The Texas Commission on Environmental Quality (commission) adopts the amendments to §116.12 and §116.150 *with changes* to the proposed text as published in the February 25, 2005, issue of the *Texas Register* (30 TexReg 1016).

These amendments 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

After adoption of the Federal Clean Air Act (FCAA) Amendments of 1990, the EPA classified the designated four areas of Texas that failed to meet the one-hour national ambient air quality standard (NAAQS) for the air contaminant ozone. Each area was classified by the EPA based on the amount by which it exceeded the ozone NAAQS of 0.12 parts per million (ppm) based on a peak one-hour concentration of ozone. Eight counties in the Houston-Galveston-Brazoria (HGB) area (Brazoria, Chambers, Fort Bend, Galveston, Harris, Montgomery, and Waller) were classified as Severe and El Paso County was classified as Serious. Four counties in the Dallas-Fort Worth (DFW) area (Collin, Dallas, Denton, and Tarrant) were originally classified as Moderate and then reclassified to Serious. Three counties in the Beaumont-Port Arthur (BPA) area (Hardin, Jefferson, and Orange) were originally classified as Serious, then reclassified to Moderate, and reclassified again, in 2004, to Serious. The classification of an area has specific effects on sources of air contaminants within the area including what will be considered a major source of contaminants. In the case of ozone, the contaminants of concern are volatile organic compounds (VOC) and nitrogen oxides (NO_x), referred to as ozone precursers.

If a proposed project (modification of existing facilities or new construction) is determined to be a major modification, the project is subject to federal nonattainment new source review (NNSR) and specific levels of pollution control, which generally mean that the source will be required to meet the lowest achievable emission rate (LAER) and offset the emissions increase.

To determine if a modification at a major source results in an emission increase that would make the project a major modification, the source owner performs a netting exercise if the project emission increase is greater than the netting trigger (five tons per year (tpy) under current commission rules). Netting is an accounting procedure used to determine the amount of increase in emissions by a source over a specified period of time. All emission increases and decreases at a source over the specified time (netting period) are added or subtracted and, if the resulting figure is at or above the major modification threshold, the source becomes subject to NNSR. This major modification threshold is determined by an area's classification (Severe, Serious, Moderate). The netting trigger and netting period are the principal subjects of this adoption.

On April 30, 2004, the EPA adopted the Phase 1 Implementation Rule (69 FR 23951), implementing a new eight-hour ozone NAAQS, effective June 15, 2004. On the same date, the EPA designated and classified areas that were not in attainment of the eight-hour standard (69 FR 23858). In the Phase 1 Implementation Rule, the EPA stated that it plans to issue a second final rule, Phase 2, which will address many of the planning and control obligations under FCAA, §172 and §182 that will apply for purposes of implementing the eight-hour ozone NAAQS. These rules will include, among other things, new source review (NSR). The EPA designated four areas of Texas as nonattainment for the eight-hour

ozone standard, and classifications under the new standard are different from the classifications under the one-hour ozone standard. Specifically, HGB and DFW are classified as Moderate, BPA is classified as Marginal, and El Paso is in attainment of the eight-hour standard. In addition to the four counties in the DFW area classified under the one-hour standard, five additional counties (Ellis, Johnson, Kaufman, Parker, and Rockwall) were designated as Moderate nonattainment. The San Antonio area, consisting of Bexar, Comal, and Guadalupe Counties, was designated nonattainment under FCAA, Title I, Part D, Subpart 1 (42 United States Code (USC), §7502) with a deferred effective date, due to its participation in the Early Action Compact Program. In the Phase 1 Implementation Rule, the EPA also adopted a rule that provides that the EPA will revoke the one-hour standard in full, including designations and classifications, one year following the effective date of the designations for the eight-hour NAAQS. One year after the effective date of the designations for the eight-hour ozone standard is June 15, 2005.

The new EPA Phase 1 Implementation Rules make no changes to the netting procedure or thresholds. The commission is adopting the federal model concerning netting triggers and periods with the exception of the netting trigger in a Serious or Severe nonattainment area where the commission is retaining its existing five tpy trigger. The commission eliminated the netting period for larger major sources that required netting going back to 1992. This period is now too long to be useful and could not be justified for the sources in the five new nonattainment counties in the DFW area. Under the new eight-hour ozone standard, there are no areas currently classified as Serious or Severe. The proposed netting triggers for all eight-hour ozone nonattainment areas is now 40 tpy and all netting periods are five years.

Application of the eight-hour ozone standard for NNSR became effective June 15, 2004, and the commission is updating its rules to implement the necessary changes. On September 24, 2004, in response to a petition by EarthJustice and other environmental groups, the EPA granted a partial reconsideration of the Phase 1 Implementation Rule adopted April 30, 2004, allowing states to apply federal NNSR based on an eight-hour classification. The result of this reconsideration could be a return to the one-hour ozone standard for application of federal NNSR. Therefore, the commission is including contingency language in §116.150, New Major Source or Major Modification in Ozone Nonattainment Areas, and in the table footnotes in the figure located in the definition of major modification in §116.12. This contingency language will go into effect if the EPA decides to require states to return to a one-hour standard for federal NNSR determination.

Adopted changes to the 30 TAC Chapter 101 corresponding rulemaking are also published in this issue of the *Texas Register*.

NO_x Netting and Mass Emission Cap and Trade

The new five-year contemporaneous period for all sources will allow sources to ignore whether the HGB NO_x mass emission cap and trade program (MECT) in Chapter 101, Subchapter H, is driving the reduction when determining whether an emission reduction made at a plant site at a facility subject to the MECT is creditable for netting purposes. This will apply only to NO_x sources subject to the MECT in HGB for netting exercises only and will not apply to NO_x credits or offsets. This determination for sites subject to HGB MECT and NO_x netting will not affect the MECT or the SIP because the MECT cap is ultimately the governing factor in the amount of NO_x emitted. Furthermore, the moving five-

year netting period will ensure that emission reduction strategies driven by MECT compliance at a plant site that are used to "net out" emission increases from increases at the site will have to occur within the same time frame (five years) as the increases. The MECT allows for trading of a fixed number of emission allowances so the emission reductions are not binding on any specific unit or site but it ensures that area-wide emission reductions are made, regardless of changes at any particular site.

SECTION BY SECTION DISCUSSION

The commission made administrative changes for better readability, conformity with the drafting standards in the *Texas Legislative Council Drafting Manual*, November 2004, and consistency with other commission rules. The commission also made corrections to citations of federal and state law and added USC references to citations of sections of the FCAA.

§116.12, Nonattainment Review Definitions

The commission amended the definition of contemporaneous period in paragraph (7) to require that netting be performed from the date of a modification going back a period of 60 months for all netting exercises. This period is more representative of recent activity as compared to a period that goes back to 1992 and is consistent with the EPA period.

The commission added new footnotes 6 and 7 to the table in the figure located in the definition of major modification in paragraph (11)(A) that require sources in areas that were classified nonattainment for ozone under a one-hour ozone standard to return to the major source thresholds, major modification thresholds, and offset ratios for the one-hour standard for federal NNSR applicability if the EPA

requires states to use the one-hour standard after reconsideration of its rule implementing the new eight-hour standard.

Footnote 7 also requires applications submitted for facilities that would be located in areas designated under FCAA, Title I, Part D, Subpart 1 (42 USC, §7502), be evaluated as if the area was classified as Marginal under FCAA, Title I, Part D, Subpart 2 (42 USC, §7502). The evaluation includes both the threshold for determining if there is a major modification as well as the ratio of offsets required along with any other applicable requirement that depends upon an area's nonattainment classification. Currently, only San Antonio is designated under Subpart 1. This is necessary due to the Phase 1 Implementation Rule that apply to areas designated under Subparts 1 or 2.

The commission deleted subparagraphs (E) and (F) from the definition of net emissions increase in paragraph (13). The subparagraphs contained references to a contemporaneous period going back to November 15, 1992.

§116.150, New Major Source or Major Modification in Ozone Nonattainment Areas

For ease of understanding, the commission reformatted the previously existing subsection (a) into additional subsections and added new language to address the eight-hour netting procedures.

The commission adopts the reformatted subsection (a) to apply major modification procedures to all NSR authorizations issued or claimed. In addition to aligning the date with the effective date of the new designations, the commission is adopting this addition because netting procedures apply to sources

authorized under standard permit or permit by rule to demonstrate that modifications under those authorizations are not major.

New subsection (b) contains language addressing the control requirements applicable to major sources or major modifications. The rule citation where the control requirements are found now reads "subsection (e)(1) - (4) of this section." The commission changed the citation concerning the exception for NO_x sources in El Paso County from subsection (b) to subsection (f). The commission also changed a reference to subsection (c) because it was obsolete. The phrase "located in the definition of major modification" was added from proposal for better clarification.

The commission adopts new subsection (c), which contains a new netting trigger of 40 tpy for areas classified as Marginal or Moderate ozone nonattainment. The commission retains the five tpy netting trigger for areas classified as Serious or Severe.

The commission adopts new subsection (d), which contains contingency language that will go into effect if the EPA, after reconsideration of the eight-hour standard, requires states to use the area's one-hour standard classification for determining applicability of NNSR. The contingency language will require sources in areas that were classified nonattainment for ozone under a one-hour ozone standard to return to a netting trigger of five tpy, which is based on a one-hour ozone standard for the applicability of federal NNSR. The commission added this language because EPA agreed to reconsider the eight-hour designations in reaction to lawsuits filed by EarthJustice and other environmental organizations.

New subsection (e) contains language from previously existing subsection (a) concerning emission standards and offsets for sources and modifications classified as major sources and modifications. The phrase "located in the definition of major modification" was added from proposal for better clarification.

New subsection (f) exempts sources located in El Paso County from the requirements of this section concerning NO_x emissions and contains identical language from previously designated subsection (b).

The commission also made administrative changes for readability, conformity with drafting standards in the *Texas Legislative Council Drafting Manual*, November 2004, and consistency with other commission rules.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a "major environmental rule." Furthermore, it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). A "major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted amendments revise the netting trigger and netting period for projects that are a major modification and are therefore subject to federal NNSR for air

quality permitting and specific levels of pollution control. The amendments also make NNSR requirements applicable to the San Antonio area and the five additional counties in the DFW area. Because San Antonio is an early action compact area, it has a deferred effective date of September 30, 2005, and will continue to be deferred as it remains in compliance with the compact agreements. The amendments also make changes to the definition of contemporaneous period and net emissions increase as well as changes to the figure in the definition of major modification, and nonsubstantive organizational changes. The adopted amendments will not 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.

In addition, Texas Government Code, §2001.0225, only 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 amendments do not exceed a standard set by federal law or exceed an express requirement of state law. There is no contract or delegation agreement that covers the topic that is the subject of this rulemaking. Finally, this rulemaking was not developed solely under the general powers of the agency, but is authorized by specific sections of the Texas Health and Safety Code (THSC) and Texas Water Code (TWC), which are cited in the STATUTORY AUTHORITY section of this preamble. Therefore,

this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the amendments do not meet any of the four applicability requirements.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact analysis for the adopted amendments. The specific purpose of this rulemaking is to revise the netting trigger and netting period for projects that are a major modification and are therefore subject to federal NNSR for air quality permitting and specific levels of pollution control. The amendments implement NNSR requirements for the newly designated San Antonio area and the five additional counties in the DFW area. The amendments also make nonsubstantive organizational changes. Promulgation and enforcement of the adopted amendments would be neither a statutory nor a constitutional taking because they do not affect private real property. Specifically, the adopted amendments do not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Therefore, the amendments do not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.*), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and

policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). No new sources of air contaminants are authorized and the adopted revisions maintain the same level of emissions control as the previously existing rules. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations (CFR), to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). This rulemaking action complies with 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Sections 116.12 and 116.150 are applicable requirements under 30 TAC Chapter 122, Federal Operating Permits Program. Upon the effective date of this rulemaking, owners or operators subject to the Federal Operating Permit Program that modify any NSR authorized sources at their sites are subject to the amended requirements of §116.12 and §116.150.

PUBLIC COMMENT

The commission conducted a public hearing in Austin on March 17, 2005. Four comments were received during the public comment period, which closed on March 28, 2005. Comments were received from: Sierra Club, Houston Regional Group (HSC); Baker Botts L.L.P. on behalf of Texas Industry Project (TIP); EPA; and Clark, Thomas, and Winters on behalf of Enbridge Gathering LP, Acacia Natural Gas Corporation, a subsidiary of Devon Energy Corporation, and Energy Transfer Company (CTW). HSC opposed the proposal, while TIP, CTW, and EPA generally supported the proposal with comments.

TIP commented that the commission proposed two unnecessary word changes in §116.112(10) and (11)(B) where the term "shall not" was changed to "may not." TIP stated that Texas Government Code, §311.016(5) makes clear that the terms are synonymous and commented that the term should not be changed to eliminate potential confusion.

The commission reviewed the use of the terms "shall not" and "may not" and their use according to the *Texas Legislative Council Drafting Manual* and will leave the term "shall not" unchanged.

HSC stated that the 40 tpy netting trigger will allow greater health, mortality, safety, and environmental effects in the nonattainment area and suggested that the commission reject the standard.

The commission acknowledges that a 40 tpy netting trigger will allow more projects to be authorized without a netting analysis, but the commission disagrees that this will result in adverse

health effects. Like the one-hour ozone standard, the eight-hour standard is health based, and the 40 tpy trigger is based on the eight-hour standard. The 40 tpy trigger has been the netting trigger for Moderate areas since the FCAA amendments of 1990. The commission has not changed the rule in response to this comment.

TIP commented on a paragraph in the preamble concerning the ability to credit reductions under the HGB NO_x MECT, which states that "the commission will allow the reductions required by the HGB NO_x mass emission cap and trade program (MECT) in 30 TAC Chapter 101, Subchapter H, to be creditable for netting purposes." TIP expressed the belief that this statement incorrectly suggests that the proposals in Chapter 116 affect the ability to credit reductions under the MECT.

The rule does not affect the ability of a site to generate excess allowances under the MECT by reducing emissions. The statement identified by the commenter clarifies that reductions made under the MECT to comply with a site's allocation will be considered surplus for netting purposes.

CTW commented that the commission should make an independent determination of a return to a one-hour ozone standard should EPA make that decision. CTW stated that the commission should apply the one-hour standard only to the four counties originally in the DFW nonattainment area.

Texas would be unable to make an independent determination since the designation and classification of areas is based on a national air standard and is determined at the federal level. The commission has not changed the rule in response to this comment.

EPA requested that the commission provide rationale for how a five-year contemporaneous period will affect the strategy to attain and maintain an eight-hour ozone standard and whether a five tpy netting trigger combined with that period will provide sufficient reductions.

A five-year contemporaneous period is the same as required for Moderate and Marginal areas under federal rules and is more consistent with the baseline used in SIP modeling demonstrations. The tagged netting window for sources with emissions greater than 250 tpy required that emissions increases and decreases made well before the SIP baseline year be considered in whether a project would be subject to nonattainment review. Given that fewer than 20 nonattainment permits were issued in Texas prior to 2001, it is likely that including emission increases and decreases prior to that date in netting exercises would result in a lower net emissions increase at most sites.

The five tpy netting trigger will only come into play if a nonattainment area should become subject to the requirements associated with a Serious or Severe nonattainment designation. It was accepted by EPA as equivalent to the federal standard provided that sources with a potential to emit greater than 250 tpy maintained a contemporaneous period back to 1992 to ensure that any small emission increases were included in the contemporaneous period. The federal applicability

analysis (netting) associated with the issued nonattainment permits in Texas was reviewed prior to these rules being proposed to determine if including this additional period would have resulted in any of those projects being subject to nonattainment review. The commission was unable to identify any cases where nonattainment review would not have been required with a five-year contemporaneous period. Based on this experience, a five-year contemporaneous period with a five tpy netting trigger would be equivalent to the commission's current rules for Serious and Severe nonattainment areas.

The commission established cap and trade programs in the HGB nonattainment area for NO_x and highly reactive volatile organic compounds, as defined in 30 TAC §115.10. These programs will ensure that emissions in that area will be consistent with what is necessary for the SIP, regardless of what construction or modifications take place under NSR. Finally, the commission will ensure that the SIP demonstration has the appropriate growth factor.

EPA requested that the commission clarify whether it interprets its SIP to make nonattainment NSR requirements applicable to areas that may be designated nonattainment in the future. EPA requested clarification of the timing of applicability of prevention of significant deterioration and NNSR requirements for previously designated and newly designated nonattainment areas prior to the effective dates of both the eight-hour ozone designations and withdrawal of the one-hour ozone standard. Specifically, EPA requested clarification that NNSR requirements apply to final permits issued after June 15, 2004, in areas designated as nonattainment of the eight-hour as well as the one-hour ozone standard and that the date of permit issuance, not administrative completeness, determines applicability

of NSR requirements. EPA asked whether the commission will interpret its SIP to require areas that may be designated as nonattainment in the future be subject to federal regulations at 40 CFR Part 51, Appendix S until the SIP is revised to include the area or will the NSR requirements become automatically applicable upon the effective date of the designation.

The commission has historically interpreted its SIP approved rules to use the administratively complete date to determine which rules apply to a particular permit. Permit applications that were administratively complete before this rulemaking adoption are processed under those rules, which are part of Texas' approved SIP. Adopted §116.150(a) continues the commission's policy to apply the rules based on when permit applications are administratively complete, and specifically provides that the rule applies to all NSR authorizations that are administratively complete after June 15, 2004. EPA rules do not provide a clear answer on when a new designation applies to pending permit applications. EPA has addressed areas in transition through 40 CFR Part 51, Appendix S, and policy memos, but EPA acknowledges that areas that have a SIP approved program in place for newly designated areas are not subject to Appendix S. Therefore, the commission will continue to follow the rules in its SIP.

EPA also requested that the commission clarify that requirements for the one-hour standard remain applicable until June 15, 2005, and that NSR applications are reviewed for one-hour applicability.

The commission will apply the requirements for compliance with the one-hour standard for permits that were administratively complete on or before June 15, 2004, and will not require a

separate review under the eight-hour ozone standard for those permits. The commission agrees that the requirements for the one-hour standard remain applicable until June 15, 2005.

EPA commented that the commission's definition of nonattainment area in §101.1(67) and §116.12(11) are generic, but that §101.1(67) also lists specific counties in each nonattainment area under both ozone NAAQS.

The federal citations are included in the definition of nonattainment area in §101.1(67), and as referenced in the definition of major modification in §116.12(11), Table I, Footnote 1. In a concurrent rulemaking, the commission is updating the definition of nonattainment area in §101.1(67).

EPA also noted that the preamble refers to an effective date of the eight-hour standard of June 15, 2005, and requested a correction to June 15, 2004.

The commission has corrected the effective date of the eight-hour standard.

EPA requested that the commission clarify that any reduction under the MECT will only occur at the source at which the proposed increase will occur. EPA also requested clarification of an apparent conflict of the preamble statement, which states that reductions under the MECT can be used for netting purposes with §101.352(d), which states that allowances cannot be used for netting requirements under Chapter 116.

Reductions occurring under the MECT that may simultaneously be used for netting must occur at the same site where the proposed emissions increase will occur. The preamble statement prohibiting allowances from being used for netting requirements addresses the ability for a site with a proposed emissions increase to purchase excess allowances from another site to use in netting. The preamble has been revised to clarify that emission reductions shown in netting must occur at the same NNSR source. Emission reductions used in netting must occur at that source and cannot be transferred to a different source for use in netting. Emission reductions used to generate and sold as emission reduction credits are not creditable for netting.

SUBCHAPTER A: DEFINITIONS

§116.12

STATUTORY AUTHORITY

The amendment is adopted under TWC, §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 TWC; and under THSC, §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 THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state 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 air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state air; §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits and adopt rules necessary for permits issued under THSC, Chapter 382; and §382.0518, concerning Preconstruction Permit, which requires that a permit be obtained from the commission prior to new construction or modification of an existing facility.

The adopted amendment implements THSC, §§382.002, 382.011, 382.012, 382.051, and 382.0518.

§116.12. Nonattainment Review Definitions.

Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. The terms in this section are applicable to permit review for major source construction and major source modification in nonattainment areas. In addition to the terms that 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), have the following meanings, unless the context clearly indicates otherwise.

(1) **Actual emissions** - Actual emissions as of a particular date are equal to the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period that precedes the particular date and that 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 that has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of 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 that restrict the operating rate, or hours of operation, or both), and the most stringent of the following:

(A) the applicable standards specified in 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 that 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 that mark the initiation of the change.

(4) **Building, structure, facility, or installation** - All of the pollutant-emitting activities that 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 are considered to be part of the same industrial grouping if they belong to the same “major group” (i.e., that 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) that would result in a change in actual emissions.

(7) **Contemporaneous period** - For major sources the period between:

(A) the date that the increase from the particular change occurs; and

(B) 60 months prior to the date that construction on the particular change commences.

(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 in tons per year with all other creditable source emission increases and decreases during the contemporaneous period is compared to the MAJOR MODIFICATION column of Table I located in the definition of major modification in this section 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 that does not exceed the amount allowable under applicable new source performance standards promulgated by the United States Environmental Protection Agency under 42 United States Code, §7411, and that reflects the following:

(A) the most stringent emission limitation that 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 that 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 that emits, or has the potential to emit, the amount specified in the MAJOR SOURCE column of Table I located in the definition of major modification in this section or more of any air contaminant (including volatile organic compounds (VOCs)) for which a national ambient air quality standard 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 is considered to be 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 designation[1]	MAJOR SOURCE tons/year	MAJOR MODIFICATION[2] tons/year	OFFSET RATIO minimum
OZONE (VOC, NOx)[3, 6]			
I marginal[7]	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[4]
II serious	50	50	1.00 to 1[4]
SO_2	100	40	1.00 to 1[4]
PM_{10}			
I moderate	100	15	1.00 to 1[4]
II serious	70	15	1.00 to 1[4]
NO_x[5]	100	40	1.00 to 1[4]
Lead	100	0.6	1.00 to 1[4]

[1] Texas nonattainment area designations are specified in 40 Code of Federal Regulations §81.344.

[2] 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 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 this table.

[3] VOC and 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 NO_x.

[4] The offset ratio is specified to be greater than 1.00 to 1.

VOC = volatile organic compounds

NO_x = oxides of nitrogen

NO_2 = nitrogen dioxide

CO = carbon monoxide

SO_2 = sulfur dioxide

PM_{10} = particulate matter with an aerodynamic diameter less than or equal to ten microns

[5] Applies to the NAAQS for nitrogen dioxide (NO_2).

[6] For the Houston-Galveston-Brazoria, Dallas-Fort Worth, and Beaumont-Port Arthur eight-hour ozone nonattainment areas, if the United States Environmental Protection Agency promulgates rules requiring new source review permit applications in these areas to be evaluated for NNSR according to that area's one-hour standard classification, each application will be evaluated according to that area's one-hour standard classification. Evaluation includes both the threshold for determining if there is a major modification as well as the ratio of offsets required along with any other applicable requirement that depends upon an area's nonattainment classification.

[7] For areas designated as nonattainment for ozone under Federal Clean Air Act, Title I, Part D, Subpart 1 (42 United States Code, §7502), each application will be evaluated as if that area was designated as Marginal. Evaluation includes both the threshold for determining if there is a major modification as well as the ratio of offsets required along with any other applicable requirement that depends upon an area's nonattainment classification.

(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 42 United States Code, §7425;

(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 that 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 that 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 that 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 the decrease to demonstrate attainment or reasonable further progress; and

(iv) the decrease 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.

(14) **Offset ratio** - For the purpose of satisfying the emissions offset reduction requirements of 42 United States Code, §7503(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 under the definition of major modification of this section. 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, may 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 the definition of net emissions increase in this section.

(17) **Secondary emissions** - Emissions that 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 that causes the secondary emissions. Secondary emissions include emissions from any off-site support facility that 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 that 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 that emits or may emit any air pollutant subject to regulation under 42 United States Code, §§7401 *et seq*.

SUBCHAPTER B: NEW SOURCE REVIEW PERMITS

DIVISION 5: NONATTAINMENT REVIEW

§116.150

STATUTORY AUTHORITY

The amendment is adopted under TWC, §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 TWC; and under THSC, §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 THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state 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 air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state air; §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits and adopt rules necessary for permits issued under THSC, Chapter 382; and §382.0518, concerning Preconstruction Permit, which requires that a permit be obtained from the commission prior to new construction or modification of an existing facility.

The adopted amendment implements THSC, §§382.002, 382.011, 382.012, 382.051, 382.0518.

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

(a) This section applies to all new source review authorizations that are administratively complete after June 15, 2004, for new construction or modification of facilities located in any area designated as nonattainment for ozone in accordance with 42 United States Code (USC), §7407.

(b) The owner or operator of a proposed new or modified facility that will be a new major stationary source of volatile organic compound (VOC) emissions or nitrogen oxides (NO_x) emissions, or the owner or operator of an existing major stationary source of VOC or NO_x emissions that will undergo a major modification with respect to VOC or NO_x, shall meet the requirements of subsection (e)(1) - (4) of this section, except as provided in subsection (f) of this section. Table I located in the definition of major modifications in §116.12 of this title (relating to Nonattainment Review Definitions) specifies the various classifications of nonattainment along with the associated emission levels that designate a major stationary source or major modification for those classifications.

(c) Except as noted in subsection (f) of this section regarding NO_x, the *de minimis* threshold test (netting) is required for all modifications to existing major sources of VOC or NO_x, unless at least one of the following conditions are met:

(1) the proposed emissions increases associated with a project, without regard to decreases, is less than five tons per year (tpy) of the individual nonattainment pollutant in areas

classified under Federal Clean Air Act (FCAA), Title I, Part D, Subpart 2 (42 USC, §7511) classified as Serious or Severe;

(2) the proposed emissions increases associated with a project, without regard to decreases, is less than 40 tpy of the individual nonattainment pollutant in areas classified under FCAA, Title I, Part D, Subpart 1 (42 USC, §7502) and for those under FCAA, Title I, Part D, Subpart 2 (42 USC, §7511) classified as Marginal or Moderate; or

(3) 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 tpy.

(d) For the Houston-Galveston-Brazoria, Dallas-Fort Worth, and Beaumont-Port Arthur eight-hour ozone nonattainment areas, if the United States Environmental Protection Agency promulgates rules requiring new source review permit applications in these areas to be evaluated for nonattainment new source review according to that area's one-hour standard classification, except as noted in subsection (b) of this section regarding NO_x, the *de minimis* threshold test (netting) is required for all modifications to existing major sources of VOC or NO_x in that area, unless at least one of the following conditions is met:

(1) the proposed emissions increases associated with a project, without regard to decreases, is less than five tpy of the individual nonattainment pollutant; or

(2) 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 tpy.

(e) 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 located in the definition of major modification in §116.12 of this title, 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 tpy 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 must 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 must 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 that are generated at the source and that otherwise meet all creditability criteria can be applied as follows.

(A) Major stationary sources with a PTE of less than 100 tpy 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 tpy 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 must contain an analysis of alternative sites, sizes, production processes, and control techniques for the proposed source. The analysis must demonstrate that the benefits of the proposed location and source configuration significantly outweigh the environmental and social costs of that location.

(f) For sources located in the El Paso ozone nonattainment area as defined in §101.1 of this title (relating to Definitions), the requirements of this section do not apply to NO_x emissions.