**Texas Commission on Environmental Quality Comments on
Approval and Promulgation of Implementation Plans; Texas;
Revisions to the New Source Review (NSR) State Implementation Plan (SIP);
Modification of Existing Qualified Facilities Program and General Definitions
Docket ID No. EPA-R06-OAR-2005-TX-0025**

The Texas Commission on Environmental Quality (TCEQ) provides the following comments on the U.S. Environmental Protection Agency's (EPA) proposed disapproval of the Texas Qualified Facilities Program (or Program), and EPA's proposed actions relating to certain TCEQ definitions. TCEQ's comments are detailed below.

I. Qualified Facilities

A. Background

The creation of the Qualified Facilities Program was a development of the 74th Texas Legislature, through Senate Bill (SB) 1126. SB 1126 became effective on May 19, 1995, and amended the Texas Clean Air Act (TCAA) by revising the definition of "modification of existing facility," which changed the factors used to determine whether a modification for state permitting (i.e. Minor New Source Review (NSR)) purposes only, has occurred. In 1996, 30 Texas Administrative Code (Tex. Admin. Code) Chapter 116 was revised to incorporate this legislative directive.

Specifically, SB 1126 provides that modifications may be made to existing facilities without triggering the state's Minor NSR definition of modification if the following conditions are met: 1) authorization for the facility to be modified was issued in a permit, permit amendment, or was exempted from pre-construction permit requirements within 120 months from when the change will occur, and 2) uses air pollution control methods that are at least as effective as the best available control technology (BACT) that was required within 120 months of when the change will occur. Facilities that meet these requirements are designated as "qualified facilities." TCEQ has always considered the Qualified Facilities Program to be applicable only to Minor NSR and not applicable to Major NSR, although this is not specifically stated in the rule.[1]

TCEQ implemented SB 1126 through rules in 30 Tex. Admin. Code Chapter 116 Subchapters A and B that frame the Qualified Facilities Program and confirm that the rules only apply to existing qualified facilities.[2] The rules do not allow construction of a new facility, nor can the change result in a net increase in allowable emissions of any air contaminant, or allow the emissions of an air contaminant category that did not previously exist at the facility undergoing the change.[3] The use of the terminology in the phrase "net increase in allowable

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[1] Federal Clean Air Act (FCAA), § 110(a) (2) (C)
[2] 30 Tex. Admin. Code § 116.10(11).
[3] 30 Tex. Admin. Code § 116.116(e) (1) and (5).

emissions of any air contaminant" in 30 Tex. Admin. Code § 116.116(e) is distinct from, and should not be confused with, federal terminology, where "net increase" has specific meaning as it relates to federal NSR (FNSR or Major NSR) applicability. For federal applicability, the "net increase" is calculated by comparing baseline actual emissions to allowable emissions.

B. How Texas Understood the Qualified Facilities Program Met Federal NSR Requirements

As mentioned, TCEQ has always considered the Qualified Facilities Program to be applicable only to Minor NSR although this is not specifically stated in the rule. The Program does not circumvent FNSR requirements. The rule[4] requires that persons making changes must maintain sufficient documentation to demonstrate that the project will comply with 30 Tex. Admin. Code §§ 116.150 and 116.151 (relating to Nonattainment Review), §§ 116.160 - 116.163 (relating to Prevention of Significant Deterioration (PSD) Review), and with Chapter 116, Subchapter C (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources.)[5] A major modification, as defined in federal rules,[6] may not occur without going through nonattainment and/or PSD review. Likewise, an owner or operator may not use Qualified Facility rules to avoid maximum achievable control technology (MACT) requirements for the construction or reconstruction of major sources of Hazardous Air Pollutants (HAP) as they are described and addressed in the 40 Code of Federal Regulations (CFR) Part 63 National Emission Standards for Hazardous Air Pollutants rules. If a proposed project is determined to be a major modification under PSD and/or nonattainment rules, or meets the definition of construction or reconstruction under 40 CFR Part 63, the owner or operator must obtain a federal NSR permit/major modification under the appropriate FNSR program, as well as a HAP permit to meet requirements of Federal Clean Air Act (FCAA) § 112(g) if case-by-case MACT applies; and a Minor NSR permit amendment. Further, the Qualified Facilities Program does not impair the TCEQ's authority to control the quality of the state's air and to take action to control a condition of air pollution if the TCEQ finds that such a condition exists.[7]

The TCEQ commits to work with the EPA to improve and clarify the 30 Tex. Admin. Code Chapter 116 rule language to ensure that the Qualified Facilities Program is specifically limited to Minor NSR changes. Texas does not apply the Qualified Facility Program to projects which constitute either a major modification under federal rule, or a project which meets the definitions of construction or reconstruction under FCAA § 112(g) requirements contained in 40

[4] 30 Tex. Admin. Code § 116.117 (a) (4)
[5] FCAA § 112(g), 40 Code of Federal Regulations (CFR) Part 63.
[6] 40 CFR § 51.165 (a) (1) (v)
[7] Texas Water Code § 5.514

CFR 63.

In summary, under the Qualified Facilities Program, TCEQ:

1. Determines federal applicability as a first step in processing a Qualified Facilities request; and uses actual emissions, not allowable emissions rates;

2. Applies federal NSR requirements when triggered;

3. Does not circumvent federal requirements applicable to major stationary sources or major modifications;

4. Considers the use of "modification" to be separate and severable from the federal definition of "modification" as reflected in the SIP-approved Major NSR Program; and

5. Does not violate the approved SIP with regard to Major NSR or Minor NSR Program requirements.

C. How Texas Air Quality Benefited from the Qualified Facilities Program

At the time that the legislature first considered the Qualified Facilities Program, Texas had a large number of grandfathered facilities.[8] In addition to providing flexibility to permitted facilities, the Program was structured to encourage grandfathered facilities to participate. To participate in the Program, that is to become "qualified," grandfathered facilities had to apply control technology to reduce emissions and comply with applicable federal requirements and not trigger FNSR. Subsequently, in 2001 the legislature required all grandfathered facilities to obtain authorization or shutdown. However, the Program remains effective as emissions are controlled, no new emissions above existing limits are allowed, and federal requirements are considered and met.

In summary, the Program reinforced the TCEQ's duties under the TCAA to protect air quality and to control air contaminants by *practical and economically feasible methods*.[9] Therefore, the environment benefited from the Program because emissions were controlled prior to the Texas Legislature mandating shut down or obtaining authorization; air quality benefited as demonstrated by monitoring which measured continued improvement; regulated entities benefited because they were given flexibility; and the state benefited by reasonable regulation that encouraged responsible economic development.

[8] Grandfathered facilities are facilities that were once exempt from most State air permitting requirements because the facilities predated the 1971 Texas Clean Air Act that required preconstruction review

[9] Tex. Health & Safety Code § 382.002, § 382.003(9) (e)

II. Specific Comments

A. Definition and Use of the Term "Facility" (74 *Federal Register* 48455)

EPA specifically solicited TCEQ to comment on EPA's interpretation of Texas law and the Texas NSR SIP with respect to the term "facility" as this is critical to EPA's understanding of the Texas Permitting Program. The definition of the term "facility" is one of the cornerstones of the Texas Permitting Program under the TCAA. TCEQ appreciates the opportunity to address this point as its interpretation of Texas law differs from that of EPA as discussed below. In addition, to provide clarity and consistency, TCEQ will provide similar comments in regard to Docket ID No. EPA-R06-OAR-2005-TX-0032 and Docket ID No. EPA-R06-OAR-2006-TX-0133.

As stated by EPA, it understands that the state uses a "dual definition for the term facility." Under the TCAA[10] and TCEQ rule,[11] "facility" is defined as "a discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment. A mine, quarry, well test, or road is not considered to be a facility." A facility may constitute or contain a stationary source -- a point of origin of a contaminant.[12] As a discrete point, a facility can constitute but cannot contain a "major stationary source" as defined by federal law. A facility is subject to Major and Minor NSR requirements, depending on the facts of the specific application.

Under Major NSR, EPA uses the term "emissions unit" (generally) when referring to part of a "stationary source"; TCEQ translates "emissions unit" to mean "facility"[13] which is at least as stringent as federal rule. TCEQ and its predecessor agencies have consistently interpreted facility to preclude inclusion of more than one stationary source, in contrast to EPA's stated understanding. Likewise, TCEQ does not interpret facility to include "every emissions point on a company site, even if limiting these emission points to only those belonging to the same industrial grouping (SIC code)." The federal definition of "major stationary source"[14] is not equivalent to the state definition of "source."[15] A "major stationary source" can include more than one "facility" as defined under Texas law – which is consistent with EPA's interpretation of a "major stationary source" including more than one emissions unit.

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[10] Tex. Health & Safety Code § 382.003(6).
[11] 30 Tex. Admin. Code § 116.10(6).
[12] Tex. Health & Safety Code § 382.003(12).
[13] 30 Tex. Admin. Code § 116.160 (c) (3) "The term "facility" shall replace the words "emissions unit" in the referenced sections of the CFR."
[14] 40 CFR 51.166 (b)(1)(i)(a).
[15] Tex. Health & Safety Code § 382.003(12).

The above interpretation of the term "facility" has been consistently applied by the TCEQ and its predecessor agencies for more than 30 years. The TCEQ's interpretation of Texas statutes enacted by the Texas Legislature is addressed by the Texas Code Construction Act. More specifically, words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.[16]

While Texas law does not directly refer to the two steps allowing deference enunciated by Justice Stevens writing for a unanimous Court in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*,[17] Texas law and judicial interpretation recognize *Chevron*[18] and follow similar analysis as discussed below.

The Texas Legislature intends an agency created to centralize expertise in a certain regulatory area "be given a large degree of latitude in the methods it uses to accomplish its regulatory function."[19] Further, Texas courts construe the text of an administrative rule under the same principles as if it were a statute.[20] Texas administrative agencies have the power to interpret their own rules, and their interpretation is entitled to great weight and deference.[21] The agency's construction of its rule is controlling unless it is plainly erroneous or inconsistent.[22] "When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order."[23] This is particularly true when the rule involves complex subject matter.[24] Texas courts recognize that the legislature intends an agency created to centralize expertise in a

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[16] Tex. Gov't Code § 311.011(b).

[17] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S 837, 842-43 (1984). "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."

[18] *Phillips Petroleum Co. v. Tex. Comm'n on Envtl. Quality*, 121 S.W.3d 502, 508 (Tex.App.–Austin 2003, no pet.), which cites Chevron to support the following. "Our task is to determine whether an agency's decision is based on a permissible interpretation of its statutory scheme."

[19] *Reliant Energy, Inc. v. Public Util. Comm'n,* 62 S.W.3d 833, 838 (Tex.App.-Austin 2001, no pet.) (citing *State v. Public Util. Comm'n,* 883 S.W.2d 190, 197 (Tex.1994)).

[20] *Texas Gen. Indem. Co. v. Texas Workers' Comp. Comm'n,* 36 S.W.3d 635, 641 (Tex.App.-Austin 2000, no pet.).

[21] *Id.*

[22] *Id.*

[23] *Udall v. Tallman,* 380 U.S. 1, 17 (1965).

[24] *See Equitable Trust Co. v. Finance Comm'n,* 99 S.W.3d 384, 387 (Tex.App.-Austin 2003, no pet.).

certain regulatory area "be given a large degree of latitude in the methods it uses to accomplish its regulatory function."[25]

In summary, TCEQ translates "emissions unit" to mean "facility." Just as an "emissions unit" under federal law is construed by EPA as part of a major stationary source, a "facility" under Texas law can be part of a major stationary source. However, a facility cannot include more than one stationary source as defined under Texas law.

B. Definition of Facility in the SIP (74 *Federal Register* 48455, 48465)

The TCEQ acknowledges that EPA proposes to correct the typographical error in 72 *Federal Register* 49198 to clarify that the definition of ''facility'' as codified at 30 Tex. Admin Code § 116.10(6) was approved as part of the Texas SIP in 2006 and remains part of the Texas SIP.[26]

C. Definition and Use of the Term "Air Quality Account Number" (74 *Federal Register* 48455)

The TCEQ no longer uses the term "air quality account number" and now uses the term "account," which is a SIP approved definition.[27] Administrative changes to the Qualified Facilities Program are planned to reflect the change in terms.

D. Netting and Double Counting (74 *Federal Register* 48461, 48462)

The Qualified Facilities Program can only be used if a physical or operational change complies with FNSR requirements. In order to make a physical or operational change to a qualified facility, an owner or operator must demonstrate that the change does not result in a net increase in allowable emissions of any air contaminant previously authorized under state minor source review.[28] Keeping in mind the state definition of the term "facility," 30 Tex. Admin Code § 116.116 (e) (2) and (3) allow a qualified facility to demonstrate that a state modification has not occurred by comparing allowable emissions to allowable emissions, before and after a proposed change. Allowable emissions (both hourly and annual rates) are one of the criteria used to provide "state qualified" flexibility because the

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[25] *Reliant Energy, Inc. v. Public Util. Comm'n,* 62 S.W.3d 833, 838 (Tex.App.-Austin 2001, no pet.) (citing *State v. Public Util. Comm'n,* 883 S.W.2d 190, 197 (Tex.1994)).

[26] 74 *Federal Register* 48455 at Footnote 6

[27] 30 Tex. Admin. Code § 101.1 (1) Account--For those sources required to be permitted under Chapter 122 of this title (relating to Federal Operating Permits Program), all sources that are aggregated as a site. For all other sources, any combination of sources under common ownership or control and located on one or more contiguous properties, or properties contiguous except for intervening roads, railroads, rights-of-way, waterways, or similar divisions. Approved as part of the Texas SIP at 70 *Federal Register* 16129 (March 30, 2005).

[28] 30 Tex. Admin. Code § 116.116 (e) (1).

facilities must exist and be authorized, and thereby undergone appropriate permit review. In addition, no existing level of control can be reduced.[29]

For facilities undergoing an intraplant trade, where the allowable emissions at one facility are increased while the allowable emissions at another facility are reduced, an allowable-to-allowable comparison is used only to determine if a net emissions increase has occurred for state purposes. The emissions are reviewed simultaneously and not contemporaneously as for federal review. If a net emissions increase has occurred, an owner or operator cannot use the Qualified Facilities Program to authorize the proposed project, and must find another state mechanism to obtain proper authorization.

In addition, the owner or operator must submit a pre-change notification if the intraplant trade moves emissions from the interior of a plant site closer to a property line. This gives the TCEQ's staff the ability to evaluate public protectiveness and evaluate any potential changes in off property impacts as they relate to all contaminants and pollutants with national standards, i.e. National Ambient Air Quality Standards (NAAQS). This intraplant trade capability only exists to the extent that the project is a Minor NSR action, and does not apply if a major modification has been triggered under FNSR requirements.

For major sources, in addition to state requirements, the evaluation of emissions related to physical and/or operational changes is conducted on a baseline actual to either a projected actual or potential to emit basis if applicable.[30] This comparison is used to determine if an emission increase above the appropriate significance threshold for a particular federal permitting program has occurred. From the FNSR standpoint, if a proposed physical and/or operational change would result in an emission increase that exceeds a significance threshold, the appropriate applicability analysis (netting) is triggered. If the results of the netting analysis indicate that a major modification has occurred, the appropriate federal program(s) is triggered and federal authorization must be obtained. In such a case, the Qualified Facilities Program would not be an applicable authorization pathway, and a state Minor NSR amendment must be obtained, along with the appropriate FNSR authorization. The exemption from the definition of "modification of an existing facility" under the Qualified Facilities Program does not relieve an owner or operator from conducting an evaluation to determine if a federal major modification has occurred.

From the federal standpoint, only the project's emission increases are evaluated (without consideration of emission decreases) to determine if a federal applicability analysis (netting) has been triggered. If the project increases equal or exceed the netting threshold for the pollutant and program under evaluation,

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[29] 30 Tex. Admin. Code § 116.116 (e) (8).
[30] 30 Tex. Admin. Code § 116.116 (e) (4).

then a full contemporaneous netting exercise is conducted in an effort to determine if the modification is a major modification. If the project is a major modification, then the appropriate FNSR program, either PSD and/or nonattainment review, is triggered. A permit holder cannot use the "no net emissions increase" concept as described in the Qualified Facilities Program rules as a mechanism to avoid a federal NSR applicability analysis (netting).

E. Reporting (74 *Federal Register* 48462)

The TCEQ has no comment on the suggested change to the reporting time interval from one year to six months and will consider this change during rulemaking.

III. Definitions

TCEQ agrees with EPA's proposal to approve the definitions of Grandfathered Facility, Maximum Allowable Emission Rate Table, and New Facility, and urges EPA to take final action to approve these definitions.

TCEQ will consider EPA's comments regarding its proposed disapproval of the definition of BACT. As EPA is aware, the TCEQ plans to propose a rulemaking at the January 13, 2010, Commission agenda to address the federal definition of BACT. TCEQ's position is that its application of BACT is consistent with the existing SIP and the TCAA.

TCEQ will consider EPA's comments regarding its proposed disapproval of the definitions of actual emissions, allowable emissions, and modification of existing facility at 30 Tex. Admin Code Chapter § 116.10 (11) (E) for qualified facilities. TCEQ's position is that its application of FNSR is consistent with the existing SIP.

TCEQ will also consider EPA's comments regarding its proposed disapproval of 30 Tex. Admin. Code Chapter § 116.10 (11) (A), (B), and (G) of the definition of modification of existing facility. This definition was revised as part of the implementation of the statutory change in 1995, as discussed above in Section I.A.

IV. TCEQ's Plan to Correct Deficiencies

Although the rules for the Qualified Facilities Program are more than a dozen years old, the TCEQ understands that EPA's review was conducted by applying the current applicable law. The Executive Director will conduct a review of all EPA comments and propose changes to the rules proposed for disapproval.

The TCEQ understands EPA's concerns with issues regarding, among other things, applicability, clarity, enforceability, replicable procedures, recordkeeping, and compliance assurance. Specifically, the Executive Director will consider rulemaking to address the following concerns:

- clarify the requirement to applying federal netting during the technical review of a qualified facility;
- ensure federal NSR requirements are met when triggered;
- clarify that a qualified claim will be denied if federal NSR is triggered;
- provide that emissions limitations are based on a 12-month rolling average instead of a calendar year average; and
- address the specific definitions as discussed above in Section III.

New and amended rules will be subject to the statutory and regulatory requirements for a SIP revision, as interpreted in EPA policy and guidance on SIP revisions, as well as applicable Texas law. The revised Program will ensure protection of the NAAQS, and demonstrate noninterference with the Texas SIP control strategies and reasonable further progress.