Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

To: Commissioners **Date:** June 8, 2007

Thru: LaDonna Castañuela, Chief Clerk
Glenn Shankle, Executive Director

From: David C. Schanbacher, P.E., Chief Engineer
Chief Engineer's Office

Docket No.: 2006-1864-RUL

Subject: Commission Approval for Rulemaking Adoption
Chapter 114, Control of Air Pollution from Motor Vehicles
Transportation Conformity Rule and State Implementation Plan (SIP) Revision
Rule Project No. 2006-046-114-EN

Reasons for the rule package:

The adopted rule revision would incorporate recent federal transportation conformity revisions to federal law, rules, and guidance into the existing SIP and rule. The recent federal changes include the conformity revisions from the six-year surface transportation reauthorization act of 2005, known as the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). In particular, SAFETEA-LU provisions substantially reduce the requirement for states to revise their rules and/or SIPs each time there is a federal revision of transportation conformity rules.

- **SAFETEA-LU revisions.** Prior to enactment of SAFETEA-LU, states were required to address almost all of the federal transportation conformity rule's provisions in their conformity SIPs, and to update state SIPs within one year each time there was a federal rule revision. Under SAFETEA-LU, states are only required to address the following three sections of the federal transportation conformity rule in their state conformity SIPs:

  - 40 Code of Federal Regulations (CFR) §93.105, consultation procedures
  - 40 CFR §93.122(a)(4)(ii), written commitments to control measures not included in transportation plans; and
  - 40 CFR §93.125(c), written commitments to mitigation measures

- **Additional federal revisions.** In addition to addressing the adopted SAFETEA-LU revisions, the rulemaking also incorporates previous federal transportation conformity revisions and guidance that include:

  - **Toll roads**. May 1999 EPA guidance recommended that states incorporate into their SIPs, through the interagency consultation process, when a regionally significant non-federal project is considered "adopted or approved" by a non-federal entity. The adopted revision clarifies when certain projects, like toll roads, can move forward during a conformity lapse.
  - **Particulate matter (PM) $PM_{2.5}$ precursors**. EPA published the Transportation Conformity Rule Amendments for the New $PM_{2.5}$ National Ambient Air Quality Standard: $PM_{2.5}$ Precursors; Final Rule (70 FR 24280) on May 6, 2005. This rule added transportation-related $PM_{2.5}$ precursors to the transportation conformity regulations and made a technical correction to a cross-reference of the U.S. Department of Transportation (U.S. DOT) planning regulations.

- **Hot-spot analysis**. EPA published the $PM_{2.5}$ and PM_{10} Hot-Spot Analysis in Project Level Transportation Conformity Determinations for the New $PM_{2.5}$ and Existing PM_{10} National Ambient Air Quality Standards; Final Rule (71 FR 12468) on March 10, 2006. This rule deletes a previous consultation requirement for quantitative PM_{10} and $PM_{2.5}$ hot-spot analysis.

- **Under what authority are we adopting these changes?**
  The Texas Water Code (TWC), §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; §382.011, which provides for general powers and duties under the TCAA; §382.012, which authorizes the commission to develop a general, comprehensive plan for the proper control of the state's air; and §382.208, which authorizes the commission to work with federal, state, and local transportation planning agencies to develop and implement transportation programs and other measures necessary to demonstrate and maintain attainment of National Ambient Air Quality Standards (NAAQS). The rules will also be adopted under the statutory requirement for transportation conformity found in §176(c) of the 1990 Federal Clean Air Act (FCAA) Amendments, 40 CFR Part 51, Subpart T and Part 93, Subpart A established criteria and procedures for determining whether transportation plans, programs, and projects in nonattainment and maintenance areas conform with the SIP.

- **Is this rulemaking required by federal rule or state statute? Which ones?** Although the federal conformity rule at 40 CFR Part 51 requires states to incorporate federal revisions into its conformity SIP and rule, these particular revisions are not required to be incorporated if a state already has a federally approved conformity SIP. However, states with a federally approved conformity SIP, like Texas, must revise its SIP to include the revisions in order to take advantage of the flexibility and streamlining the revisions provide. The federal statute, SAFETEA-LU, amended the FCAA to add a requirement that states are only required to address the following three sections of the federal transportation conformity rule in their state conformity SIPs:
  - 40 CFR §93.105, consultation procedures
  - 40 CFR §93.122(a)(4)(ii), written commitments to control measures not included in transportation plans
  - 40 CFR §93.125(c), written commitments to mitigation measures

- **Are there any legal deadlines by which these rules must be adopted or effective?** Although the federal conformity rule requires states to incorporate federal revisions within one year of publication, these particular revisions are not required to be incorporated if a state already has a federally approved conformity SIP. However, states with a federally approved conformity SIP, like Texas, must revise its SIP to include the revisions in order to take advantage of the flexibility and streamlining the revisions provide.

- **What issue(s) or problem(s) are we trying to solve?** The adopted revision will substantially reduce the requirement for state regulatory revisions each time there is a federal revision.

- **Why is it important that we do this rule package?** In addition to adopting the SAFETEA–LU revisions, this rulemaking also reflects changes in the federal transportation conformity rule and other federal transportation conformity-related rules and guidance that include:

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•**Toll roads**. May 1999 Environmental Protection Agency (EPA) guidance asks states to incorporate into SIPs, through the interagency consultation process, when a regionally significant non-federal project is considered "adopted or approved" by a non-federal entity. This adoption clarifies when certain projects, like toll roads, can move forward during a conformity lapse.

•**$PM_{2.5}$ (particulate matter) precursors**. EPA published the Transportation Conformity Rule Amendments for the New $PM_{2.5}$ National Ambient Air Quality Standard: $PM_{2.5}$ Precursors; Final Rule (70 FR 24280) on May 6, 2005. This rule added transportation-related $PM_{2.5}$ precursors to the transportation conformity regulations and made a technical correction to a cross-reference of the U.S. DOT planning regulations.

•**Hot-spot analysis**. EPA published the $PM_{2.5}$ and PM_{10} Hot-Spot Analysis in Project Level Transportation Conformity Determinations for the New $PM_{2.5}$ and Existing PM_{10} National Ambient Air Quality Standards; Final Rule (71 FR 12468) on March 10, 2006. This rule deletes a previous consultation requirement for quantitative PM_{10} and $PM_{2.5}$ hot-spot analysis.

- **Other important background or historical information.** None.

Scope of the rulemaking:

The adopted rulemaking will make the following revisions to the state transportation conformity rule, §114.260, and SIP narrative.

- Adopt by reference 40 CFR §93.122(a)(4)(ii) and 40 CFR §93.125(c) and continue to include the state's consultation requirements in the state conformity rule. (The state's consultation provisions were adapted from 40 CFR §93.105, Interagency Consultation Procedures.)
- Add a new subsection that will address when a regionally significant non-federal project is considered "adopted or approved" by a non-federal entity.
- Ensure that $PM_{2.5}$ precursors are addressed in the transportation conformity process.
- Make a correction to a cross-reference to U.S. DOT regulations contained in the state's consultation requirements.
- Delete the quantitative PM_{10} and $PM_{2.5}$ hot-spot analysis requirement contained in the state's consultation requirements.
- Make administrative changes, edits, and corrections to the existing rule, if necessary.

- **Changes required by federal rule:** None of the changes in the rulemaking are required by federal rule or statute. However, a state with a federally approved conformity SIP must revise its SIP to include the revisions in order to take advantage of the flexibility and streamlining the revisions provide.

- **Changes required by state statute:** None.

- **Staff recommendations that are not expressly required by federal rule or state statute:** None.

Impact on the regulated community:

- **Who will be affected?** A revision that specifies when non-federally funded projects (for example, a toll road) may advance during a conformity lapse would provide regional transportation planners increased certainty.

- **Does it create a group of affected persons who were not affected previously? How?** No.

- **Will there be a fiscal impact? If so, estimate.** No.

Impact on the public:

- **Who will be affected?** None.

- **Does it create a group of affected persons who were not affected previously? How?** No.

- **Will there be a fiscal impact? If so, estimate.** No.

Impact on agency programs: Fewer state rule and SIP revisions would be needed.

Stakeholder meetings:

- **Have any stakeholder meetings been held?** A teleconference was held to seek feedback from the interagency consultation partners that are identified in the state's conformity rule and the state's Technical Work Group.

- **With whom?** Agency staff, the Technical Work Group, and interagency consultation partners.

- **What were the general sentiments?** Agreement with proposed rule changes.

- **Were any changes made in response to stakeholder concerns?** No.

Policy issues:

- **What policy issues are affected?** None.

- **Are any policies that are not currently based on rule being made into a rule?** No.

- **What are the consequences if this rulemaking is not approved to go forward?** Not revising the rule now would mean the state rule incorporates by reference more sections of the federal transportation conformity rule than is required. If and when EPA revises those sections, the state would have to incorporate those revisions by way of a SIP and rule revision within one year of publication of the federal rule.

- **Are there alternatives?** The commission could choose to not adopt the revisions. However, a state with a federally approved conformity SIP must revise its SIP to include the revisions in order to take advantage of the flexibility and streamlining the revisions provide.

Potentially controversial matters: None.

Key points in adoption rulemaking schedule:

- ***Texas Register* proposal publication date:** February 9, 2007

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- **Anticipated effective date:** July 19, 2007
- **Six-month *Texas Register* filing date:** August 9, 2007

Public comment:

The public hearing for the rulemaking was held on March 5, 2007, 10:00 a.m., Texas Commission on Environmental Quality, Building B, Room 201A, 12100 Park 35 Circle, Austin.

The EPA submitted written comment in general support of the rule with suggested changes to the proposal as explained in the next section.

Significant changes from proposal:

Changes have been made to §114.260(a) in response to comments made by the EPA. Statutory reference for the implementation of conformity has been changed from §176(c) to §176(c)(4)(e) to offer a more specific reference to the FCAA. Additionally, the EPA noted that the word "help" in §114.260(a) is not necessary; therefore, it has been removed.

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Attachments

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