

The Texas Natural Resource Conservation Commission (agency or commission) adopts the amendments to §116.12, Nonattainment Review Definitions; §116.160, Prevention of Significant Deterioration Requirements; and §116.162, Evaluation of Air Quality Impacts *without changes* to the proposed text as published in the June 22, 2001 issue of the *Texas Register* (26 TexReg 4591) and will not be republished. Sections 116.12, 116.160, and 116.162 will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the Texas state implementation plan.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The commission adopts this rulemaking to correct the definitions of “building, structure, facility, or installation” and “secondary emissions” as defined in §116.12 and §116.160. This amendment eliminates the inconsistency in the commission’s rules and the rules promulgated by the EPA on August 7, 1980, concerning the inclusion of marine vessel emissions in applicability determinations for prevention of significant deterioration (PSD) and nonattainment (NA) permits. The rulemaking also revises §116.160 and §116.162 to incorporate updated federal regulation citations.

On August 7, 1980, the EPA promulgated regulations in the *Federal Register* (45 FR 52696) that defined “stationary source” as “any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.” In the preamble (45 FR 52695) to address whether dockside activities are included in the stationary source, the EPA established “purpose and control” criteria. The EPA discussed how the final definition of “building, structure, facility, or installation” would “encompass the activities of a marine terminal and only those dockside activities that would serve the purposes of the terminal directly and would be under the control of its owner or

operator.” The EPA noted that the term “dockside activities” meant “those activities in which the ships would engage while docked at the terminal.” The EPA stated (45 FR 52696) that “The activities of a terminal itself would be stationary, but all ship activities would not be. Only those that would directly serve the purposes of the terminal, such as loading and unloading, would be stationary since they alone would be in a sense fixed to the particular site. Hence, ‘stationary source’ encompasses the activities of a marine terminal and only those dockside activities that would directly serve its purposes.” The EPA concluded that the “stationary source” definition was limited to those activities that were on contiguous or adjacent properties, thus, “only dockside activities would be located on ‘property’ that is contiguous or adjacent to the terminal,” and that the activities must be under the control of one person or one group of persons under common control. Thus, “stationary source” only includes the “activities at a terminal and those over which the owner or operator of the terminal would have control.” Finally, the EPA noted that the terminal activities and the dockside activities would fall under the same two-digit standard industrial classification code.

The EPA included a detailed analysis of vessel loading and unloading and specifically determined that vessel loading and unloading should be included in permit applicability determinations. The EPA concluded that loading and unloading “would in every case directly serve the purposes of the terminal and would be under the control of its owner or operator to a substantial extent.” Further, the EPA expected that no loading activities would occur without consent from the terminal owner or operator and that the terminal would have significant involvement in the scheduling for loading and unloading. Other dockside activities were not individually addressed, but the EPA stated that the determination would be based on the same two criteria of “purpose and control.” The EPA also stated that emissions

resulting from propulsion of marine vessels as they approach or leave marine terminals (commonly referred to as “to and fro emissions”) would be considered secondary emissions. Therefore “to and fro” emissions would not be included in applicability, but would be considered in the permit review. The definitions of “stationary source,” “building, structure, facility, or installation,” and “secondary emissions” are identical for purposes of PSD/NA permitting.

On July 15, 1981, the EPA issued a stay of the August 7, 1980 regulations (46 FR 36695) that, in part, reversed EPA’s decision that vessel emissions should be included in applicability determinations for PSD/NA permitting. On December 17, 1981, the stay was extended and EPA proposed a revised regulation to remove dockside vessel emissions from consideration in PSD/NA permit applicability and review, based on a new interpretation that marine vessels are mobile sources within the meaning of Federal Clean Air Act (FCAA), §110(a)(5) as codified in 40 United States Code (USC), §7410(a)(5) and that terminals would be indirect sources of pollution. On June 25, 1982 (47 FR 27554), the EPA promulgated a rule that specifically excluded dockside vessel emissions and “to and fro” emissions from PSD/NA applicability determinations and permit review on the basis that marine vessels are mobile sources.

The Natural Resources Defense Council (NRDC) challenged the June 25, 1982 regulations with regard to the marine vessel emissions issue. In *Natural Resources Defense Council v. EPA*, 725 F.2d 761 (D.C. Cir. 1984), the court vacated the portion of the June 25, 1982 regulation which excepts the activities of any vessel from the emissions attributable to marine terminals. By vacating that portion of the June 25, 1982 regulations the court “implicitly reinstated” the August 7, 1980 regulation which

requires that dockside vessel emissions be included in PSD/NA permit applicability and review. The court affirmed that portion of the EPA's 1982 rule which excluded "to and fro" vessel emissions from the definition of secondary emissions; thus, these emissions are not included in any PSD/NA permit applicability or review considerations. The court remanded the regulation so that the EPA could do a more detailed and specific analysis of each dockside activity to determine if it meets the two criteria in the 1980 rule ("purpose and control") and thus, should be included in applicability determinations for PSD/NA permits.

The commission believes that, even though the EPA has not initiated the court ordered review, the effect of the order is that the 1980 rules are effective and dockside vessel emissions are included in applicability determinations for PSD/NA permitting. However, because the EPA has not done the required rulemaking, the marine vessel sections of the vacated June 25, 1982 rules are still in the Code of Federal Regulations (CFR) in the definition of "building, structure, facility, or installation" in §52.21(b)(6) and §52.24(f)(2). In 1993, Chapter 116 was revised to incorporate the PSD/NA permitting requirements and definitions from the vacated 1982 regulations were included in §116.12(4) for NA and incorporated into §116.160(a) for PSD. This rulemaking incorporates the correct federal regulation citations and definitions into Chapter 116.

In addition, several amendments to the federal PSD rules have been made since 1993 when the Chapter 116 PSD rules were last updated. This rulemaking also updates the federal PSD rules incorporated by reference into §116.160. These revisions will not have an impact on permit holders or applicants because the commission already conducts PSD reviews consistent with the most current PSD rules.

## SECTION BY SECTION DISCUSSION

### *Subchapter A - 116.12, Definitions*

As previously discussed, the commission adopts changes to amend §116.12(4), the definition of “building, structure, facility, or installation,” to delete the language “...except the activities of any vessel.” The amendment makes the definition in Chapter 116 consistent with the August 7, 1980 rule.

### *Subchapter B - Division 6, Prevention of Significant Deterioration Review*

The commission adopts changes to §116.160(a) to incorporate the most recent version of PSD air quality regulations promulgated by the EPA in 40 CFR §52.21 as amended March 12, 1996, and the most recent version of 40 CFR §51.301, Definitions for Protection of Visibility, as amended on July 1, 1999.

The commission adopts new §116.160(c) to specifically exclude the federal definition of “building, structure, facility, or installation” and “secondary emissions” contained in the CFR because it still contains the definitions from the June 25, 1982 rule which were vacated by the 1984 NRDC case. The commission also adopts definitions for these terms to §116.610(c) that reflect the requirements of the August 7, 1980 federal rule and the 1984 NRDC court decision.

Finally, the commission modifies two references in §116.162 and corrects a typographical error. The commission revises §116.162(2) in order to clarify the reference to 40 CFR Part 60 related to reconstruction by identifying the specific section, 40 CFR §60.15, which relates to reconstruction. In addition, the commission modifies §116.162(3) by deleting the reference to 40 CFR §51.118(c), which

does not exist in the current federal rule. The references to federal regulations in §116.162(2) - (4) are adopted for clarification through specifying the promulgation date of the federal regulation being referenced.

There have been many amendments to portions of 40 CFR §§51.100, 51.118, 51.164, 51.301, and 52.21 since the promulgation and amendment dates specified in §116.160(a) and §116.162. However, all these 40 CFR amendments, except one, affected portions of the CFR which were excluded from the adoptions by reference in Chapter 116. Therefore, Chapter 116 only needs to be updated to reflect only one of the CFR amendments. The 1996 amendment to 40 CFR §52.21(b)(23)(i) (61 FR 9918) amended the definition of "significant." The commission revises §116.160(a) to reflect the amendment date of 1996.

#### FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking 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, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The commission does not believe that the rules will have an adverse, material affect on the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Amendments adopted in this rulemaking correct the definitions of "building, structure,

facility, or installation” and “secondary emissions,” and incorporate by reference the most recent amendments to the PSD rules.

The adopted amendments do not meet any of the four applicability criteria for requiring a regulatory analysis of "major environmental rule" as defined in the Texas Government Code. Texas Government Code, §2001.0225 applies only to a major environmental rule, the result of which is to: 1.) exceed a standard set by federal law, unless the rule is specifically required by state law; 2.) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3.) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4.) adopt a rule solely under the general powers of the agency instead of under a specific state law.

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

part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. If each rule for implementation of federally required programs, such as PSD/NA permitting, was considered to be a major environmental rule that exceeds federal law, then every such rule would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Because the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature.

The agency has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature revised the Texas Government Code, but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), writ denied with per curiam opinion respecting another issue, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, no writ). Cf. *Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Sharp v. House of Lloyd, Inc.*, 815 S.W.2d 245 (Tex. 1991); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App.--Austin 2000, pet. denied); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).

The amendments are adopted in order to meet the requirements of 40 CFR §52.21 and §52.24.

Therefore, in addition to not exceeding an express standard set by federal law, the amendments do not exceed state requirements, and are not adopted solely under the general powers of the agency because the provisions of the Texas Clean Air Act (TCAA) and Texas Water Code (TWC), provided in the STATUTORY AUTHORITY section of this preamble, provide the commission the authority necessary to implement the PSD/NA permit programs. The rules will achieve their stated purpose by correcting the definition of “building, structure, facility, or installation” and incorporating by reference the amendments to the PSD rules. The remaining applicability criteria, pertaining to exceeding a delegation agreement or contract between the state and the federal government, does not apply because the adopted rules will enable the commission to seek a revision to the June 24, 1992 PSD delegation (57 Federal Register 28093) and finally obtain full PSD approval. Thus, the commission is not required to conduct a regulatory analysis as provided in Texas Government Code, §2001.0225.

#### TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed an analysis of whether the rules are subject to Texas Government Code, Chapter 2007. The following is a summary of that analysis. The purpose of this rulemaking is to address the inconsistencies which exist between Chapter 116 and the federal regulations for PSD/NA programs with regard to the definitions of “building, structure, facility, or installation” and “secondary emissions.” The rules will achieve their stated purpose by correcting the definitions of “building, structure, facility, or installation” and “secondary emissions” and incorporating by reference the most recent amendments to 40 CFR §52.21 and §51.301. The rules also delete an incorrect reference to a federal rule and more specifically identify certain federal regulations.

Because the amendments are an action that is reasonably taken to fulfill an obligation mandated by federal law, the amendments meet the exception in Texas Government Code, §2007.003(b)(4). The commission has included elsewhere in this preamble the necessity for the amendments. For these reasons the amendments do not constitute a takings under Chapter 2007 and do not require additional analysis.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.*), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Coastal Management Program. As required by 30 TAC §281.45(a)(3) and 31 TAC §505.11(b)(2) relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this rulemaking action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that this rulemaking action is consistent with the applicable CMP goals and policies. The CMP goal applicable to the rules is 31 TAC §501.12(1). This goal requires the protection, preservation, restoration, and enhancement of the diversity, quality, quantity, functions, and values of coastal natural resource areas. The CMP policy applicable to the rules is 31 TAC §501.14(q), concerning policies for specific activities and coastal natural resource areas. Section 501.14(q) requires commission rules under Texas Health and Safety Code (THSC), Chapter 382, governing emissions of air pollutants, to comply with the regulations in 40 CFR, adopted in accordance with 42 USC §§7401 *et*

*seq.*, to protect and enhance air quality in the coastal areas so as to protect coastal natural resource areas and promote public health, safety, and welfare. The purpose of this rulemaking is to address the inconsistencies which exist between Chapter 116 and the federal regulations for PSD/NA programs with regard to the definitions of “building, structure, facility, or installation” and “secondary emissions.” The amendments incorporate by reference the most recent amendments to 40 CFR §52.21 and §51.301. The amendments also delete an incorrect reference to a federal rule and more specifically identify certain federal regulations. This rulemaking is consistent with the previously stated goals and policies of the CMP.

#### EFFECT ON SITES SUBJECT TO THE PSD AND NA PERMITS PROGRAM

The amendments deal exclusively with major sources subject to PSD/NA permits. The amendments should not affect any new or existing sites because this rulemaking does not change the already existing requirements under the federal PSD/NA permitting programs. Therefore, this rulemaking does not subject sites to any new requirements, but merely clarifies the federal requirements. Owners or operators of major sources should be sure to consider dockside marine vessel emissions in applicability determinations for PSD and NA.

#### HEARING AND COMMENTERS

The commission held a public hearing on this proposal on July 19, 2001, at 2:00 p.m., Building F, Room 2210, Texas Natural Resource Conservation Commission Complex, located at 12100 Park 35 Circle, Austin, Texas. The public comment period closed on July 23, 2001. No comments were made

at the hearing, but written comments were received from the EPA and from Baker Botts on behalf of the Texas Industry Project (Baker Botts).

## RESPONSE TO COMMENTS

### *Comment*

The EPA Region 6 noted that the proposed rules would eliminate the inconsistency in the commission's rules and the rules promulgated by the EPA on August 7, 1980 concerning the inclusion of marine vessel emissions in applicability determinations for PSD/NA permitting. The EPA added that they support the efforts the commission has made to address and correct the agency rule deficiencies in the definitions of "building, structure, facility, or installation" and "secondary emissions." The EPA believes that the proposed changes are significant steps toward developing regulations and they are supportive of the efforts of the commission to correct these deficiencies.

### *Response*

**The commission appreciates the support of the EPA. The commission intends to submit a request to the EPA to revise the PSD delegation promulgated by the EPA on June 24, 1992 in order to address the limitation on the issuance of PSD permits that involve dockside vessel emissions.**

### *Comment*

Baker and Botts questioned the commission's authority to extend permit requirements to dockside vessel emissions. They raise this issue relative to federal and state permitting requirements. For federal permitting, Baker Botts questioned the agency's reliance on the federal court decision "implicitly

reinstating” the 1980 federal regulations because while the *NRDC v. EPA* decision repealed portions of the 1982 regulations that excluded “dockside” and “to and fro” vessel emissions, it did not endorse the 1980 regulations. In addition, Baker Botts stated that the court remanded to EPA the issue of whether dockside vessel emissions should be attributed to a marine terminal. The commenter noted that the court specifically stated that its decision “casts a cloud” over the 1980 vessel emission requirements and that in promulgating the 1980 regulations, the court stated that EPA had “failed to engage in the careful examination of the specific nature of dockside vessel emissions which we mandate in this opinion,” *NRDC v. EPA*, 725 F2d 761, 772. Baker Botts concluded that EPA’s failure to respond to the remand cannot be interpreted as a subsequent, affirmative decision to include dockside emissions in federal permitting.

*Response*

**The adopted rules have not been revised in response to this comment. As stated in the BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES section, the commission believes that even though the EPA has not initiated the court ordered review, the effect of the order is that the 1980 rules are effective and dockside vessel emissions are included in applicability determinations for PSD/NA permitting. This interpretation is supported by the EPA’s comments summarized previously, as well as the discussion in the December 22, 1992 and June 24, 1992 EPA rulemakings concerning the approval of the commission’s PSD permitting program (54 FR 52823 and 57 FR 28093, respectively), the 1990 EPA New Source Review Workshop Manual, and EPA letters concerning this issue.**

**In the December 22, 1992 proposal to approve the Texas Air Control Board's (TACB) PSD program, EPA discussed the NRDC case and stated its position that the holding in that case "had the effect of reinstating the dockside emission provisions of the 1980 regulations pending further rulemaking by the EPA." At the time of the 1992 proposal, the TACB rules incorporated the version of the PSD rules that excluded dockside vessel emissions from PSD applicability determinations. The EPA proposed to approve the TACB's program with a requirement that EPA retain its permitting authority over sources and modifications that would be affected by dockside vessel emissions. In the June 24, 1992 rulemaking, the EPA approved the TACB PSD program enabling the TACB to issue and enforce PSD permits in those cases that involve dockside vessel emissions, without final issuance of PSD permits by the EPA. The EPA stated that previous PSD delegation agreements would remain in effect for major new sources and major modifications to existing sources that involved applicability determinations affected by dockside emissions from vessels. Under these prior agreements, the TACB had administrative, technical review, and public participation authority for PSD applications with dockside vessel emissions, but the EPA retained final permit approval and oversight. Although historical practice with regard to the conditions of the delegation agreement concerning EPA involvement in the issuance of permits involving dockside vessel emissions has been inconsistent, the commission has generally included these emissions in PSD applicability determinations.**

**In addition, EPA's view of the 1984-court decision concerning dockside vessel emission is made clear in the 1990 EPA New Source Review Workshop Manual, Section II.B.4. This section of the manual states, "As a result of a court decision in *NRDC v. EPA*, 725 F.2d 761 (D.C. Circuit**

**1984), emissions from vessels at berth (“dockside”) {are} not included in the determination of secondary emissions but {are} considered primary emissions for applicability purposes.”**

**This view is also reflected in a letter dated January 8, 1990 from John Calcagni, Director of EPA Air Quality Management Division. That letter provides a summary of the 1984-court decision and stated, “The court affirmed the portion of the 1982 promulgation that excluded ‘to and fro’ vessel emission from the attribution to the terminal as secondary emissions, but vacated EPA’s 1982 blanket repeal of the dockside vessel emissions component from the PSD emissions counting as either primary or secondary emissions.” In so doing, the court acknowledged that, with the exception of to and fro emissions, it implicitly reinstated the PSD regulations promulgated on August 7, 1980 (45 FR 52676). In essence, the court removed from the CFR the total exclusion of vessel emissions counting which now appears in 40 CFR §52.21(b)(6) as the phrase “...except the activities of any vessel,” and in 40 CFR §52.21(b)(18) as the phrase “...or from a vessel.”**

**Consequently, the August 7, 1980 PSD regulations (with the exception of to and fro emissions counting) shall apply to determinations on how to treat vessel emissions. The EPA letter reiterates the purpose and control criteria from the 1980 regulations as the basis for determining whether dockside vessel emissions are primary or secondary. The letter also acknowledges that EPA has not yet completed that analysis necessary to define which dockside vessel emission, and under what conditions, should be assigned to the terminal and whether these would be considered primary or secondary emissions. The letter also states that states with federally-approved PSD implementation plans are free to develop regulations with regard to the treatment of vessel emissions which establish whether those dockside vessel emissions are considered primary or**

secondary.

**Because EPA considers the 1980 rules to be controlling and those rules require the consideration of dockside vessel emissions, the commission believes that it has the authority to adopt this rulemaking and to seek a revision to the PSD delegation agreement.**

*Comment*

Baker Botts also made comments concerning state permitting of marine vessel emissions and suggested that the commission does not have the authority to require permits for marine vessel emissions in the state program based on the holding of *Scurry v. Texas Air Control Board*, 622 S.W.2d 155 (Tex. Civ. App.1981). Although the issues raised by Baker Botts with regard to the *Scurry* case are not the subject of this adoption, a response to those comments is provided.

*Response*

**Chapter 116, the regulation dealing with state new source review permits, requires that “{a}ny person who plans to construct any new facility or to engage in the modification of any existing facility which may emit air contaminants into the air of this state {Texas}” shall obtain a Chapter 116 authorization (30 TAC §116.110).**

**In 1981, there was a court case involving marine vessel emissions, *Scurry v. Texas Air Control Board*, 622 S.W.2d 155 (Tex. Civ. App. Austin 1981). The court held that the TCAA requirement to obtain a permit for construction of a crude oil loading facility and installation of a tank farm**

**applies only to terminal facilities, not to vessels or their operation, and applies only to facilities that the terminal owns or operates. The court did not define “vessel emissions” nor did it expand on what it meant by “operation” but it is clear that the court was excluding the mobile source emissions from permit review. The *Scurry* case was decided prior to the inclusion of a definition of “facility” in the TCAA and the creation of a definition of “stationary source” in the FCAA.**

**Subsequent to the *Scurry* case, a definition of “facility” was added to the TCAA. The TCAA, THSC, §382.003(6) defines a “facility” as “a discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source.” Based on this definition, for dockside marine vessel emissions to be subject to this permit requirement, such emissions must be from a stationary source.**

**Neither the TCAA nor agency rules contain an applicable general definition of “stationary source.” Title 30 TAC §101.1 and §116.10 provide that unless specifically defined in TCAA or in agency rules, the terms used by the commission have meanings commonly ascribed to them in the field of air pollution control. Definitions in the FCAA are widely-used meanings of terms regarding air quality control. The general provisions of the FCAA (42 USC, §7602(z)) define stationary source as “generally any source of an air pollutant except those emissions resulting directly from an internal combustion engine for transportation purposes or from a nonroad engine or nonroad vehicle as defined in §7550 of this title.” The foregoing definition was added by the Clean Air Act Amendments of 1990. Legislative history regarding this definition contains the following explanation: “This amendment clarifies and confirms that a source cannot escape**

regulation under Title I of the Act merely because it may be mobile, or because it may be moved by means of a motor. The authority in Title I of the Act to regulate stationary sources is intended to include the regulation of any source capable of being moved from one location to another if the source emits a pollutant from a process other than, or in addition to, the means of propulsion employed to move the source.”

The FCAA treats the vessel emissions at issue as sources that are stationary relative to the vessels from which they originate. Therefore, it is possible to have facilities that constitute or contain stationary sources on moving or moveable marine vessels. Marine vessels are “facilities” since they contain “a discrete or identifiable structure...that constitutes or contains a stationary source.” The stationary source is the “compartment” which when filled, degassed, or cleaned displaces the air space which contains air contaminants. Accordingly, offshore marine vessel emissions resulting from onshore facility activities or processes other than vessel propulsion are subject to new source review permitting requirements.

Because of the definitions of “facility” and “stationary source,” it is appropriate to require the onshore facilities to include the emissions from dockside marine vessels in their permits when the onshore facilities are constructed or modified. This is because when those emissions are being created, the owner or operator of the onshore facilities, not the captain of the vessel, is the entity that is operating the facility (the vessel compartment) that will emit air contaminants into the air of the State of Texas. This is consistent with the position in *Scurry* that the determining factor for who must obtain preconstruction authorization is who owns or operates the facility (the

**compartment within the marine vessel) when it produces the emissions.**

**This approach to dockside marine vessels is analogous to the commission's permitting requirements for bulk fuel terminals and the loading and unloading of tank trucks. A tank truck is a movable unit that contains a stationary source. The stationary source on the tank truck does not emit any air contaminants until it is hooked up to the facilities at the bulk fuel terminal. The emissions from the tank truck will not occur until the owner or operator of the bulk fuel terminal begins the process of loading or unloading. Since the bulk fuel terminal is in control of the operation that is creating the emissions, the tank truck loading emissions are included in the permits for those terminals.**

#### STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under TWC; §5.105, which authorizes the commission to establish and approve commission policy; and under THSC, TCAA, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendment is also adopted under §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the protection of the state's air; §382.051, which authorizes the commission to issue permits and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits.

#### **CHAPTER 116: CONTROL OF AIR POLLUTION BY PERMITS FOR NEW**

## CONSTRUCTION OR MODIFICATION

### SUBCHAPTER A: DEFINITIONS

#### §116.12

##### §116.12. Nonattainment Review Definitions.

Unless specifically defined in the Texas Clean Air Act (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. The terms in this section are applicable to permit review for major source construction and major source modification in nonattainment areas. In addition to the terms which are defined by the TCAA, and in §101.1 of this title (relating to Definitions), the following words and terms, when used in §116.150 and §116.151 of this title (relating to Nonattainment Review), shall have the following meanings, unless the context clearly indicates otherwise.

(1) **Actual emissions** -- Actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation. The executive director shall allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period. The executive director may presume that the source-specific allowable emissions for the unit are equivalent to the actual emissions, e.g., when the allowable limit is reflective of actual emissions.

For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit the unit on that date.

(2) **Allowable emissions** -- The emissions rate of a stationary source, calculated using the maximum rated capacity of the source (unless the source is subject to federally enforceable limits which restrict the operating rate, or hours of operation, or both), and the most stringent of the following:

(A) the applicable standards set forth in Title 40 Code of Federal Regulations, Part 60 or 61;

(B) the applicable state implementation plan emissions limitation including those with a future compliance date; or

(C) the emissions rate specified as a federally enforceable permit condition including those with a future compliance date.

(3) **Begin actual construction** -- In general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework, and construction of permanent storage structures. With respect to a change in method of operation, this term refers to those on-site activities other than preparatory activities which mark the initiation of the

change.

(4) **Building, structure, facility, or installation** -- All of the pollutant-emitting activities which belong to the same industrial grouping, are located in one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "major group" (i.e., which have the same two-digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 supplement.

(5) **Commence** -- As applied to construction of a major stationary source or major modification, means that the owner or operator has all necessary preconstruction approvals or permits and either has:

(A) begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

(B) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

(6) **Construction** -- Any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) which

would result in a change in actual emissions.

**(7) Contemporaneous period** -- As follows.

(A) For major sources with the potential to emit 250 tpy or more of a nonattainment pollutant, the period between:

(i) November 15, 1992; and

(ii) the date that the increase from the particular change occurs.

(B) For major sources with the potential to emit less than 250 tpy of a nonattainment pollutant, the period between:

(i) the date five years before construction on the particular change commences; and

(ii) the date that the increase from the particular change occurs.

(C) Notwithstanding subparagraphs (A) and (B) of this definition, for major sources of nitrogen oxides as a precursor to ozone in ozone nonattainment areas, the contemporaneous period shall begin no earlier than November 15, 1992.

(8) **De minimis threshold test (netting)** -- A method of determining if a proposed emission increase will trigger nonattainment review. The summation of the proposed increase with all other creditable source emission increases and decreases during the contemporaneous period is compared to the MAJOR MODIFICATION column of Table I (in tpy) for that specific nonattainment area. If the major modification level is exceeded, then nonattainment review is required.

(9) **Lowest achievable emission rate** -- For any emitting facility, that rate of emissions of a contaminant which does not exceed the amount allowable under applicable New Source Performance Standards promulgated by the United States Environmental Protection Agency under the Federal Clean Air Act, §111, and which reflects the following:

(A) the most stringent emission limitation which is contained in the rules and regulations of any approved state implementation plan for a specific class or category of facility, unless the owner or operator of the proposed facility demonstrates that such limitations are not achievable; or

(B) the most stringent emission limitation which is achieved in practice by a specific class or category of facilities, whichever is more stringent.

(10) **Major facility/stationary source** -- Any facility/stationary source which emits, or has the potential to emit, the amount specified in the MAJOR SOURCE column of Table I of this section or more of any air contaminant (including volatile organic compounds) for which a National Ambient Air Quality Standard (NAAQS) has been issued. Any physical change that would occur at a

stationary source not qualifying as a major stationary source in Table I of this section, if the change would constitute a major stationary source by itself. A major stationary source that is major for volatile organic compounds or nitrogen oxides shall be considered major for ozone. The fugitive emissions of a stationary source shall not be included in determining for any of the purposes of this definition whether it is a major stationary source, unless the source belongs to one of the categories of stationary sources listed in Title 40 Code of Federal Regulations, Part §51.165(a)(1)(iv)(C).

(11) **Major modification** -- As follows.

(A) Any physical change in, or change in the method of operation of a facility/stationary source that causes a significant net emissions increase for any air contaminant for which an NAAQS has been issued. At a facility/stationary source that is not major prior to the increase, the increase by itself must equal or exceed that specified in the MAJOR SOURCE column of Table I of this section. At an existing major facility/stationary source, the increase must equal or exceed that specified in the MAJOR MODIFICATION column of Table I.

Figure: 30 TAC §116.12(11)(A)

TABLE I

MAJOR SOURCE/MAJOR MODIFICATION EMISSION THRESHOLDS

POLLUTANT <u>designation</u> <sup>1</sup>	MAJOR SOURCE <u>tons/year</u>	MAJOR MODIFICATION <sup>2</sup> <u>tons/year</u>	OFFSET RATIO <u>minimum</u>
OZONE (VOC, NO <sub>x</sub> ) <sup>3</sup>			
I marginal	100	40	1.10 to 1
II moderate	100	40	1.15 to 1
III serious	50	25	1.20 to 1
IV severe	25	25	1.30 to 1
CO			
I moderate	100	100	1.00 to 1 <sup>4</sup>
II serious	50	50	1.00 to 1 <sup>4</sup>
SO <sub>2</sub>	100	40	1.00 to 1 <sup>4</sup>
PM <sub>10</sub>			
I moderate	100	15	1.00 to 1 <sup>4</sup>
II serious	70	15	1.00 to 1 <sup>4</sup>
NO <sub>x</sub> <sup>5</sup>	100	40	1.00 to 1 <sup>4</sup>
Lead	100	0.6	1.00 to 1 <sup>4</sup>

<sup>1</sup> Texas nonattainment area designations are specified in Title 40, Code of Federal Regulations, §81.344.

<sup>2</sup> The major modification threshold is applicable only to existing major sources and shall be evaluated

after netting, unless the applicant chooses to apply nonattainment new source review (NNSR) directly to the project. The appropriate netting triggers for existing major sources of  $\text{NO}_x$  and VOC are specified in §116.150 of this title (relating to New Major Source or Major Modification in Ozone Nonattainment Area) and for other pollutants are equal to the major modification level listed in Table I.

<sup>3</sup> VOC and  $\text{NO}_x$  are precursors to ozone formation and should be quantified individually to determine whether a source is subject to NNSR under §116.150 of this title. As specified in §116.150 of this title, for El Paso County, the NNSR rules apply to sources of VOC, but not to sources of  $\text{NO}_x$ .

<sup>4</sup> The offset ratio is specified to be greater than 1.00 to 1.

VOC = volatile organic compounds

$\text{NO}_x$  = oxides of nitrogen

CO = carbon monoxide

$\text{SO}_2$  = sulfur dioxide

$\text{PM}_{10}$  = particulate matter of less than ten microns in diameter

<sup>5</sup> Applies to the NAAQS for nitrogen dioxide ( $\text{NO}_2$ ).

(B) A physical change or change in the method of operation shall not include:

(i) routine maintenance, repair, and replacement;

(ii) use of an alternative fuel or raw material by reason of an order under the Energy Supply and Environmental Coordination Act of 1974, §2(a) and (b) (or any superseding legislation) or by reason of a natural gas curtailment plan under the Federal Power Act;

(iii) use of an alternative fuel by reason of an order or rule of the FCAA, §125;

(iv) use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(v) use of an alternative fuel or raw material by a stationary source which the source was capable of accommodating before December 21, 1976 (unless such change would be prohibited under any federally enforceable permit condition established after December 21, 1976) or the source is approved to use under any permit issued under regulations approved under this chapter;

(vi) an increase in the hours of operation or in the production rate (unless the change is prohibited under any federally enforceable permit condition which was established

after December 21, 1976); or

(vii) any change in ownership at a stationary source.

(12) **Necessary preconstruction approvals or permits** -- Those permits or approvals required under federal air quality control laws and regulations and those air quality control laws and regulations which are part of the applicable state implementation plan.

(13) **Net emissions increase** -- The amount by which the sum of the following exceeds zero: the total increase in actual emissions from a particular physical change or change in the method of operation at a stationary source, plus any sourcewide creditable contemporaneous emission increases, minus any sourcewide creditable contemporaneous emission decreases.

(A) An increase or decrease in actual emissions is creditable only if both of the following conditions are met:

(i) it occurs during the contemporaneous period; and

(ii) the executive director has not relied on it in issuing a nonattainment permit for the source (under regulations approved during which the permit is in effect) when the increase in actual emissions from the particular change occurs.

(B) An increase in actual emissions is creditable only to the extent that the new level of actual emissions exceeds the old level.

(C) A decrease in actual emissions is creditable only to the extent that all of the following conditions are met:

(i) the old level of actual emissions or the old level of allowable emissions, whichever is lower, exceeds the new level of actual emissions;

(ii) it is federally enforceable at and after the time that actual construction on the particular change begins;

(iii) the reviewing authority has not relied on it in issuing a Prevention of Significant Deterioration or a nonattainment permit, or the state has not relied on it in demonstrating attainment or reasonable further progress; and

(iv) it has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change.

(D) An increase that results from a physical change at a source occurs when the emissions unit on which construction occurred becomes operational and begins to emit a particular pollutant. Any replacement unit that requires shakedown becomes operational only after a reasonable

shakedown period, not to exceed 180 days.

(E) At major sources with the potential to emit 250 tpy or more of a nonattainment pollutant:

(i) increases and decreases of such pollutant resulting from authorizations or applications received before November 15, 1992, are creditable to the extent that the increases or decreases occur within the period five years prior to the date construction on a particular change commences and meet all other creditability criteria; and

(ii) increases and decreases of such pollutant resulting from authorizations or applications received on or after November 15, 1992, are creditable indefinitely to the extent that all other creditability criteria are met.

(F) For all major sources of NO<sub>x</sub> in ozone nonattainment areas, increases and decreases of NO<sub>x</sub> are creditable only if they resulted from authorizations or applications received on or after November 15, 1992.

(14) **Offset ratio** -- For the purpose of satisfying the emissions offset reduction requirements of the FCAA, §173(a)(1)(A), the emissions offset ratio is the ratio of total actual reductions of emissions to total allowable emissions increases of such pollutants. The minimum offset ratios are included in Table I of this section under the definition of major modification. In order to be

considered creditable, offsets must be enforceable, permanent, quantifiable through a replicable methodology, real, and surplus. The reduction must be surplus at the time it was created as well as when it is used. The reduction must have occurred after January 1, 1990, and have been reported or represented in the 1990 or a subsequent emissions inventory. The reduction must not have been relied on in the issuance of a previous nonattainment or prevention of significant deterioration permit.

(15) **Potential to emit** -- The maximum capacity of a facility/stationary source to emit a pollutant under its physical and operational design. Any physical or enforceable operational limitation on the capacity of the facility/stationary source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design only if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions, as defined in 40 Code of Federal Regulations §51.165(a)(1)(viii), do not count in determining the potential to emit of a stationary source.

(16) **Project net** -- The sum of the following: the total proposed increase in emissions resulting from a physical change or change in the method of operation at a stationary source, minus any sourcewide creditable actual emission decreases proposed at the source between the date of application for the modification and the date the resultant modification begins emitting. Increases and decreases must meet the creditability criteria listed under paragraph (13) of this section.

(17) **Secondary emissions** -- Emissions which would occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the

source or modification itself. Secondary emissions must be specific, well-defined, quantifiable, and impact the same general area as the stationary source or modification which causes the secondary emissions. Secondary emissions include emissions from any off-site support facility which would not be constructed or increase its emissions, except as a result of the construction or operation of the major stationary source or major modification. Secondary emissions do not include any emissions which come directly from a mobile source such as emissions from the tail pipe of a motor vehicle, from a train, or from a vessel.

(18) **Stationary source** -- Any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Federal Clean Air Act.

**SUBCHAPTER B: NEW SOURCE REVIEW PERMITS**

**DIVISION 6: PREVENTION OF SIGNIFICANT DETERIORATION REVIEW**

**§116.160 and §116.162**

**STATUTORY AUTHORITY**

The amendments are adopted under TWC, §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under TWC; §5.105, which authorizes the commission to establish and approve commission policy; and under THSC, TCAA, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendments are also adopted under §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the protection of the state's air; §382.051, which authorizes the commission to issue permits and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits.

**§116.160. Prevention of Significant Deterioration Requirements.**

(a) Each proposed new major source or major modification in an attainment or unclassifiable area shall comply with the Prevention of Significant Deterioration (PSD) of Air Quality regulations promulgated by the EPA in Title 40 Code of Federal Regulations (CFR) at 40 CFR §52.21 as amended March 12, 1996 and the Definitions for Protection of Visibility promulgated at 40 CFR §51.301 as amended July 1, 1999, hereby incorporated by reference.

(b) The following paragraphs are excluded:

(1) 40 CFR §52.21(j), concerning control technology review;

(2) 40 CFR §52.21(l), concerning air quality models;

(3) 40 CFR §52.21(q), concerning public notification (provided, however, that a determination to issue or not issue a permit shall be made within one year after receipt of a complete permit application so long as a contested case hearing has not been called on the application);

(4) 40 CFR §52.21(r)(2), concerning source obligation;

(5) 40 CFR §52.21(s), concerning environmental impact statements;

(6) 40 CFR §52.21(u), concerning delegation of authority; and

(7) 40 CFR §52.21(w), concerning permit rescission.

(c) The definitions of building, structure, facility, or installation (40 CFR §52.21(b)(6)) and secondary emissions (40 CFR §52.21(b)(18)) are excluded and replaced with the following definitions:

(1) building, structure, facility, or installation -- all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control).

Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same first two-digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 supplement.

(2) secondary emissions -- emissions which would occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the major stationary source or major modification itself. Secondary emissions include emissions from any offsite support facility which would not be constructed or increase its emission except as a result of the construction or operation of the major stationary source or major modification. Secondary emissions do not include any emissions which come directly from a mobile source, such as emissions from the tailpipe of a motor vehicle, from a train, or from a vessel.

(d) The term "executive director" shall replace the word "administrator," except in 40 CFR §52.21(b)(17), (f)(1)(v), (f)(3), (f)(4)(i), (g), and (t). "Administrator or executive director" shall replace "administrator" in 40 CFR §52.21(b)(3)(iii), and "administrator and executive director" shall replace "administrator" in 40 CFR §52.21(p)(2).

(e) All estimates of ambient concentrations required under this subsection shall be based on the applicable air quality models and modeling procedures specified in the EPA Guideline on Air Quality

Models, as amended, or models and modeling procedures currently approved by the EPA for use in the state program, and other specific provisions made in the PSD state implementation plan. If the air quality impact model approved by the EPA or specified in the guideline is inappropriate, the model may be modified or another model substituted on a case-by-case basis, or a generic basis for the state program, where appropriate. Such a change shall be subject to notice and opportunity for public hearing and written approval of the administrator of the EPA.

**§116.162. Evaluation of Air Quality Impacts.**

In evaluating air quality impacts under §116.160 of this title (relating to Prevention of Significant Deterioration Requirements) or §116.161 of this title (relating to Sources Located in an Attainment Area with a Greater Than De Minimis Impact), the owner or operator of a proposed new facility or modification of an existing facility shall not take credit for reductions in impact due to dispersion techniques as defined in Title 40 Code of Federal Regulations (CFR). The relevant federal regulations are incorporated herein by reference, as follows:

(1) 40 CFR §51.100(hh) - (kk) promulgated November 7, 1986;

(2) the definitions of “owner or operator,” “emission limitation and emission standards,” “stack,” “a stack in existence,” and “reconstruction,” as given under 40 CFR §51.100(f), (z), (ff), (gg), promulgated November 7, 1986, and 40 CFR §60.15, promulgated December 16, 1975, respectively;

(3) 40 CFR §51.118(a) and (b), promulgated November 7, 1986; and

(4) 40 CFR §51.164, promulgated November 7, 1986.