₁₀ and PM fine. The commission defines the term Aparticulate matter@ in 30 TAC ' 101.1, Item 71. The commission renumbered ' 114.270(e) as ' 114.270(f) and revised ' 114.270(f)(2)(A) to state Aparticulate matter@ at the EPA=s request.

An individual commented that the working group referenced in ' 114.270(e)(3) must notify the public of its meeting, be open to the public, have meetings in public, have the public participate in its deliberations, and have a public input session required at each meeting.

The commission disagrees. The public has ample opportunity for involvement in the TCM substitution process during the public comment period to be conducted by the commission. The commission notes that ' 114.270(f)(3) (' 114.270(e) has been renumbered as ' 114.270(f)) does not prohibit public participation in the working group, it merely does not require it.

EPA requested that the commission add local air agencies to ' 114.270(e)(3)(A).

The commission agrees with the EPA=s request. The commission renumbered ' 114.270(e)(3)(A) as ' 114.270(f)(3)(A) and revised the language accordingly.

EPA questioned whether the Federal Highway Administration (FHWA) should be a part of the concurring agencies on the TCM substitution process as defined by ' 114.270(e)(4). EPA recommended that the TCM substitution concurrence be limited to the MPO, state, and EPA. EPA further stated that if the commission retains the FHWA, then the Federal Transit Administration and the TxDOT should also be added to the list of concurring agencies, which would increase the time needed to complete the substitution process.

The commission agrees with EPA=s recommendation. The commission renumbered ' 114.270(e)(4) as ' 114.270(f)(4) and revised the language accordingly.

An individual commented that, under ' 114.270(e)(4) and (7), EPA must have the final decision and not simply concur. The individual also stated that 14 days is not long enough for EPA to analyze any changes and give a reasoned judgement about such changes and suggested that EPA should have 45 to 60 days.

The commission does not agree that ' 114.270(f)(4) and (7) (renumbered from ' 114.270(e) to ' 114.270(f)) need to be revised to give EPA the final decision on TCM substitutions. Since the commission is responsible for the contents of the SIP and the TCM substitution process is a method of altering contents of the SIP, it is appropriate for the commission to be involved in the final decision on TCM substitutions. It is also appropriate for the MPO to be involved in the final decision because MPOs are primarily responsible for ensuring timely TCM implementation. The commission also notes that ' 114.270(f) requires EPA involvement in the substitution process long before the 14-day concurrence period. The EPA therefore would already be familiar with the specific TCMs involved in the substitution process and would only have to analyze any changes made in response to public comments. The commission believes that 14 days is an adequate time period for this purpose.

EPA commented that ' 114.270(e)(5) does not identify the agency that will approve the substitute measures and is thus responsible for conducting the public participation. EPA stated that, as written, they can not determine whose responsibility it is to do public participation and respond to public comments.

The commission agrees with the EPA. The commission renumbered ' 114.270(e)(5) as ' 114.270(f)(5) and revised the language to indicate that the commission approves the substitute measures and is responsible for conducting public participation.

EPA commented that, in reference to ' 114.270(e)(7), the commission must respond to all comments submitted. EPA stated that ' 114.270(e)(7) does not identify who will address and respond to public comments and requested clarification. EPA also requested that the text be modified to indicate that EPA shall notify the commission within 14 days of receipt of the commissions summary of comments and responses to comments.

The commission agrees with the EPA=s comments. The commission renumbered ' 114.270(e)(7) as ' 114.270(f)(7) and revised the language to indicate that the commission will address and respond to all comments submitted. The commission has also revised ' 114.270(f)(7) to indicate that EPA shall notify the commission within 14 days of receipt of the commissions summary of comments and responses to comments.

EPA and an individual objected to ' 114.270(e)(10) because it limits the commissions enforcement authority and states that the commission will seek a financial penalty against the MPO or an implementing agency only in the case of an egregious or knowing violation of the provisions of this section.

The commission agrees and has deleted ' 114.270(e)(10) accordingly.

STATUTORY AUTHORITY

The amendment is adopted under the Texas Water Code (TWC), ' 5.103, which provides the commission the authority to adopt rules necessary to carry out its powers and duties under the TWC. The amendment is also adopted under the Texas Health and Safety Code, Texas Clean Air Act (TCAA), ' 382.012, which provides the commission the authority to prepare and develop a general, comprehensive plan for the proper control of the state=s air; ' 382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA; and ' 382.019, which provides the commission with the authority to adopt rules to control and reduce emissions from engines used to propel land vehicles.

SUBCHAPTER A: DEFINITIONS

' 114.5

' 114.5. Transportation Planning Definitions.

Unless specifically defined in the TCAA or in the rules of the Texas Natural Resource Conservation Commission (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 words and terms, when used in Subchapter G of this chapter (relating to Transportation Planning), shall have the following meanings, unless the context clearly indicates otherwise:

(1) **Implementing agency** - An entity, transportation provider, organization, agency, or individual responsible for the design, procurement of funds, construction, operation, maintenance, management, monitoring, and, in conjunction with the metropolitan planning organization, compliance with transportation control measures.

(2) **Metropolitan Planning Organization** - As defined under the Intermodal Surface Transportation Efficiency Act, Title 23, ' 134.

(3) **Transportation Control Measure (TCM)** - Any measure that is specifically identified and committed to in the applicable implementation plan that is either one of the types listed in ' 7408 of the Federal Clean Air Act, 42 United States Code, 1970, as amended, or any other measure for the purpose of reducing emissions or concentrations of air pollutants from transportation sources by reducing vehicle use or changing traffic flow or congestion conditions. Notwithstanding the first sentence of this definition, vehicle technology-based, fuel-based, or maintenance-based measures which control the emissions from vehicles under fixed traffic conditions are not TCMs for the purposes of this section.

SUBCHAPTER G. TRANSPORTATION PLANNING
' 114.270

STATUTORY AUTHORITY

The repeal is adopted under the Texas Water Code (TWC), ' 5.103, which provides the commission the authority to adopt rules necessary to carry out its powers and duties under the TWC. The repeal is also adopted under the Texas Health and Safety Code, Texas Clean Air Act (TCAA), ' 382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA.

' 114.270. Transportation Control Measures.

SUBCHAPTER G. TRANSPORTATION PLANNING
' 114.270

STATUTORY AUTHORITY

The new section is adopted under the Texas Water Code (TWC), ' 5.103, which provides the commission the authority to adopt rules necessary to carry out its powers and duties under the TWC. The new section is also adopted under the Texas Health and Safety Code, Texas Clean Air Act (TCAA), ' 382.012, which provides the commission the authority to prepare and develop a general, comprehensive plan for the proper control of the state=s air; ' 382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA; and ' 382.019, which provides the commission with the authority to adopt rules to control and reduce emissions from engines used to propel land vehicles.

' 114.270. Transportation Control Measures.

(a) Purpose. The purpose of this section is to implement requirements relating to transportation control measures (TCMs). These requirements address the roles and responsibilities of the metropolitan planning organizations (MPOs) and implementing transportation agencies in nonattainment and maintenance areas and provide a method for the substitution of TCMs without a state implementation plan (SIP) revision.

(b) Applicability. This section applies to MPOs and agencies that implement TCMs in designated nonattainment or maintenance areas. The affected nonattainment and maintenance areas are listed in ' 101.1 of this title (relating to Definitions).

(c) General. All TCMs shall be developed, coordinated, funded, approved, implemented, tracked, evaluated, and monitored in accordance with ' 114.260 of this title (relating to Transportation Conformity); Title 40 Code of Federal Regulations, Part 93 (Conformity to State or Federal Implementation Plans of Transportation Plans, Programs and Projects Developed, Funded or Approved Under Title 23 USC or the Federal Transit Laws, as amended); the Federal Clean Air Act, 42 United States Code, 1970, as amended; and the EPA TCM SIP approval criteria listed in the EPA guidance document ATransportation Control Measures: State Implementation Plan Guidance,@ EPA 450/2-89-020, September 1990.

(d) MPO responsibilities. The MPO shall:

(1) ensure that all responsibilities required by subsection (c) of this section are fulfilled;

(2) maintain, on a rolling basis, complete and accurate records of all TCMs for at least five years. TCM records shall be sufficient to accurately reflect the effectiveness of the TCM program and shall include the following:

(A) the annual status of the implementation of the TCM, including quantification of progress;

(B) an annual estimate of the funding and other resources expended toward implementing the TCM, and a comparison of the actual and projected expenditures;

(C) an annual estimate of the emission reductions achieved from implementation of the TCM, and a comparison of the actual and projected reductions; and

(D) any modifications to the TCM since the last annual report and/or projected modifications for the next reporting period to compensate for a shortfall in the implementation of the TCM or in the associated emissions reductions; and

(3) make such records available to representatives of the commission, the EPA, the Federal Highway Administration, the Federal Transit Administration, the Texas Department of Transportation, local air pollution agencies having jurisdiction in the area, and the public, upon request;

(e) Implementing agency responsibilities. The implementing agency shall have the responsibility to:

(1) ensure that all responsibilities required by subsection (c) of this section are fulfilled; and

(2) provide to the MPO upon request:

(A) a complete description of the TCMs and their associated estimated emission reduction benefits;

(B) evidence that the TCMs were properly adopted by a jurisdiction with legal authority to commit to and execute the program;

(C) evidence that funding has been, or will be, obligated to implement the TCMs; and

(D) a description of the monitoring program to assess the TCM effectiveness.

(f) TCM substitution process. If a TCM cannot be implemented by the implementation date specified in the SIP, the parties in the interagency consultation process established under ' 114.260 of this title shall determine whether the TCM continues to be appropriate. When the MPO and the commission concur that a TCM identified in the SIP is no longer appropriate for any reason, the agencies may initiate the following process to identify and approve a substitute TCM. This process is the only way in which a TCM may be substituted. Approval of substitute TCMs shall not constitute a SIP revision for the purpose of transportation conformity when this process is followed.

(1) A substitute TCM must provide for:

(A) equivalent or greater emissions reductions than the TCM to be replaced;

(B) implementation in the time frame established for the TCM in the SIP. If the implementation date has already passed, measures that require funding must be included in the first year of the next transportation improvement program and metropolitan transportation plan adopted by the MPO;

(C) full implementation not later than two years from the scheduled implementation date of the original TCM in order to meet timely TCM implementation criteria under ' 114.260 of this title;

(D) evidence of adequate personnel, funding, and authority under state or local law to implement, monitor, and enforce the measures in order for the commission to adopt the substitute TCM; and

(E) evidence of commitments to implement the substitute TCM must be made by the agency with legal authority for implementation.

(2) The analysis of substitute TCMs must be consistent with the methodology used for evaluating TCMs in the SIP. If emissions models and/or transportation models have changed since measures in the SIP were evaluated, both the TCM to be replaced and the substitute TCM shall be evaluated using the latest modeling techniques to demonstrate that equivalent or greater emissions reductions will be achieved through implementation of the substitute TCM. Key methodologies and assumptions that must be consistent are:

(A) EPA approved regional and hot-spot (for carbon monoxide and particulate matter) emission models;

(B) the area transportation model; and

(C) population and employment growth projections.

(3) To identify and evaluate possible substitute TCMs, the MPO shall convene a committee or working group which shall consult with EPA Region 6. Consultation may be accomplished by sending copies of all draft and final documents, agendas, and reports to EPA Region 6. The committee or working group shall include:

(A) members from all affected jurisdictions, including local air agencies;

(B) the commission; and

(C) state and local transportation agencies.

(4) The MPO, the commission, and the EPA Region 6 must concur with the appropriateness and equivalency of the substitute TCM. All agreed upon substitute TCMs must be adopted by the commission following the public comment period and the EPA 14-day concurrence period.

(5) Before the commission approves a substitute measure, the substitute TCM(s) must have been subject to a public hearing and comment process conducted by the commission. The TCM substitution process parallels the rulemaking and SIP processes for the purpose of public participation; however, commission approval of a substitute TCM shall not constitute a SIP revision for the purpose of transportation conformity. There must be at least one public hearing on the substitution. The hearing can only be held after reasonable public notice, which will be considered to be a minimum of 30 days prior to the hearing. The public notice shall include:

(A) prominent advertising in the affected area announcing the date, time, and place of the hearing; and

(B) availability of each proposed substitute TCM for public inspection in at least one location in the affected area.

(6) The public notice shall include a description of the substitute TCM and supporting analysis, including assumptions and methodology.

(7) Following the close of the public comment period, the commission shall respond to all comments received, and submit to EPA Region 6 a summary of comments received during the public comment period along with the commission responses to all comments. EPA shall notify the commission within 14 days of receipt of the summary of comments and responses if its concurrence with the substitute TCM has changed as a result of the public comments. If EPA fails to notify the commission within 14 days, EPA is deemed to concur.

(8) The TCM being replaced shall stay in effect until the substitute TCM has been approved. By approving a substitute TCM, the commission formally rescinds the previously applicable TCM.

(9) The commission shall maintain documentation of approved TCM substitutions. The documentation shall consist of a description of the substitute and replaced TCMs, including the requirements and schedules; a description of the substitution process, including a list of the committee or working group members; the public hearing and comment process; EPA concurrence; and commission approval. The documentation shall be submitted to EPA following the approval of the substitute measure by the commission and made available to the public as an attachment to the SIP.