

The Texas Commission on Environmental Quality (commission) proposes amendments to §116.12 and §116.150.

If adopted, 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 PROPOSED 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, Liberty, 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 precursors.

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. Under the commission's existing rules, the netting period, defined as the contemporaneous period in 30 TAC §116.12(7), begins on the date of the emission increase and goes back to November 15, 1992, for major sources that emit 250 tpy or more, and goes back five years for major sources emitting less than 250 tpy. 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 rulemaking action.

The commission's current netting triggers and periods are different than the corresponding federal rules, but are considered equivalent by the EPA and are approved as part of the SIP. The federal rule, adopted after the FCAA Amendments of 1990 and classifications of the areas, required that any increase in emissions would trigger the netting exercise in areas classified as Serious or Severe. To

reduce the number of netting exercises, the commission adopted a netting exercise that would not be required when the project resulted in a small increase of emissions resulting from such activities as valve changes or other minor maintenance or facility upgrades and proposed a five tpy trigger. The EPA agreed to the change provided that the netting period was extended to go back to November 15, 1992, for the larger major sources instead of the five-year netting period in the federal rule.

On April 30, 2004, the EPA adopted the Phase I 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 I 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 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 I 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 rules make no changes to the netting procedure or thresholds. The new designations and classifications allow the commission an opportunity to limit the number of netting exercises by revising its rule. The commission is proposing to adopt 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 would retain its existing five tpy trigger. The commission would eliminate the netting period for larger major sources that requires netting going back to 1992. This period is now too long to be useful and would 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 would be 40 tpy and all netting periods would be five years.

Application of the eight-hour ozone standard for NNSR becomes effective June 15, 2005, 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 I 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. The result of the EPA reconsideration may not be known until after the commission adopts these amendments. Therefore, the commission is

including contingency language in §116.150, New Major Source or Major Modification in Ozone Nonattainment Areas, and in the footnotes of the definition of major modification in §116.12. This contingency language would go into effect if the EPA decided to require states to return to a one-hour standard for federal NNSR determination.

NO_x Netting and Mass Emission Cap and Trade

Concurrent with the effective date of the new five-year contemporaneous period, 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. This will apply only to NO_x sources subject to 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 impact 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 that are used to "net out" emission increases from increases at a site will have to occur within the netting period. 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 proposes to make administrative changes for better readability, conformity with the drafting standards in the *Texas Legislative Council Drafting Manual*, October 2002, and consistency with other commission rules.

The commission also proposes to make corrections to citations of federal and state law and to add USC references to citations of sections of the FCAA.

§116.12, Nonattainment Review Definitions

The commission proposes to amend 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.

The commission proposes to add new footnotes 6 and 7 in the figure located in the definition of major modification in paragraph (11)(A) that would 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 the rule implementing the new eight-hour standard.

Footnote 7 would require 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.

The commission also proposes to delete subparagraphs (E) and (F) from the definition of net emissions increase in paragraph (13). The subparagraphs contain 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 proposes to reformat the lengthy existing subsection (a) into additional subsections and add new language to address the eight-hour netting procedures.

The commission proposes to amend 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 proposing 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.

Proposed new subsection (b) contains language from existing subsection (a) and addresses the control requirements applicable to major sources or major modifications. The rule citation where the control requirements may be found is proposed to be changed to read “subsection (e)(1) - (4) of this section.”

The commission also proposes to change the citation concerning the exception for NO_x sources in El Paso County from subsection (b) to subsection (f). A reference to a subsection (c) would be deleted as it is obsolete.

The commission proposes new subsection (c), which would contain language from existing subsection (a) that would be amended to contain a new netting trigger of 40 tpy for areas classified as Marginal or Moderate ozone nonattainment. The commission would retain the five tpy netting trigger for areas classified as Serious or Severe.

The commission proposes to add new subsection (d), which would contain contingency language that would 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 would 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.

Proposed new subsection (e) contains language from existing subsection (a) concerning emission standards and offsets for sources and modifications classified as major sources and modifications.

Existing subsection (b), which exempts sources located in El Paso County from the requirements of this section concerning NO_x emissions, is proposed to be relettered as subsection (f).

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Grants Management Section, determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated as a result of administration or enforcement for units of state or local governments. State or local governments that own or operate major sources of air contaminants could realize a cost savings resulting from the reduction in the number of netting exercises.

Currently, NNSR is implemented under EPA's one-hour ozone NAAQS. EPA's implementation of an eight-hour ozone NAAQS designated attainment areas under the eight-hour standard, added five new counties to the DFW ozone nonattainment area, and designated the San Antonio area as nonattainment with a deferred effective date.

Major sources, including those operated by state or local government, located in the counties added to the DFW nonattainment area and the San Antonio area, could have significant costs if required to upgrade their emission control equipment from best available control technology (BACT) to LAER.

The new designation of the counties as nonattainment does not in itself mean that emission controls must be immediately upgraded or additional controls installed. Also, because San Antonio is participating in the Early Action Compact Program, its designation may never become effective.

Sources that undergo major modifications would be subject to LAER, but the commission does not have

information indicating which, if any, sources are going to be affected. The commission expects cost increases to be mostly limited to large combustion sources because of the limited industrialization of the new nonattainment counties.

The proposed rulemaking seeks to: 1) implement EPA netting triggers and periods for nonattainment areas classified as Moderate or Marginal to 40 tpy and five years; 2) retain the five tpy netting trigger for Serious or Severe nonattainment areas but reduce the netting period to five years; and 3) include contingency language for a possible return to a one-hour standard for NNSR determinations of new major source or major modification in nonattainment areas if EPA decides to reapply the one-hour standard at a later date after reconsidering implementation of the eight-hour standard.

Under the proposed rules, state or local governments with major sources of air contaminants in nonattainment areas classified as Serious or Severe under the one-hour standard may see a decrease in costs because of the classification to Moderate and Marginal under the eight-hour standard. This new classification carries with it a new netting trigger for emissions associated with a new project or certain changes in operations. The higher netting trigger of 40 tpy for Moderate, Marginal, and FCAA, Title I, Part D, Subpart 1 areas will mean that fewer netting exercises will be required and will reduce the chance that an emission increase associated with these activities would trigger requirements to offset emissions because of new projects or operational changes. The commission is unable to estimate savings for individual sources because of the inability to anticipate which sources will be subject to future modification. However, if the EPA decides to require eight-hour nonattainment areas to continue NNSR under its one-hour designation, then no cost savings would be realized.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be implementation of current federal regulations for NAAQS.

Under the proposed rules, businesses with major sources of air contaminants in nonattainment areas classified as Serious or Severe under the one-hour standard may see a decrease in costs because of the classification under the eight-hour standard of Moderate and Marginal. The higher netting trigger of 40 tpy for Moderate, Marginal, and FCAA, Title I, Part D, Subpart 1 areas will mean that fewer netting exercises will be required and will reduce the probability that an emission increase associated with these activities would trigger requirements to offset emissions because of new projects or operational changes. Sources in the El Paso area would realize a cost savings because it would no longer be subject to NNSR. The commission is unable to estimate savings for individual sources because of the inability to anticipate which sources will be subject to future modification.

Major sources located in the counties added to the DFW nonattainment area and the San Antonio area could have significant costs if required to upgrade their emission control equipment from BACT to LAER. The designation of the counties as nonattainment does not in itself mean that emission controls must be immediately upgraded or additional controls installed. Because San Antonio is participating in the Early Action Compact Program, its designation may never become effective. Sources that undergo major modifications would be subject to LAER, but the commission does not have information indicating which, if any, sources are going to be affected. The commission expects cost increases to be

mostly limited to large combustion sources because of the limited industrialization of the new nonattainment counties.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses. Small or micro-businesses are less likely to operate major sources of air contaminants. Small or micro-businesses that do operate major sources will see the same reduction in probability that a source modification will trigger a major modification under federal NNSR, and they will experience the same types of costs savings or increases as those experienced by large businesses that generate major sources of contamination under the eight-hour ozone standard. Small businesses operating sources of air contaminants in the new DFW nonattainment counties that do undergo major modifications would be subject to the same NNSR requirements and potential expense as larger businesses.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rulemaking does not meet the definition of a “major environmental rule.” Furthermore, it does not meet any of the

four applicability requirements listed in §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 proposed 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 proposed amendments also make applicable to the San Antonio area and the five additional counties in the DFW area NNSR requirements. 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 proposed 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

proposed 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 and Texas Water Code, 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 proposed amendments do not meet any of the four applicability requirements.

The commission invites public comment regarding the draft regulatory impact analysis determination during the public comment period.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact analysis for the proposed 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 proposed amendments would be neither a statutory nor a constitutional taking because they do not affect private real property. Specifically, the proposed 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 proposed 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 will be authorized and the proposed revisions will maintain the same level of emissions control as the 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, to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). This rulemaking action complies with 40 Code of Federal Regulations 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.

The commission solicits comments on the consistency of the proposed rulemaking with the CMP during the public comment period.

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 will be subject to the amended requirements of §116.12 and §116.150.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on March 17, 2005, at 10:00 a.m. in Building F, Room 2210, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes before the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Lola Brown, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808.

Comments must be received by 5:00 p.m., March 28, 2005, and should reference Rule Project Number 2005-009-116-AI. Copies of the proposed rule can be obtained from the commission's Web site at <http://www.tnrcc.state.tx.us/oprdrules/propadop.html>. For further information, please contact Beecher Cameron, Air Permits Division, at (512) 239-1495 or Michael Bame, Policy and Regulations Division, at (512) 239-5658.

SUBCHAPTER A: DEFINITIONS

§116.12

STATUTORY AUTHORITY

The amendment is proposed 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 Health and Safety Code, §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 proposed under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission 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 Texas Health and Safety Code, 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 proposed amendment implements Texas Health and Safety Code, §§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) [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 [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 are [shall] equal to the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period that [which] precedes the particular date and that [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 that [which] 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 [which] restrict the operating rate, or hours of operation, or both), and the most stringent of the following:

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

(B) - (C) (No change.)

(3) **Begin actual construction** - In general, initiation of physical on-site construction activities on an emissions unit that [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 that [which] mark the initiation of the change.

(4) **Building, structure, facility, or installation** - All of the pollutant-emitting activities that [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 are [shall be] considered to be [as] part of the same industrial grouping if

they belong to the same “major group” (i.e., that [which] have the same two-digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 supplement.

(5) (No change.)

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

(A) the date that the increase from the particular change occurs [(i) November 15, 1992]; and

(B) 60 months prior to [(ii)] the date that construction on [the increase from] the particular change commences [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*** [**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 [(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 that [which] does not exceed the amount allowable under applicable new source performance standards [New Source Performance Standards] promulgated by the United States

Environmental Protection Agency [EPA] under 42 United States Code, §7411 [the FCAA, §111], and that [which] reflects the following:

(A) the most stringent emission limitation that [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 that [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 that [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 [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 is [shall be] considered to be major for ozone. The fugitive emissions of a stationary source may [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 [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, NO _x) ^{3, 6}			
I marginal ²	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 [Table I].

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

NO₂ = nitrogen dioxide

CO = carbon monoxide

SO₂ = sulfur dioxide

PM₁₀ = particulate matter with an aerodynamic diameter [of] less than or equal to ten microns [in diameter]

⁵ Applies to the NAAQS for nitrogen dioxide (NO₂).

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 may [shall] not include:

(i) - (ii) (No change.)

(iii) use of an alternative fuel by reason of an order or rule of 42

United States Code, §7425 [the FCAA, §125];

(iv) (No change.)

(v) use of an alternative fuel or raw material by a stationary source that [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 that [which] was established after December 21, 1976); or

(vii) (No change.)

(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 [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) - (B) (No change.)

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

(i) - (ii) (No change.)

(iii) the reviewing authority has not relied on it in issuing a prevention of significant deterioration [Prevention of Significant Deterioration] or a nonattainment permit, or the state has not relied on the decrease to demonstrate [it in demonstrating] attainment or reasonable further progress; and

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

(D) (No change.)

[(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_x) in ozone nonattainment areas, increases and decreases of NO_x 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 42 United States Code, §7503(a)(1)(A) [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 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 [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 the definition of net emissions increase in [paragraph (13) of] this section.

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

SUBCHAPTER B: NEW SOURCE REVIEW PERMITS

DIVISION 5: NONATTAINMENT REVIEW

§116.150

STATUTORY AUTHORITY

The amendment is proposed 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 Health and Safety Code, §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 proposed under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission 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 Texas Health and Safety Code, 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 proposed amendment implements Texas Health and Safety Code, §§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 which are administratively complete after June 15, 2004, [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 42 United States Code (USC), §7407 [the FCAA, §107].

(b) The owner or operator of a proposed new or modified facility that [which] 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 [paragraphs (1) - (4) of this subsection], except as provided in subsection (f) [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 that [which] designate a major stationary source or major modification for those classifications.

(c) Except as noted in subsection (f) [(b)] of this section regarding NO_x, the de minimis [de minimis] threshold test (netting) is [shall be] 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 [, the]

(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 [tons per year].

(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* [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 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 [tons per year] of the applicable nonattainment pollutant. For these sources, best available control technology [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 [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 must [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 that [which] are generated at the source and that [which] otherwise meet all creditability criteria can be applied as follows.

(A) Major stationary sources with a PTE of less than 100 tpy [tons per year] of an applicable nonattainment pollutant are not required to undergo nonattainment new source review [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 [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 must [shall] contain an analysis of alternative sites, sizes, production processes, and control techniques for the proposed

source. The analysis must [shall] demonstrate that the benefits of the proposed location and source configuration significantly outweigh the environmental and social costs of that location.

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