

The Texas Commission on Environmental Quality (TCEQ or commission) adopts the repeal of §116.170; new §§116.120, 116.170, and 116.172; and amendments to §§116.12, 116.114, 116.115, 116.143, 116.150, 116.313, 116.315, and 116.715. Sections 116.114, 116.120, 116.170, 116.315, and 116.715 are adopted *with changes* to the proposed text as published in the April 4, 2003 issue of the *Texas Register* (28 TexReg 2903). Sections 116.12, 116.115, 116.143, 116.150, 116.172, 116.313, and the repealed §116.170 are adopted *without changes* and will not be republished. The new and amended sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

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

The commission is adopting rule amendments to ensure the timely submission of updated and additional information used to process new source review applications. The commission is also adopting rules so that applicants who do not supply requested and necessary information for the processing of a permit application will have their application voided. Applications resubmitted within six months would not be subject to any further permit fees, but the applicant would be required to go back through the public notice process in order to make possible a public review of updated and current information about the proposed facility.

The commission requires that persons issued a new source review permit under Chapter 116 begin construction of the facility within 18 months of permit issuance or the permit will be voided. The executive director may grant an additional 18-month extension to this period. In the case of flexible permits, the time period to begin construction is specified in the permit with one 12-month extension

available. In the large majority of cases, these cumulative time periods are sufficient to resolve issues associated with starting construction. In some cases, particularly when third party litigation is involved, a permit holder may not be able to start construction within the extended time periods. The commission is therefore adopting rules so that an additional extension will be available. The commission is specifically adopting rules so that the first 18-month extension may be granted at the permit holder's request. Another extension of up to 18 months will be granted by the executive director to resolve litigation that is not of the permit holder's origin. The commission also believes that economic or other circumstances can arise which would affect the decision to start construction and adopts amendments allowing the executive director to retain discretion to grant a further extension for reasons not specified in the rules, if the permit holder has demonstrated an intent to build the project by spending at least 10% of the estimated total cost of the project up to a maximum of \$5 million. Any permit holder receiving a second extension would be required to demonstrate that the project continues to meet all the rules and regulations of the commission and the intent of the Texas Clean Air Act, including protection of the public's health and physical property. Any extension of the time to begin construction of a project will subject the permit holder to additional best available control technology, lowest achievable emission rate, and offset review. Because the same conditions that would motivate a new NSR (new source review) permit holder to seek extensions can also apply to holders of flexible permits, the commission is adopting rules to apply the extension periods and conditions in §116.120 to flexible permits as well. Flexible permits are used to authorize changes and modifications to existing facilities.

Emission reductions in the form of offsets are obtained prior to the issuance of a new source review permit to counter the effect of new emissions on air quality. In recent years, the commission has established programs that create emission caps in Houston and Dallas and use emission credits and allowances to maintain the caps. Emission offsets are also considered in these programs and must meet the same certification standards as emission credits in order to achieve consistent protection of air quality. The commission is therefore adopting rules so that emission offsets will be certified in the same way as emission credits in 30 TAC Chapter 101, Subchapter H, Emissions Banking and Trading. The commission is adopting rules in Chapter 116 to retain certification of future offsets internal to a facility. In many cases, these future internal offsets are credited for the replacement of existing equipment that must be kept in operation until the new, lower emitting equipment is operational. This is in contrast to offsets used between facilities which requires that a reduction occur before it can be credited. Those portions of §116.170 that concern the offset of emissions from rocket engine firing and cleaning are transferred to a new §116.172.

Offsets are not permanent reductions but will reappear in the future. In order to make meaningful emission control plans for nonattainment and prevention of significant deterioration areas, the commission needs timely and accurate information on emission reductions that will be used as offsets. The commission is adopting rules so that emission reductions not yet certified and banked as emission credits by the effective date of these rules must be certified and banked by September 1, 2004, in order to be considered for offsets.

The commission requires adequate time to process permit renewals and, for workload management, needs to ensure that those permits closest to expiration are received first. For these reasons, the commission is also adopting rules so that permit renewal applications be submitted at least six months, but no earlier than 18 months, before the permit will expire. By establishing a date for the earliest submission of a renewal application, the commission will also increase the probability that renewal applications are received under the most current fee tables.

## SECTION BY SECTION DISCUSSION

### *Subchapter A: Definitions*

The definition of "Offset ratio" in §116.12, Nonattainment Review Definitions, is amended to state that an offset would have to be certified as an emission credit under Chapter 101, Subchapter H, in order to qualify as a reduction. The commission is also making minor changes to abbreviations, rule citations, and acronyms to conform with *Texas Register* formatting in the definitions.

### *Subchapter B: New Source Review Permits*

The amendments to §116.114, Application Review Schedule, state that an application for a permit or permit amendment will be voided in the event deficient information supplied with the application is not corrected. If an applicant fails to make a good faith effort to provide the required information after two written notifications of the deficiency, the executive director will void the application and notify the applicant. To pursue the project, the applicant shall submit an entirely new application with a new Form PI-1. The new application will be subject to the state and federal rules and regulations in place at the time of submittal. If a new application is submitted within six months of the voidance of the

original application, the application will be exempt from the fee requirements under §116.140, Applicability. However, the applicant must go through a new technical review and republish public notice.

The amendment of §116.115, General and Special Conditions, removes language relating to the voiding of permits and extensions of time to begin construction and transfers this language to a new §116.120.

The new §116.120, Voiding of Permits, addresses the voiding of permits and contains language relocated from §116.115. The relocated language allows additional time to begin construction of a project authorized with a new source review permit. This extension would be available in the case of a construction delay caused by litigation, not of the permit holder's origin, associated with the issuance of the permit. The executive director could also issue an extension if the permit holder has spent, or has committed to spend, 10% of the estimated cost of construction to a maximum of \$5 million and has demonstrated that emissions from the facility would be in compliance with commission rules and the intent of the Texas Clean Air Act. The commission proposed that a permit holder would have to spend 15% of the cost of the project, but has reduced that figure based on public comments stating that costs incurred preparatory to a project do not rise proportionately with the cost of the project. The commission has also added language to the rules stating that, in addition to best available control technology review, the commission will also review the application of lowest achievable emission rate. This is consistent with the commission's current practice of determining applicability of federal rules to projects where construction has been delayed.

The amendments to §116.143, Payment of Fees, state that the permit application fee must be received before an application will be processed or before the start of any time constraints required of the commission in application processing. This amendment is intended to ensure that the commission receives fees needed to cover the expense of permit review and processing. The commission retains the conditions under which fees will or will not be returned to the applicant. If no permit or amendment is issued or if the applicant withdraws the application prior to permit issuance, then one-half of the fee will be refunded. If it is determined that a permit applicant will meet the requirements of a permit by rule, the applicant is entitled to a refund of the fee difference. The commission amended the rule to state that a qualification for a standard permit or de minimis classification under §116.119, De Minimis Facilities or Sources, would also enable the applicant to withdraw the permit application and receive a refund of the fee difference.

The amendment to §116.150, New Major Source or Major Modification in Ozone Nonattainment Areas, deletes subsection (c) because the time period specified for the application of certain exemptions to nitrogen oxides reductions for sources in the Houston-Galveston and Beaumont-Port Arthur ozone nonattainment areas has expired.

The new §116.170, Applicability of Emission Reductions as Offsets, establishes requirements for the use of emission reductions as offsets. Reductions that will be used as emission credits must be certified and banked under the requirements of Chapter 101, Subchapter H, Division 1 or 4. The commission will require that any existing reductions must be certified under Chapter 101 by September 1, 2004 in order to be eligible for use as an offset. The commission changed the rule from proposal and specified

that the September 1, 2004 date applies to existing reductions. Reductions occurring after that date may also be certified under Chapter 101.

Future reductions that will be used internally to a facility may still be certified under Chapter 116. The permit for the facility must contain special conditions that specify the date when the permit holder must submit to the executive director appropriate and sufficient data verifying that the reduction has occurred, and the reduction must be achieved prior to the commencement of the permitted emissions for which the offset is required. The reduction must meet the requirements of Chapter 101, and the permit holder agrees to obtain additional offsets if the executive director determines the reductions do not satisfy the original offset requirements.

The new §116.172, Emissions Offsets from Rocket Engine Firing and Cleaning, contains the conditions under which emissions from rocket engine firing or cleaning may be offset by alternative or innovative means. These requirements have been transferred unchanged to the new section from existing §116.170 except to state that information regarding rocket engine offsets would be submitted to the executive director instead of the commission.

*Subchapter D: Permit Renewals*

The amendment to §116.313, Renewal Application Fees, corrects the zip code in the commission's address.

The amendments to §116.315, Permit Renewal Submittal, state that an application for permit renewal must be submitted at least six months, but no earlier than 18 months prior to the permit expiration date. The commission intends to allow sufficient time for preparation and submission of renewals for permit holders whose permit expires within six months of the potential effective date of these adopted rules. The commission proposed February 1, 2004 as the effective date of this new requirement, but extended the date to May 1, 2004 as a result of public comment to allow additional time for permit holders to become aware of the new requirement. With executive director approval, applications may be submitted before or after this specified time period.

*Subchapter G: Flexible Permits*

The amendments to §116.715, General and Special Conditions, remove language concerning voiding of the permit. The commission will apply the same extension of construction conditions, as stated in the new §116.120, to flexible permits as would be applied to other new source review permits.

**FINAL REGULATORY IMPACT ANALYSIS DETERMINATION**

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rules do not meet the definition of a “major environmental rule.” Major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted rules require that emission reductions used as emission offsets be certified in a manner consistent with

other TCEQ regulations, establish a deadline for the certification of existing reductions as emission offsets, establish procedures for voiding permit applications, establish conditions under which permit fees may be refunded, specify a time period for the submission of permit renewal applications, and specify which fee schedule will apply to permit renewals. These adopted rules will not require additional emission controls or new capital expenses. Applicants who have their applications voided will be required to submit a new application and repeat the public notification process. Depending on location, this notification can cost from \$700 to \$4,000. This expense will only be incurred following a lack of action from the applicant after being notified of deficiencies in its application.

Permit holders who wish to extend the start of project construction beyond 36 months may be required to spend a large amount of money to qualify for this extension. Large projects can cost into the hundreds of millions of dollars and the 10% qualification threshold of such a figure is clearly a significant amount. However, the adopted rules do not compel a permit holder to seek an extension. While permit holders seeking an extension under this cost threshold are assumed to do so under economic reasons that make construction impractical or unprofitable, the commission sees this as a risk of doing business over which it has no control and the opportunity for extension reduces that risk.

Texas Government Code, §2001.0225, applies 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. The adopted rules in Chapter 116 are not subject to the regulatory analysis provisions of §2001.0225(b), because the adopted rules do not meet any of the statute's four applicability requirements.

#### TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact assessment for the adopted rules. Promulgation and enforcement of the rules will not burden private real property. The rules will not affect private property in a manner which restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Therefore, the adopted rules do not constitute a taking under Texas Government Code, Chapter 2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the adoption is a rulemaking identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, and therefore, will require that applicable goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission's preliminary consistency determination for the adopted rules in accordance with 31 TAC §505.22 found that the rulemaking is consistent with the applicable CMP goal to protect and preserve the quality and values of coastal natural resource areas (31 TAC §501.12(1)), and the policy which requires that the commission protect air quality in coastal areas (31 TAC §501.14(q)). The adopted rules require that emission reductions used as emission offsets be certified in a manner

consistent with other TCEQ regulations, establish a deadline for the certification of existing reductions as emission offsets, establish conditions under which the construction of a permitted project can be delayed, establish procedures for voiding permit applications, establish conditions under which permit fees may be refunded, and specify a time period for the submission of permit renewal applications. No new emissions will be authorized. Therefore, the rulemaking is consistent with the CMP.

#### EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

New source review is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits. These amendments affect the issuance, renewal, or extension of a new source review permit. Because they do not address permit content, the amendments do not require changes to federal operating permits.

#### PUBLIC COMMENT

A public hearing on these rules was held on April 24, 2003 in Austin, and the public comment period closed on May 5, 2003. The agency received written comments from Texas Chemical Council (TCC), El Paso Electric (ELP), Baker Botts, L.L.P. on behalf of the Texas Industry Project (TIP), Sempra Energy Resources (Sempra), Dow Chemical Company (Dow), EPA, and BP Products North America, Inc. (BP). All commenters disagreed with or had suggestions for changes to portions of the proposed rules.

RESPONSE TO COMMENTS

TCC, BP, and Dow commented that the notice of deficiency referenced in §116.114(b)(2) should be specified as a written notice. Dow and BP further recommended that the applicant be notified in writing if the application is voided. Dow and BP requested that the commission provide maximum flexibility in responding to requests for application information that may require complex modeling studies and evaluate deficient applications on a case-by-case basis.

**The commission agrees with the commenters and has changed the rule language to include a requirement for written notification of deficiencies. The commission currently notifies permit applicants in writing if an application has been voided. The commission recognizes that certain requests for additional application information may require more time to produce than others. Requests for information and the time to respond to them will be evaluated and handled on a case-by-case basis. For this reason, the commission is not including in the rule language any specific time to respond to deficiency requests.**

Sempre stated that the current rule limiting start of construction extensions is in conflict with federal rules (40 Code of Federal Regulations 52.21(r)(2)) which allow the granting of more than one extension.

**The commission has not changed the rules in response to this comment. Under the commission's adopted rules, a permit holder can have up to 4-1/2 years from permit issuance to the beginning of construction. In the nonattainment areas of the state there is the need to obtain offsets or**

**allowances before a project can be authorized which limits the number of permits that may be issued. Permitted projects are also generally located near population centers where the population may grow and population concentrations may shift or expand. For these reasons, the commission does not wish to have an indefinite authorization for a project that has not been built. The federal rule cited by the commenter is silent on the number and length of extensions available, but does allow for the invalidation of a permit if construction is not completed within a reasonable time. The commission believes that the provisions it has established in the rules allow a reasonable time for the beginning of construction and are consistent with the federal rule.**

Sempre recommended that the commission examine alternative approaches to the granting of a second construction extension. Sempra prefers a method whereby the second extension is left entirely to the discretion of the executive director. Sempra recommended that a list of factors, including delays from litigation, amount and cost of preliminary work, binding contracts on the permit holder, unique economic circumstances, and the public or environmental benefit of the project be considered as a substitute to potential scenarios in the rule language. Sempra stated that executive director discretion would provide a disincentive for and protection against permits that are sought speculatively.

**The commission has not changed the rules in response to this comment. The adopted rules are structured such that the executive director may grant extensions if the permit holder meets certain conditions involving litigation and minimum expenditures. The commission has chosen these methods because decisions of the executive director may be appealed, and it wishes to limit the scope of possible appeals by placing a minimum requirement within the rules.**

As another alternative, Sempra suggested that the commission concentrate on the initial project development costs instead of the estimated cost for completion of the project. These development costs include engineering, infrastructure study, acquisitions, and permitting and generally approach \$10 million in a typical power plant project. In the case of a speculative project, Sempra stated that the cost would be held to a minimum, typically \$3 to \$4 million. Sempra suggested that a percentage (80%) of these development costs be used as the threshold for determining eligibility for a second extension rather than a percentage of the total project cost.

**The commission has not changed the rules in response to these comments. The commission agrees with another statement from Sempra that development costs tend to become detached from the total cost of a project as the cost of the project increases (see next comment).**

**Development costs would make up a higher percentage of the total cost of less expensive projects. The commission adopted a price threshold for the determination of a second extension as a deterrent against speculative permitting and wants this deterrent to apply equally to large as well as small projects. Because the development costs would be a lesser proportion of large projects, the commission believes that companies with greater resources undertaking these projects would be deterred less by a threshold based on development costs.**

Sempra stated that development costs for lower cost projects would be close to 15% of the total project cost, but in the case of projects that have a total cost of \$50 million or more, the development costs do not increase proportionately and become detached from the 15% figure. Sempra recommended an alternative approach where the 15% figure is used for projects under \$50 million, but capping the

expenditure amount at \$7.5 million for projects over \$50 million. Sempra opposed the concept of using non-recoverable or "walkaway" costs as the determining figure in meeting the 15% threshold as it requires good money to be thrown after bad to meet a figure without a clear correlation to speculative versus non-speculative projects. Sempra stated that since preconstruction costs tend to become detached from the 15% figure, the balance of the money would come from losses on resale of capital equipment. This requirement might be met in depressed industrial areas, but does not recognize that the majority of post-development costs are not triggered until construction has begun. If development costs only are considered, Sempra recommended a 10% threshold for projects under \$50 million total costs and a \$5 million cap for projects at or above that amount.

**The commission has changed the rules in response to these comments. The commission believes that the expenditure required to qualify for a second extension should be based on a percentage of the total project cost as this provides the most equal disincentive to small and large companies against speculative permitting. The commission also agrees with the commenter that project development or non-recoverable costs do not rise proportionately with the total cost of a project. Considering these factors the commission has lowered the required expenditure to 10% of total project costs, which is consistent with federal guidance concerning substantial loss, and has capped the maximum required expenditure at \$5 million.**

In order to qualify for a second extension of the time to begin construction, TCC and BP recommended that the commission reduce the required expenditure from 15% to 5% of the cost of the project. TCC stated that this figure would still be a large sum of money for a project not fully authorized by the commission and envisions a scenario where economic or business conditions decline that require

postponement of further investment in a project for 18 months. TCC also recommended that the terms “spent or committed” be used when determining the expenditure figure so that it includes money that must be paid even if the project is canceled. TIP recommended a 5% figure as sufficient demonstration of intent to build and suggested rule language allowing the executive director discretion in determining intent to build without the 5% expenditure. TIP stated that the proposed 15% figure may exceed the amount that could be reasonably expected to be spent on preparation for construction, making the rules useless.

**The commission has changed the rules to incorporate the TCC recommendation that the phrase “spent or committed” be used in determining a second extension threshold. The commission has not changed the rules in response to the other comments. The commission agrees that a 15% figure for determining a second extension would become detached from total costs for more expensive projects and could become an unreasonable figure. However, the commission believes that a 5% threshold does not provide a sufficient disincentive to speculative projects, especially for large resource companies. The commission has changed the rules to use a 10% threshold and \$5 million cap.**

TIP suggested that the commission remove the requirement for additional health effects review for permit holders seeking a second extension because of involvement in litigation.

**The commission has not changed the rules in response to this comment. The commission recognizes that litigation initiated against the permit holder may be beyond the permit holder’s control and does not want to penalize the holder as a result. Regardless of the reason for**

**construction delay, the commission is obligated to ensure that the project continues to meet all the rules and regulations of the commission, including the protection of the public's health and property. By the end of a second construction extension, 4-1/2 years may have passed between permit issuance and the beginning of construction. It is reasonable to expect that there may have been changes in population near the proposed project. The commission anticipates that, in the majority of cases, the nature of the additional health effects review will be a documentation that the original conditions of the area near the project have not changed significantly. If such a demonstration is not possible, then the commission reserves the right to require additional health effect evaluation including dispersion modeling.**

Sempra supported the concept of litigation providing a circumstance for an extension of construction. Because lenders may withhold loan approvals while litigation is active causing delay of the project, Sempra believes that the permit holder should be made whole again once the litigation is resolved, and the two conditions proposed by the commission for a second construction extension should not be mutually exclusive. An extension of construction granted for purposes of litigation resolution should not preclude the applicant from requesting an additional extension based on changing economic conditions. Otherwise, the permit holder is penalized for third party litigation over which it had no control.

**The commission agrees with Sempra's argument and has changed the rules accordingly.**

EPA commented that the rules should clearly state that best available control technology review should apply to both the first and second extension of construction. Additionally, the rules should contain a requirement to reevaluate lowest achievable emission rate. EPA also commented that the requirement to demonstrate that a facility will comply with all rules and regulations, including protection of the public's health and property, should apply to both the first and second extension of construction.

**The commission agrees with the commenter in part, and has changed the rules to require both best available control technology and lowest achievable emission rate reviews as applicable as a condition for any extension. The commission does not agree with the comment that the rules require a health effects review as a condition for a first extension and has not changed the rules in response to this comment. A first extension would be granted at or near the end of 18 months since permit issuance. The commission believes that no significant changes to the area surrounding the permitted site will occur over this period.**

TIP opposed an additional best available control technology review for projects that have received a first 18-month extension of the beginning of construction. TIP stated that this would unnecessarily consume commission and industry resources and could lead to further project delays. TIP also stated that the reason for the additional best available control technology review was not stated in the proposal preamble and that adoption of this requirement would make the existing rules considerably more stringent.

**Best available control technology review is a current permitting practice, and the commission has not changed the rules in response to this comment. Best available control technology is a constantly but slowly changing level of control that is accepted by both regulators and industry as the current and reasonable level of control. Current best available control technology also provides the best protection of public health and ambient air quality standards. Without an extension, permit holders can wait a full 18 months between permitting and construction. It is conceivable that best available control technology could change in that period and during any subsequent extension. The commission will not apply a best available control technology change retroactively once an extension has been granted at a previous best available control technology level unless the permit holder requests another extension.**

ELP expressed concern that the proposed requirement to certify that reductions be used as offsets under Chapter 101, Subchapter H, Divisions 1 or 4, will jeopardize the ELP-initiated program of emission substitutions in the El Paso area where emission reductions from brick kilns achieved in Ciudad Juarez may be used in lieu of emission reductions achieved in the El Paso nonattainment area.

ELP listed the following specific concerns: 1) Would §101.301, Purpose, be applied to the creation of offsets, removing its voluntary application? 2) Under the general provisions of §101.302, would offsets be restricted to volatile organic compounds and nitrogen oxides and would the Juarez sources be subject to TCEQ measurement protocols? 3) Would offsets be restricted to designated ozone nonattainment areas? 4) Does TCEQ intend to create a bank for all nonattainment areas?

ELP recommended the creation of a separate division in Chapter 101, Subchapter H, where TCEQ defines the specific requirements for creating offsets under nonattainment new source review. ELP

believes that the Chapter 101 requirement could fatally burden the kiln conversion program because the kilns are not currently subject to an emission inventory or measurement program, the kilns are not subject to the ordinary recordkeeping requirements of United States sources, and the kiln conversion program is currently based on the number of kilns converted and not the emission reduction protocols in §101.303.

**The commission has not changed the rules in response to this comment. The commission supports the ELP-sponsored program of brick kiln modification in Ciudad Juarez, and this adoption will not affect the existing requirements for using reductions generated in Mexico in lieu of achieving reductions in El Paso. Senate Bill 1561 (77th Legislature, 2001) directed the commission to adopt rule language authorizing the use of reductions generated outside of the United States to satisfy otherwise applicable emission reductions in Texas. Any reductions achieved outside of the United States are required to be surplus to all applicable laws and if used in lieu of an emission reduction credit or discrete emission reduction credit must meet the applicable requirements of those programs.**

**In addressing ELP's specific concerns, the requirement to offset new emissions in an area designated as nonattainment for a criteria pollutant is not voluntary; however, in accordance with the Federal Clean Air Act the reductions used to satisfy the offset requirement must be voluntary and "otherwise not relied upon." Based on this reasoning, there is no need to alter the statement of purpose under §101.301 as both emission credits and reductions used to offset must be voluntary reductions. The emission reduction credit program was established in 1993 to**

provide a means for marketing reductions in criteria pollutants for use in satisfying the offset requirements in all nonattainment areas. The commission acknowledges that the requirement to offset emission increases is not specific to ozone precursor pollutants, however, the perceived need, by the commission and interested parties, at that time was for a market-based system for reductions in ozone precursor pollutants, nitrogen oxides, and volatile organic compounds. This perception has been supported over time by the lack of interest and need in establishing a market for other criteria pollutants. To date, El Paso County is the only county in the state which contains nonattainment areas for criteria pollutants other than ozone, and there are currently no nonattainment permits that have been issued in El Paso County. The commission agrees with ELP's comments regarding the need to include other criteria pollutants in the emission reduction credit program in order to meet potential offset needs and will revise §101.302 in future rulemaking. In addition, the commission intends to maintain a credit registry for all nonattainment areas in which banked credit could be created or needed and will appropriately revise §101.309 and §101.311 in future rulemaking.

Emission reductions generated outside of the United States that are used in lieu of an emission reduction credit or discrete emission reduction credit shall meet the applicable requirements of those programs. One such requirement for an emission reduction credit or discrete emission reduction credit is that the reduction be quantifiable. To meet this requirement, quantification methods must be based on TCEQ- and EPA-approved quantification protocols. Quantification methods that have not been previously approved may be submitted to the commission and the EPA for approval. Sources located outside the United States which generate emission reductions

that are used in Texas are subject to this requirement and would need to submit a chosen quantification method for approval. Once approved, the quantification protocol may be used for future reduction strategies from the same source type (i.e., engine, flare, brick kiln) and would not be subject to the approval process. The commission disagrees that this process will frustrate or hinder the generation of reductions that may be used as offsets.

The commission acknowledges the differences in the emissions inventory, emissions measurement, and recordkeeping requirements between sources in Mexico and the United States. Additionally, the commission recognizes the obstacles which sources in Texas must overcome in proving that reductions achieved in Mexico are creditable for use in satisfying the offset requirement. To date, the commission has approved the use of emission reductions from the modification of brick kilns in Ciudad Juarez to be used in lieu of allowances within a state-required cap and trade program enacted under Senate Bill 7 (76th Legislature, 1999). Future use of these reductions for purposes of meeting a federal requirement, such as offsets, will be subject to the approval of the EPA as well as the TCEQ. Thus, the requirements by which these reductions are evaluated may be more rigorous than those previously used in approving use for a state requirement. The commission will continue to work with ELP and other interested parties in addressing these and other issues to promote the use of reductions from Ciudad Juarez and other border areas of Mexico.

TIP commented that the commission should clarify that the September 1, 2004 deadline in §116.170(b) applies to existing reductions and that reductions occurring after that date may also be certified and

banked. TIP also requested clarification that the commission will continue to allow, consistent with current permitting practice, a period of overlap between the installation of new equipment for internal offsets and the removal of the old equipment so that the old equipment remains available as backup during the new equipment checkout, testing, and troubleshooting.

**The commission agrees with the TIP suggestion and has changed the rules in response to this comment. TIP is also correct about the current practice of allowing a checkout period for new equipment that is replacing old. The commission will continue this practice.**

Dow commented that the proposed rules should be clarified that the requirement to certify a reduction as an offset applies only to those offsets that will be applied at another site.

**The commission is retaining language that allows future internal offsets to a facility to be certified under Chapter 116. This allows the operation of equipment to be replaced until the replacement equipment is tested and integrated into the facility. The emission credit and banking system allows the commission to keep track of emission reductions that may reappear as emissions if they are used as offsets. Therefore, the commission will require that any reduction to be used as an offset at a facility other than where it was generated must be certified under Chapter 101. The commission has not changed the rules in response to this comment.**

EPA commented that the commission should clarify that reductions to be used as offsets must be certified under Federal Clean Air Act requirements if those reductions are to be applied before the September 1, 2004 deadline as proposed in §116.170(b).

**The commission currently requires that reductions be certified under Clean Air Act requirements, which are incorporated into Chapter 101, Subchapter H, if they are to be used as offsets. Existing reductions that have not yet been banked must be certified by the effective date of September 1, 2004 if they are to be used as offsets. The commission has not changed the rules in response to this comment.**

EPA recommended the following modifications to §116.170(c)(2) - (4): paragraph (2) should contain a reference to any additional reductions required by the executive director; paragraph (3) should contain a requirement to provide information to the executive director that emission reductions meet the requirements of Chapter 101, Subchapter H; and paragraph (4) should contain language requiring that any additional reductions meet the requirements of paragraphs (2) and (3).

**The commission does not believe the additions are necessary for the clear application of the rule and has not changed §116.170 in response to this comment.**

TCC and Dow are concerned that the effective date of February 1, 2004 proposed in §116.315(a) will not allow sufficient time for notification and application preparation for companies that must renew their permits in February. TCC is basing this comment on an anticipated rule promulgation of July

2003. This effective date would only leave one month for companies to read and respond to the amended rules in order to submit renewals six months prior to February 2004. TCC recommended an effective date of April 1, 2004. Dow recommended that permits expiring between May 1, 2004 and August 1, 2004 be submitted by February 1, 2004. Dow further recommended that §116.310 be revised to require the commission provide notification 270 days prior to permit expiration.

**The commission agrees with the request for an extension of the effective date of the rules to May 1, 2004 and has changed the rules accordingly. Section 116.310 was not proposed for amendment and, under rulemaking procedures, cannot be changed at this adoption. The commission staff will modify its internal procedures to provide more advance notification of pending expiration of permits.**

EPA recommended an addition to §116.116 stating that discrete emission credits used to exceed permit allowables under §101.376(b)(1), Discrete Emission Credit Use, are subject to the limitations of §101.376(c).

**This section was removed from the proposal and, under the Texas Administrative Procedure Act, cannot be changed in this rulemaking.**

## **SUBCHAPTER A: DEFINITIONS**

### **§116.12**

#### **STATUTORY AUTHORITY**

The amendment is adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Clean Air Act, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also adopted under Texas Clean Air Act, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to develop a general, comprehensive plan for control of the state's air; and §382.016, concerning Monitoring Requirements, Examination of Records, which authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of emissions of air contaminants. The amendment is also adopted under 42 United States Code, §7410(a)(2)(A), which requires SIPs to include enforceable emission limitations and other control measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

**§116.12. Nonattainment Review Definitions.**

Unless specifically defined in the TCAA or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. 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 tons per year (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 tons per year) 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 EPA under the FCAA, §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 (VOCs)) 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 VOCs 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 40 Code of Federal Regulations §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 a National Ambient Air Quality Standard (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	MAJOR SOURCE	MAJOR	OFFSET RATIO
designation <sup>1</sup>	tons/year	MODIFICATION <sup>2</sup>	minimum
		tons/year	
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 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 Areas) 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 tons per year 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 nitrogen oxides (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 for a reduction to qualify as an offset, it must be certified as an emission credit under Chapter 101, Subchapter H, Division 1 or 4 of this title (relating to Emission Credit Banking or Trading; or Discrete Emission Credit Banking and Trading), except as provided for in §116.170(b) of this title (relating to Applicability of Emission Reductions as Offsets). 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 for 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 FCAA.

**SUBCHAPTER B: NEW SOURCE REVIEW PERMITS**

**DIVISION 1: PERMIT APPLICATION**

**§§116.114, 116.115, 116.120**

**STATUTORY AUTHORITY**

The new and amended sections are adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Clean Air Act, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The new and amended sections are also adopted under Texas Clean Air Act, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to develop a general, comprehensive plan for control of the state's air; §382.016, concerning Monitoring Requirements, Examination of Records, which authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of emissions of air contaminants; §382.051, concerning Permitting Authority of Commission Rules, which authorizes the commission to issue permits for the construction of a new facility or modification of an existing facility; §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; §382.0515, concerning Application for Permit, which authorizes the commission to require a permit application with plans and specifications necessary for the commission

to determine if the facility will comply with applicable state and federal regulations and the intent of the Texas Clean Air Act; §382.0517, concerning Determination of Administrative Completion of Application, which authorizes the commission to determine when an application is administratively complete; and §382.0518, concerning Preconstruction Permit, which requires persons planning the construction or modification of a facility to obtain a permit from the commission.

**§116.114. Application Review Schedule.**

(a) Review schedule. The executive director shall review permit applications in accordance with the following.

(1) Notice of completion or deficiency. The executive director shall mail written notification informing the applicant that the application is complete or that it is deficient within 90 days of receipt of the application for a new permit, or amendment to a permit or special permit.

(A) If the application is deficient, the notification must state:

(i) the additional information required; and

(ii) the intent of the executive director to void the application if information for a complete application is not submitted.

(B) Additional information may be requested within 60 days of receipt of the information provided in response to the deficiency notification.

(2) Preliminary decision to approve or disapprove the application. The executive director shall conduct a technical review and send written notice to the applicant of the preliminary decision to approve or not approve the application within 180 days from receipt of a completed permit application or 150 days from receipt of a completed permit amendment. If the applicant has provided Notice of Receipt of Application and Intent to Obtain Permit public notification as required by the executive director under Chapter 39 of this title (relating to Public Notice), one of the following shall apply:

(A) if comments are received on the proposed facility and replied to by the executive director in accordance with §39.420 of this title (relating to Transmittal of the Executive Director's Response to Comments and Decision) and §55.156 of this title (relating to Public Comment Processing); and

(B) if no requests for public hearing or public meeting on the proposed facility have been received or the application is otherwise exempt under §39.419(e) of this title (relating to Notice of Application and Preliminary Decision), the executive director shall send a copy of the Preliminary Decision to the applicant; or

(C) if Notice of Application and Preliminary Decision is required under §39.419(d) of this title (relating to Notice of Application and Preliminary Decision), the executive director shall authorize this notice and send copies to the applicant and all other persons are required under §39.602 of this title (relating to Mailed Notice).

(3) Refund of permit fee.

(A) If the time limits provided in this section to process an application are exceeded, the applicant may appeal in writing to the executive director for a refund of the permit fee.

(B) The permit fee shall be reimbursed if it is determined by the executive director that the specified period was exceeded without good cause, as provided in Texas Civil Statutes, Article 6252-13b.1, §3.

(b) Voiding of deficient application.

(1) An applicant shall make a good faith effort to submit, in a timely manner, adequate information which demonstrates that the requirements for obtaining a permit or permit amendment are met in response to any deficiency notification issued by the executive director under the provisions of this section, or Chapter 39 of this title (relating to Public Notice).

(2) If an applicant fails to make such good faith effort after two written notices of deficiency, the executive director shall void the application and notify the applicant of the voidance and the remaining deficiencies in the voided application. If a new application is submitted within six months of the voidance, it shall meet the requirements of §116.111 of this title (relating to General Application) but will be exempt from the requirements of §116.140 of this title (relating to Applicability).

(c) Notification of executive director's decision.

(1) Notification to applicant. The executive director or the chief clerk shall send to the applicant the decision to approve or not approve the application if:

(A) no timely requests for reconsideration, contested case hearing, or public meeting on the proposed facility have been received; or

(B) if hearing requests have been received and withdrawn before the executive director's Preliminary Decision; or

(C) the application is for any amendment, modification, or renewal application that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted; and

(D) the applicant has satisfied all public notification requirements of Chapter 39 of this title.

(2) Notification to commenters. Except for initial issuance of voluntary emission reduction permits and electric generating facility permits, persons submitting written comments under Chapter 39 of this title shall be sent the executive director's final action and given an explanation of the opportunity to file a motion under §50.139 of this title (relating to Motion to Overturn Executive Director's Decision) at the same time that the applicant is notified. If the number of interested persons who have requested notification makes it impracticable for the commission to notify those persons by mail, the commission shall notify those persons by publication using the method prescribed by §382.031(a) of the Texas Health and Safety Code.

(3) Time limits. The executive director shall send notification of final action within:

(A) one year after receipt of a complete prevention of significant deterioration or nonattainment permit application, or a complete permit application for an action under Subchapter C of this chapter;

(B) 180 days of receipt of a completed permit or permit renewal application;

or

(C) 150 days of receipt of a permit amendment or special permit amendment application.

**§116.115. General and Special Conditions.**

(a) General and special conditions. Permits, special permits, standard permits, and special exemptions may contain general and special conditions.

(b) General conditions. Holders of permits, special permits, standard permits, and special exemptions shall comply with the following:

(1) the general conditions contained in the permit document if issued or amended prior to August 16, 1994; or

(2) the following general conditions if the permit or amendment is issued or amended on or after August 16, 1994, regardless of whether they are specifically stated within the permit document.

(A) Report of construction progress. The permit holder shall report start of construction, construction interruptions exceeding 45 days, and completion of construction. The report shall be given to the appropriate regional office of the commission not later than 15 working days after occurrence of the event.

(B) Start-up notification.

(i) The permit holder shall notify the appropriate air program regional office of the commission prior to the commencement of operations of the facilities authorized by the permit. The notification must be made in such a manner as to allow a representative of the commission to be present at the commencement of operations.

(ii) The permit holder shall provide a separate notification for the commencement of operations for each unit of phased construction, which may involve a series of units commencing operations at different times.

(iii) Prior to operation of the facilities authorized by the permit, the permit holder shall identify to the Office of Permitting, Remediation, and Registration the source or sources of allowances to be utilized for compliance with Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program).

(C) Sampling requirements.

(i) If sampling is required, the permit holder shall contact the commission's Office of Compliance and Enforcement prior to sampling to obtain the proper data forms and procedures.

(ii) All sampling and testing procedures must be approved by the executive director and coordinated with the regional representatives of the commission.

(iii) The permit holder is also responsible for providing sampling facilities and conducting the sampling operations or contracting with an independent sampling consultant.

(D) Equivalency of methods. The permit holder must demonstrate or otherwise justify the equivalency of emission control methods, sampling or other emission testing methods, and monitoring methods proposed as alternatives to methods indicated in the conditions of the permit. Alternative methods shall be applied for in writing and must be reviewed and approved by the executive director prior to their use in fulfilling any requirements of the permit.

(E) Recordkeeping. The permit holder shall:

(i) maintain a copy of the permit along with records containing the information and data sufficient to demonstrate compliance with the permit, including production records and operating hours;

(ii) keep all required records in a file at the facility site. If, however, the facility site normally operates unattended, records must be maintained at an office within Texas having day-to-day operational control of the facility site;

(iii) make the records available at the request of personnel from the commission or any local air pollution control agency having jurisdiction over the site. Upon request, the commission shall make any such records of compliance available to the public in a timely manner;

(iv) comply with any additional recordkeeping requirements specified in special conditions attached to the permit;

(v) retain information in the file for at least two years following the date that the information or data is obtained; and

(vi) for persons certifying and registering a federally-enforceable emission limitation in accordance with §116.611 of this title (relating to Registration To Use a Standard Permit), retain all records demonstrating compliance for at least five years.

(F) Maximum allowable emission rates. The total emissions of air contaminants from any of the sources of emissions must not exceed the values stated on the table attached to the permit entitled "Emission Sources--Maximum Allowable Emission Rates."

(G) Maintenance of emission control. The permitted facilities shall not be operated unless all air pollution emission capture and abatement equipment is maintained in good working order and operating properly during normal facility operations. The permit holder shall provide notification for emissions events and maintenance in accordance with §§101.201, 101.211, and

101.221 of this title (relating to Emissions Event Reporting and Recordkeeping Requirements; Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements; and Operational Requirements).

(H) Compliance with rules.

(i) Acceptance of a permit by an applicant constitutes an acknowledgment and agreement that the permit holder will comply with all rules, regulations, and orders of the commission issued in conformity with the TCAA and the conditions precedent to the granting of the permit.

(ii) If more than one state or federal rule or regulation or permit condition are applicable, the most stringent limit or condition shall govern and be the standard by which compliance shall be demonstrated.

(iii) Acceptance includes consent to the entrance of commission employees and agents into the permitted premises at reasonable times to investigate conditions relating to the emission or concentration of air contaminants, including compliance with the permit.

(c) Special conditions. The holders of permits, special permits, standard permits, and special exemptions shall comply with all special conditions contained in the permit document.

(1) Special conditions may be attached to a permit that are more restrictive than the requirements of Title 30 of the Texas Administrative Code.

(2) Special condition for written approval.

(A) The executive director may require as a special condition that the permit holder obtain written approval before constructing a source under:

(i) a standard permit under Subchapter F of this chapter (relating to Standard Permits); or

(ii) an exemption under Chapter 106 of this title (relating to Permits by Rule).

(B) Such written approval may be required if the executive director specifically finds that an increase of a particular pollutant could either:

(i) result in a significant impact on the air environment; or

(ii) cause the facility to become subject to review under:

(I) Subchapter C of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)); or

(II) the provisions in §116.150 and §116.151 of this title (relating to Nonattainment Review) and §§116.160 - 116.163 of this title (relating to Prevention of Significant Deterioration Review).

**§116.120. Voiding of Permits.**

(a) A permit or permit amendment under this chapter is void if the permit holder does one of the following:

(1) fails to begin construction within 18 months of issuance, except as noted in subsection (b) of this section;

(2) discontinues construction for more than 18 consecutive months prior to completion; or

(3) fails to complete construction within a reasonable time.

(b) The executive director may grant extensions to begin construction. Permits issued to holders who have received extensions will be subject to revision based on best available control technology, lowest achievable emission rate, and netting or offsets as applicable. A first extension of 18 months may be granted solely at the request of the permit holder. One additional extension of up to 18 months may be granted if the permit holder demonstrates that emissions from the facility will comply with all rules and regulations of the commission and the intent of the TCAA, including protection of the public's health and physical property; and

(1) the permit holder is a party to litigation not of the permit holder's initiation regarding the issuance of the permit; or

(2) the permit holder has spent, or committed to spend, at least 10% of the estimated total cost of the project up to a maximum of \$5 million.

(c) A permit holder granted an extension under subsection (b)(1) of this section may receive one subsequent extension if the permit holder meets the conditions of subsection (b)(2) of this section.

**SUBCHAPTER B: NEW SOURCE REVIEW PERMITS**

**DIVISION 4: PERMIT FEES**

**§116.143**

**STATUTORY AUTHORITY**

The amendment is adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Clean Air Act, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also adopted under Texas Clean Air Act, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to develop a general, comprehensive plan for control of the state's air; §382.016, concerning Monitoring Requirements, Examination of Records, which authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of emissions of air contaminants; §382.051, concerning Permitting Authority of Commission Rules, which authorizes the commission to issue permits for the construction of a new facility or modification of an existing facility; §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; §382.0515, concerning Application for Permit, which authorizes the commission to require a permit application with plans and specifications necessary for the commission to determine if the

facility will comply with applicable state and federal regulations and the intent of the Texas Clean Air Act; §382.0517, concerning Determination of Administrative Completion of Application, which authorizes the commission to determine when an application is administratively complete; §382.0518, concerning Preconstruction Permit, which requires persons planning the construction or modification of a facility to obtain a permit from the commission; and §382.061, concerning Application, Permit, and Inspection Fees, which requires the commission to adopt, charge, and collect fees for each application for a permit or renewal of a permit.

**§116.143. Payment of Fees.**

All permit fees will be remitted in the form of a check, certified check, electronic funds transfer, or money order made payable to the Texas Commission on Environmental Quality (TCEQ) or TCEQ and delivered with the application for permit or amendment to the TCEQ, P.O. Box 13088, MC 214, Austin, Texas 78711-3088. Fees must be paid at the time an application for a permit or amendment is submitted. Applications will not be considered for review nor will any time constraints required of TCEQ for application processing begin until a fee is received.

(1) Single fee. The executive director shall charge only one fee for multiple permits issued for one project if it is determined that the following conditions are met:

(A) all the component or separate processes being permitted are integral or related to the overall project;

(B) the project is under continuous construction of the component parts;

(C) the permitted facilities are to be located on the same or contiguous property; and

(D) applications for all permits for the project must be submitted at the same time.

(2) Return of fees. No fees will be refunded after a deficient application has been voided or after a permit or amendment has been issued by the agency. Fees will be returned under the following conditions.

(A) If no permit or amendment is issued by the agency or if the applicant withdraws the application prior to issuance of the permit or amendment, one-half of the fee will be refunded.

(B) The fee difference will be refunded if a permit application is withdrawn because the proposed construction or modification is determined to meet the requirements of:

(i) a standard permit issued under Subchapter F of this chapter (relating to Standard Permits);

(ii) a permit by rule under Chapter 106 of this title (relating to Permits by Rule); or

(iii) the conditions of §116.119 of this title (relating to De Minimis

Facilities or Sources).

**SUBCHAPTER B: NEW SOURCE REVIEW PERMITS**

**DIVISION 5: NONATTAINMENT REVIEW**

**§116.150**

**STATUTORY AUTHORITY**

The amendment is adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Clean Air Act, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also adopted under Texas Clean Air Act, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to develop a general, comprehensive plan for control of the state's air; §382.016, concerning Monitoring Requirements, Examination of Records, which authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of emissions of air contaminants; §382.051, concerning Permitting Authority of Commission Rules, which authorizes the commission to issue permits for the construction of a new facility or modification of an existing facility; §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; §382.0515, concerning Application for Permit, which authorizes the commission to require a permit application with plans and specifications necessary for the commission to determine if the

facility will comply with applicable state and federal regulations and the intent of the Texas Clean Air Act; §382.0517, concerning Determination of Administrative Completion of Application, which authorizes the commission to determine when an application is administratively complete; and §382.0518, concerning Preconstruction Permit, which requires persons planning the construction or modification of a facility to obtain a permit from the commission.

**§116.150. New Major Source or Major Modification in Ozone Nonattainment Areas.**

(a) This section applies to administratively complete applications submitted on or after November 15, 1992 for new construction or modification of facilities located in any area designated as nonattainment for ozone in accordance with the FCAA, §107. The owner or operator of a proposed new or modified facility which will be a new major stationary source of volatile organic compound (VOC) emissions or nitrogen oxides (NO<sub>x</sub>) emissions, or the owner or operator of an existing major stationary source of VOC or NO<sub>x</sub> emissions that will undergo a major modification with respect to VOC or NO<sub>x</sub>, shall meet the requirements of paragraphs (1) - (4) of this subsection, except as provided in subsections (b) and (c) of this section. Table I of §116.12 of this title (relating to Nonattainment Review Definitions) specifies the various classifications of nonattainment along with the associated emission levels which designate a major stationary source or major modification for those classifications. Except as noted in subsection (b) of this section regarding NO<sub>x</sub>, the de minimis threshold test (netting) shall be required for all modifications to existing major sources of VOC or NO<sub>x</sub>, unless at least one of the following conditions are met: the proposed emissions increases associated with a project, without regard to decreases, is less than five tons per year of the individual

nonattainment pollutant or, the project emissions increases coupled with project actual emissions decreases for the same pollutant, summed as the project net, are less than or equal to zero tons per year. In applying the de minimis threshold test, if the net emissions increases, aggregated over the contemporaneous period, are greater than the major modification levels stated in Table I, then the following requirements apply.

(1) The proposed facility shall comply with the lowest achievable emission rate (LAER) as defined in §116.12 of this title for the nonattainment pollutants for which the facility is a new major source or major modification except as provided in paragraph (3)(B) of this subsection and except for existing major stationary sources that have a potential to emit (PTE) of less than 100 tons per year of the applicable nonattainment pollutant. For these sources, Best Available Control Technology (BACT) can be substituted for LAER. LAER shall otherwise be applied to each new emission unit and to each existing emission unit at which the net emissions increase will occur as a result of a physical change or change in method of operation of the unit.

(2) All major stationary sources owned or operated by the applicant (or by any person controlling, controlled by, or under common control with the applicant) in the state shall be in compliance or on a schedule for compliance with all applicable state and federal emission limitations and standards.

(3) At the time the new or modified facility or facilities commence operation, the emissions increases from the new or modified facility or facilities shall be offset. The proposed facility

shall use the offset ratio for the appropriate nonattainment classification as defined in §116.12 of this title and shown in Table I of §116.12 of this title. Internal offsets which are generated at the source and which otherwise meet all creditability criteria can be applied as follows.

(A) Major stationary sources with a PTE of less than 100 tons per year of an applicable nonattainment pollutant are not required to undergo Nonattainment New Source Review under this section, if the project increases are offset with internal offsets at a ratio of at least 1.3 to 1.

(B) Major stationary sources with a PTE of greater than or equal to 100 tons per year of an applicable nonattainment pollutant can substitute BACT for LAER, if the project increases are offset with internal offsets at a ratio of at least 1.3 to 1. Internal offsets used in this manner can also be applied to satisfy the offset requirement.

(4) In accordance with the FCAA, the permit application shall contain an analysis of alternative sites, sizes, production processes, and control techniques for the proposed source. The analysis shall demonstrate that the benefits of the proposed location and source configuration significantly outweigh the environmental and social costs of that location.

(b) For sources located in the El Paso ozone nonattainment area (El Paso County), the requirements of this section do not apply to NO<sub>x</sub> emissions.

**SUBCHAPTER B: NEW SOURCE REVIEW PERMITS**

**DIVISION 7: EMISSION REDUCTIONS: OFFSETS**

**§116.170**

**STATUTORY AUTHORITY**

The repeal is adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Clean Air Act, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The repeal is also adopted under Texas Clean Air Act, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, which authorizes the commission to develop a general, comprehensive plan for control of the state's air.

**§116.170. Applicability for Reduction Credits.**

**SUBCHAPTER B: NEW SOURCE REVIEW PERMITS**

**DIVISION 7: EMISSION REDUCTIONS: OFFSETS**

**§116.170, §116.172**

**STATUTORY AUTHORITY**

The new sections are adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Clean Air Act, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The new sections are also adopted under Texas Clean Air Act, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to develop a general, comprehensive plan for control of the state's air; §382.016, concerning Monitoring Requirements, Examination of Records, which authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of emissions of air contaminants; §382.051, concerning Permitting Authority of Commission Rules, which authorizes the commission to issue permits for the construction of a new facility or modification of an existing facility; §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; §382.0515, concerning Application for Permit, which authorizes the commission to require a permit application with plans and specifications necessary for the commission to determine if the

facility will comply with applicable state and federal regulations and the intent of the Texas Clean Air Act; §382.0517, concerning Determination of Administrative Completion of Application, which authorizes the commission to determine when an application is administratively complete; and §382.0518, concerning Preconstruction Permit, which requires persons planning the construction or modification of a facility to obtain a permit from the commission. The new sections are also adopted under 42 United States Code, §7410(a)(2)(A), which requires SIPs to include enforceable emission limitations and other control measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

**§116.170. Applicability of Emission Reductions as Offsets.**

(a) No reduction may be used as an offset unless it has been certified as an emission credit under Chapter 101, Subchapter H, Division 1 or 4 of this title (relating to Emission Credit Banking and Trading; or Discrete Emission Credit Banking and Trading), except as provided for in subsection (c) of this section.

(b) Existing reductions not yet certified and banked as an emission credit must be certified and banked with the executive director by September 1, 2004 in order to be considered for use as an offset.

(c) A future reduction may be used as an offset for a permit provided that:

(1) the permit contains special conditions that specify the date by which the permit holder must submit to the executive director appropriate and sufficient data to verify that the reduction has occurred and the reduction is provided by start of operation;

(2) the reduction must be achieved prior to commencement of the permitted emissions for which the offset is required;

(3) the reduction meets all of the requirements of Chapter 101, Subchapter H, Division 1 or 4 of this title when submitted to the executive director for review per the requirements of the issued permit; and

(4) the permit holder agrees to obtain additional offsets if the review by the executive director indicates the reductions do not satisfy the original offset requirements.

**§116.172. Emissions Offsets from Rocket Engine Firing and Cleaning.**

Emissions increases from rocket engine and motor firing, and cleaning related to such firing, at an existing or modified major source, shall be allowed to be offset by alternative or innovative means, provided the following conditions are met.

(1) Any modification proposed is solely for the purpose of expanding the testing of rocket engines or motors at an existing source permitted to test such engines as of November 15, 1990.

(2) The source demonstrates to the satisfaction of the executive director that it has used all reasonable means to obtain and utilize offsets, as determined on an annual basis, for the emissions increases beyond allowable levels, that all available offsets are being used, and that sufficient offsets are not available to the source.

(3) The source has obtained a written finding from the Department of Defense, Department of Transportation, National Aeronautics and Space Administration, or other appropriate federal agency, that the testing of rocket motors or engines at the facility is required for a program essential to the national security.

(4) The source will comply with an alternative measure, imposed by the executive director, designed to offset any emissions increases beyond permitted levels not directly offset by the source. In lieu of imposing any alternative offset measures, the executive director may impose an emissions fee to be paid, which shall be an amount no greater than 1.5 times the average cost of stationary source control measures adopted in that area during the previous three years.

**SUBCHAPTER D: PERMIT RENEWALS**

**§116.313, §116.315**

**STATUTORY AUTHORITY**

The amendments are adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Clean Air Act, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendments are also adopted under Texas Clean Air Act, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to develop a general, comprehensive plan for control of the state's air; §382.016, concerning Monitoring Requirements, Examination of Records, which authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of emissions of air contaminants; §382.051, concerning Permitting Authority of Commission Rules, which authorizes the commission to issue permits for the construction of a new facility or modification of an existing facility; §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; §382.0515, concerning Application for Permit, which authorizes the commission to require a permit application with plans and specifications necessary for the commission to determine if the facility will comply with applicable state and federal regulations and the intent of the Texas Clean Air

Act; §382.0517, concerning Determination of Administrative Completion of Application, which authorizes the commission to determine when an application is administratively complete; §382.0518, concerning Preconstruction Permit, which requires persons planning the construction or modification of a facility to obtain a permit from the commission; and §382.061, concerning Application, Permit, and Inspection Fees, which requires the commission to adopt, charge, and collect fees for each application for a permit or renewal of a permit.

**§116.313. Renewal Application Fees.**

(a) The fee for renewal is based on the total annual allowable emissions from the permitted facility to be renewed, according to the following table.

Figure: 30 TAC §116.313(a)

**RENEWAL FEE TABLE\***

<b>X = TOTAL ALLOWABLE (TONS/YEAR)</b>	<b>BASE FEE</b>	<b>INCREMENTAL FEE</b>
X ≤ 5	\$300	--
5 < X ≤ 24	\$300	\$35/ton
24 < X ≤ 99	\$965	\$25/ton
99 < X ≤ 994	\$2,840	\$8/ton
X > 994	\$10,000	--

Minimum fee: \$300

Maximum fee: \$10,000

\* To calculate the fee, multiply the number of tons in excess of the lower limit of the appropriate category by the incremental fee, then add this amount to the base fee. For example, if total emissions of all air contaminants are 50 tons per year, the total fee would be \$1,615 (base fee of \$965, plus incremental fee of \$25 x 26 tons or \$650).

(b) Fees are due and payable at the time the renewal application is filed. No fee will be accepted before the permit holder has been notified by the commission that the permit is scheduled for review. All permit review fees shall be remitted by check, certified check, electronic funds transfer, or money order payable to the Texas Commission on Environmental Quality (TCEQ) and mailed to the TCEQ, P.O. Box 13088, MC 214, Austin, Texas 78711-3088. Required fees must be received before the agency will consider an application to be complete.

**§116.315. Permit Renewal Submittal.**

(a) An application for renewal must be submitted at least six months, but no earlier than 18 months, prior to expiration of the permit or the permit will expire. This subsection will be effective on May 1, 2004.

(b) With executive director approval, the application may be submitted before or after the time period specified in subsection (a) of this section.

(c) Any permit issued:

(1) before December 1, 1991, is subject for review 15 years after the date of issuance;

(2) on or after December 1, 1991, is subject for review every ten years after the date of issuance; or

(3) at non-federal sources on or after December 1, 1991, may, for cause, contain a provision requiring renewal between five and ten years.

**SUBCHAPTER G: FLEXIBLE PERMITS**

**§116.715**

**STATUTORY AUTHORITY**

The amendment is adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Clean Air Act, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also adopted under Texas Clean Air Act, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to develop a general, comprehensive plan for control of the state's air; §382.016, concerning Monitoring Requirements, Examination of Records, which authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of emissions of air contaminants; §382.051, concerning Permitting Authority of Commission Rules, which authorizes the commission to issue permits for the construction of a new facility or modification of an existing facility; §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; §382.0515, concerning Application for Permit, which authorizes the commission to require a permit application with plans and specifications necessary for the commission to determine if the facility will comply with applicable state and federal regulations and the intent of the Texas Clean Air

Act; §382.0517, concerning Determination of Administrative Completion of Application, which authorizes the commission to determine when an application is administratively complete; §382.0518, concerning Preconstruction Permit, which requires persons planning the construction or modification of a facility to obtain a permit from the commission; and §382.061, concerning Application, Permit, and Inspection Fees, which requires the commission to adopt, charge, and collect fees for each application for a permit or renewal of a permit.

**§116.715. General and Special Conditions.**

(a) Flexible permits may contain general and special conditions. The holders of flexible permits shall comply with any and all such conditions. Upon a specific finding by the executive director that an increase of a particular air contaminant could result in a significant impact on the air environment, or could cause the facility, group of facilities, or account to become subject to review under §116.150 and §116.151 and §§116.160 - 116.163 of this title (relating to Nonattainment Review or Prevention of Significant Deterioration Review) or Subchapter C of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)), the permit may include a special condition which requires the permittee to obtain written approval from the executive director before constructing a facility under a standard permit or a permit by rule under Chapter 106 of this title (relating to Permits by Rule).

(b) A pollutant specific emission cap or multiple emission caps and/or individual emission limitations shall be established for each air contaminant for all facilities authorized by the flexible permit.

(c) The following general conditions shall be applicable to every flexible permit.

(1) Applicability. This section does not apply to physical or operational changes allowed without an amendment under §116.721 of this title (relating to Amendments and Alterations).

(2) Construction progress. The start of construction, construction interruptions exceeding 45 days, and completion of construction shall be reported to the appropriate regional office of the commission not later than 15 working days after occurrence of the event.

(3) Start-up notification.

(A) The appropriate regional office of the commission and any local program having jurisdiction shall be notified prior to the commencement of operations of the facilities authorized by the permit in such a manner that a representative of the commission may be present.

(B) Phased construction, which may involve a series of facilities commencing operations at different times, shall provide separate notification for the commencement of operations for each facility.

(C) Prior to beginning operations of the facilities authorized by the permit, the permit holder shall identify to the Office of Permitting, Remediation, and Registration the source or sources of allowances to be utilized for compliance with Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program).

(4) Sampling requirements. If sampling of stacks or process vents is required, the flexible permit holder shall contact the commission's Office of Compliance and Enforcement prior to sampling to obtain the proper data forms and procedures. All sampling and testing procedures must be approved by the executive director and coordinated with the appropriate regional office of the commission. The flexible permit holder is also responsible for providing sampling facilities and conducting the sampling operations or contracting with an independent sampling consultant.

(5) Equivalency of methods. It shall be the responsibility of the flexible permit holder to demonstrate or otherwise justify the equivalency of emission control methods, sampling or other emission testing methods, and monitoring methods proposed as alternatives to methods indicated in the conditions of the flexible permit. Alternative methods shall be applied for in writing and must be reviewed and approved by the executive director prior to their use in fulfilling any requirements of the permit.

(6) Recordkeeping. A copy of the flexible permit along with information and data sufficient to demonstrate continuous compliance with the emission caps and individual emission limitations contained in the flexible permit shall be maintained in a file at the plant site and made

available at the request of personnel from the commission or any air pollution control program having jurisdiction. For facilities that normally operate unattended, this information shall be maintained at the nearest staffed location within Texas specified by the permit holder in the permit application. This information may include, but is not limited to, emission cap and individual emission limitation calculations based on a 12-month rolling basis and production records and operating hours. Additional recordkeeping requirements may be specified in special conditions attached to the flexible permit. Information in the file shall be retained for at least two years following the date that the information or data is obtained.

(7) Maximum allowable emission rates. A flexible permit covers only those sources of emissions and those air contaminants listed in the table entitled "Emission Sources, Emissions Caps and Individual Emission Limitations" attached to the flexible permit. Flexible permitted sources are limited to the emission limits and other conditions specified in the table attached to the flexible permit.

(8) Emission cap readjustment. If a schedule to install additional controls is included in the flexible permit and a facility subject to such a schedule is taken out of service, the emission cap contained in the flexible permit will be readjusted for the period the unit is out of service to a level as if no schedule had been established. Unless a special provision specifies the method of readjustment of the emission cap, a permit alteration shall be obtained.

(9) Maintenance of emission control. The facilities covered by the flexible permit shall not be operated unless all air pollution emission capture and abatement equipment is maintained in

good working order and operating properly during normal facility operations. Notification for emissions events and scheduled maintenance shall be made in accordance with §101.201 and §101.211 of this title (relating to Emissions Event Reporting and Recordkeeping Requirements; and Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements).

(10) Compliance with rules. Acceptance of a flexible permit by a permit applicant constitutes an acknowledgment and agreement that the holder will comply with all Rules, Regulations, and Orders of the commission issued in conformity with the TCAA and the conditions precedent to the granting of the permit. If more than one state or federal rule or regulation or flexible permit condition are applicable, then the most stringent limit or condition shall govern and be the standard by which compliance shall be demonstrated. Acceptance includes consent to the entrance of commission employees and agents into the permitted premises at reasonable times to investigate conditions relating to the emission or concentration of air contaminants, including compliance with the flexible permit.

(d) There may be additional special conditions attached to a flexible permit upon issuance or amendment of the permit. Such conditions in a flexible permit may be more restrictive than the requirements of this title.

