The Texas Commission on Environmental Quality (TCEQ or commission) proposes new §§116.1500, 116.1510, 116.1520, 116.1530, and 116.1540.

The proposed new sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The Federal Clean Air Act (FCAA), §169A, Visibility Protection for Federal Class I Areas, and §169B, Visibility (42 United States Code (USC), §7491 and §7492), require the EPA to adopt regulations to address visibility impairment at federal Class I areas due to regional haze. Class I areas are federally designated parks and scenic areas of national importance. There are 156 Class I areas in the United States, including national and international parks and wilderness areas. Regional haze is caused by the emission of air pollutants from numerous sources located over a wide geographic area. The EPA promulgated regulations to address these statutory requirements in 40 Code of Federal Regulations (CFR) Part 51, Subpart P, Protection of Visibility, on July 1, 1999 (64 FR 35763), and promulgated amendments to Subpart P and a new Appendix Y, Guidelines for BART Determinations Under the Regional Haze Rule, to Part 51 on July 6, 2005 (70 FR 39156). The FCAA and implementing regulations require states to submit SIPs to address visibility impairment caused by regional haze and include guidelines for determining best available retrofit technology (BART). As part of the SIP, states must identify BART-eligible sources. BART-eligible sources belong to one of 26 named source categories, have the potential to emit 250 tons per year or more of a visibility-impairing pollutant (nitrogen oxides (NO_x), sulfur dioxide (SO_2), and particulate matter (PM)), and were built or

reconstructed between August 7, 1962, and August 7, 1977. These sources must be evaluated to determine whether they cause or contribute to visibility impairment at any Class I area. BART-eligible sources that cause or contribute to visibility impairment at any Class I area are subject to BART and owners or operators must conduct a technology evaluation to determine the appropriate level of BART controls. BART is to be determined on a case-by-case basis for each source based on the technology available, the costs of compliance, the energy and non-air quality environmental impacts of controls, any existing pollution control technology used by the source, the remaining useful life of the source, and the degree of visibility improvement that would result from the use of the technology.

The proposed rules would revise Chapter 116 to ensure that owners or operators of sources that are subject to BART requirements perform a BART engineering evaluation to determine the appropriate level of BART, and subsequently implement any required BART controls. The proposed rules also provide mechanisms for BART-eligible sources to demonstrate that they do not significantly impact visibility in Class I areas and are therefore not subject to BART control requirements.

The TCEQ is required to submit a Regional Haze SIP to the EPA no later than December 17, 2007. In order to develop this SIP in a timely manner, the TCEQ must receive the BART engineering analyses (or BART exemption modeling) from each BART-eligible source no later than April 30, 2007. A corresponding deadline is proposed in the rules.

SECTION BY SECTION DISCUSSION

§116.1500. Definitions.

The commission proposes new §116.1500, which contains definitions relevant to the proposed rules. The terms defined include BART-eligible source and visibility-impairing air pollutant. The proposed definition of BART-eligible source is similar to the functional definition of this term under 40 CFR §51.301, Definitions, except that the proposed definition refers only to visibility-impairing pollutants, instead of all pollutants. The reference to visibility-impairing pollutants should minimize confusion as to what pollutants are relevant to BART applicability. The term "visibility-impairing air pollutant" is also defined and includes NO_x, SO_2, and PM, which are the principal species emitted from Texas sources that are believed to influence visibility. Note that particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM_{10}) may be used as the indicator for PM when assessing BART eligibility. The commission has not proposed to include volatile organic compounds (VOCs) or ammonia as visibility-impairing air pollutants. The commission's initial research suggests that VOCs are not a significant contributor to visibility impairment at Class I areas that are impacted by Texas facilities. In addition, the commission has not proposed to include ammonia because existing background levels in Texas would make visibility improvements from ammonia source reductions only marginally effective, and the EPA has indicated that inclusion of ammonia as an evaluated BART pollutant is not expected. However, this determination is not final and the commission is interested in comments or data relating to the possible inclusion of VOCs and/or ammonia as visibility-impairing air pollutants. For terms not defined in this section, the definitions contained in 40 CFR §51.301 apply.

§116.1510. Applicability and Exemption Requirements.

The commission proposes new §116.1510 to specify which facilities would be subject to the proposed rules and identify certain exemptions which may apply. The proposed rules only apply to BART-eligible sources as defined in §116.1500.

Under proposed §116.1510(b), the owner or operator of a BART-eligible source may elect to use modeling to demonstrate that the source does not cause or contribute to visibility impairment at any Class I areas. If the owner or operator successfully demonstrates that the source does not cause or contribute to visibility impairment, the source would not be subject to the requirements of §116.1520, Best Available Retrofit Technology (BART) Analysis, and §116.1530, Best Available Retrofit Technology (BART) Control Implementation. Owners or operators who seek to claim this exemption must submit the exemption modeling to the commission's Air Permits Division no later than April 30, 2007, under seal of a professional engineer licensed in the State of Texas.

BART exemption modeling and modeling conducted as part of the BART analysis must conform to a commission-approved model and associated guidelines. The commission is considering the approval of California Puff Model (CALPUFF) modeling and the Central Regional Air Planning Association's *CENRAP BART Modeling Guidelines*. The commission is seeking comments on other appropriate modeling approaches for BART. Persons seeking guidance about the *CENRAP BART Modeling Guidelines* and other aspects of the BART modeling process should contact the commission's Air Permits Division.

The commission is proposing a 0.5 deciview threshold for determining whether a source causes or contributes to visibility impairment. EPA guidance indicates that 0.5 deciview is the upper limit that states should use for determining whether a source contributes to visibility impairment. Factors that may influence the selection of this threshold are the number of emission sources affecting Class I areas and the magnitude of emissions from the individual sources. As additional information is gathered about emissions from BART-eligible sources in Texas and how those emissions relate to visibility in Class I areas, it is possible that a lower threshold of visibility impairment may be necessary. A lower threshold could include the application of different visibility impairment thresholds for each individual Class I area. The commission invites comment on the proposed 0.5 deciview threshold, as well as any alternative strategy.

The commission is proposing several exemptions under §116.1510(c). These exemptions are based on examples that the EPA developed for 40 CFR Part 51, Appendix Y. There are two "model plant" exemptions proposed as §116.1510(c)(1) and (2), respectively. The EPA concluded that sources meeting the stated criteria for emissions and distance from Class I areas are unlikely to have a significant effect on visibility. The exemptions in §116.1510(c)(1) and (2) are pollutant specific for NO_x and SO_2, such that the owner or operator of the source would still be required to perform the BART engineering analysis and implement any applicable BART controls for other visibility-impairing pollutants (such as PM).

The exemption proposed under §116.1510(c)(3) is based on *de minimis* emission totals which EPA determined would be unlikely to contribute to regional haze. As is the case with the proposed

exemptions in §116.1510(c)(1) and (2), the exemption in §116.1510(c)(3) is pollutant specific. For example, a source may be exempted for purposes of NO_x or SO_2 while remaining subject to BART requirements for PM. A source claiming this exemption could also be exempted from BART requirements for PM_{10} while remaining subject to BART for other visibility-impairing air pollutants.

Owners or operators claiming exemption under §116.1510(c) are required to maintain records to demonstrate compliance with the exemption criteria, and shall make such records available to the commission or any local air pollution control agency with jurisdiction upon request.

The commission is proposing §116.1510(d) to provide that electric generating units (EGUs) that are participating in the Clean Air Interstate Rule (CAIR) cap and trade program may avoid a BART analysis and implementation of controls for NO_x and SO_2. The EPA has determined that CAIR provides greater reasonable progress than BART and has correspondingly allowed the use of CAIR as an acceptable substitute for the application of BART controls. This subsection only addresses NO_x and SO_2, so BART-eligible EGUs would remain subject to BART requirements for PM.

§116.1520. Best Available Retrofit Technology (BART) Analysis.

The commission proposes new §116.1520, which contains requirements for the BART engineering analysis. BART-eligible sources that are not exempted under §116.1510(b) or (c) are required to develop a BART engineering analysis to determine BART for that source. The analysis shall be conducted according to the procedures established in 40 CFR Part 51, Appendix Y, Guidelines for BART Determinations Under the Regional Haze Rule, Section IV, The Bart Determination: Analysis

of BART Options. The BART analysis must include an evaluation of all technically feasible retrofit technologies in accordance with the five factors stated in FCAA, §169A(g)(2) (42 USC, §7491). The factors to be considered in the BART analysis are: an analysis of the cost of compliance, the energy and non-air quality environmental impacts, the degree of visibility improvement in affected Class I areas resulting from the use of the control technology, the remaining useful life of the source, and any existing control technology present at the source. Based on these statutory factors, the owner or operator must select and identify one of the emission control alternatives as the prospective BART control strategy for the source.

Proposed §116.1520(b) would require the owner or operator to specify short-term (hourly) and long-term (annual) emission limits associated with the selected BART control strategy. This information is necessary for the commission to develop the required Regional Haze SIP.

Proposed §116.1520(c) would establish a deadline of April 30, 2007, for submission of the BART analysis. This deadline is necessary to provide the commission with sufficient time to review the BART analyses and compile BART emission reductions to develop the required Regional Haze SIP by the December 17, 2007, deadline.

§116.1530. Best Available Retrofit Technology (BART) Control Implementation.

The commission proposes new §116.1530, which contains requirements and deadlines associated with the implementation of any required BART controls. Proposed §116.1530(a) establishes the deadline for any required BART controls to be implemented. Federal regulations specify that BART controls must

be in place no later than five years after the EPA approves a state's Regional Haze SIP. Given that the commission is required to submit the Regional Haze SIP to EPA by December 17, 2007, and the EPA will require some time to review the SIP, it is likely that the BART control deadline will occur during or after the year 2013. Many factors influence the schedule of the development and approval of the Regional Haze SIP and it would be difficult to estimate a more precise deadline. Proposed §116.1530(a) also contains a requirement for owners or operators to establish procedures to ensure that BART-required control equipment is properly and continuously operated and maintained.

Proposed §116.1530(b) is intended to ensure that owners or operators subject to BART obtain any necessary authorization for new control equipment and establish enforceable mechanisms to ensure ongoing compliance with BART. The proposed rule requires that each owner or operator of a BART-eligible source apply for a permit, permit amendment, permit alteration, applicable standard permit, or other enforceable mechanism to establish BART emission limitations. If a BART-eligible facility satisfies BART requirements using existing controls, and there are no changes in quantity or character of emissions, then no permit action is required as long as the existing emissions have enforceable limits in a permit, standard permit, or other type of authorization.

§116.1540. Exemption from Best Available Retrofit Technology (BART) Control Implementation.

Proposed new §116.1540 provides a case-specific mechanism for BART-eligible sources to request an exemption from BART control requirements. In order to obtain exemption under this section, the owner or operator seeking exemption must first obtain initial approval from the commission, then obtain final approval from the EPA. Although this exemption may be used to avoid the otherwise-

required installation of BART controls, this exemption does not negate the requirement to perform the BART analysis required under proposed §116.1520, or the requirement to submit the analysis no later than April 30, 2007.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment Section, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency. The agency will be required to review modeling and engineering analyses to verify that they meet federal guidelines and are technically correct. Staff anticipates that these reviews can be done with existing resources. Administration or enforcement of the proposed rules may have fiscal implications, some of which may be significant, for other units of state or local governments owning or operating facilities that may require BART to control emissions. Fiscal implications would depend on the results of exemption modeling assessments and engineering analysis as well as the determination of whether controls would be required.

The FCAA requires states to submit SIPs to address visibility impairment caused by regional haze in the 156 federally protected parks and wilderness areas. As part of their SIPs, states must identify the BART-eligible sources within their boundaries and provide guidelines for determining BART to ensure certain older pollution sources use appropriate technology to control emissions that cause or contribute to impaired visibility in designated national parks and landmarks.

The EPA has named 26 general types of sources that could be affected by the proposed rules. These types of sources include chemical plants, fossil fuel-fired EGUs, refineries, portland cement plants, lime plants, large boilers, carbon black plants, certain types of smelters, kraft pulp mills, iron mills, steel mills, fiber glass processing plants, and charcoal production facilities. The proposed rules would apply to sources that have the potential to emit 250 tons or more per year of visibility-impairing air pollutants and were built or reconstructed between August 7, 1962, and August 7, 1977. The proposed rules define visibility-impairing air pollutants as NO_x, SO_2, and PM.

Texas has BART-eligible sources scattered throughout the state. Local governments that own or operate facilities classified as BART-eligible sources may need to perform case-specific emissions modeling to claim exemptions from the proposed rules. Entities that are not eligible to meet any exemptions will be required to prepare and submit a BART engineering analysis. They may also be required to install BART emission controls at a later date, in the year 2013 or later, if it is determined that additional controls are needed.

A recent survey conducted by the agency indicates that there may be as many as 127 BART-eligible sources in Texas. According to survey results, there are less than 15 BART-eligible sources in Texas that are owned or operated by local governments. Local governments subject to the proposed rules may be required to pay as much as $5,000 to $20,000 for exemption modeling. An engineering analysis, if required, may cost affected local governments as much as $10,000 to $40,000. The costs of the exemption modeling and BART engineering analysis would vary greatly depending on a number of factors, which include the complexity of the source, the size of a facility, and the proximity of the

source to protected national parks and landmarks. Costs of implementing BART controls depend on the type of control required and are estimated by EPA to range from a low of $1,000 to a high of $10,000 per ton of NO_x, SO_2, or PM controlled.

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 compliance with federal regulations and, over the long term, improved visibility, cleaner air, and a healthier and safer environment.

A recent survey conducted by the agency indicates that there may be as many as 127 BART-eligible sources in Texas. There may be as many as 112 of these sources that are owned or operated by large businesses. Large businesses may pay as much as $5,000 to $20,000 for exemption modeling. An engineering analysis, if required, may cost large businesses as much as $10,000 to $40,000. The costs of the exemption modeling and BART engineering analysis would vary greatly depending on a number of factors, which include the complexity of the source, the size of a facility, and the proximity of the source to protected national parks and landmarks. Costs of implementing BART controls depend on the type of control required and are estimated by the EPA to range from a low of $1,000 to a high of $10,000 per ton of NO_x, SO_2, or PM controlled.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses. None of the potential BART-eligible sources in Texas are known to be owned or operated by a small or micro-business. If a small or micro-business does become subject to the proposed rules, it would incur the same costs as those incurred by local governments or large businesses.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has 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 meets the definition of a "major environmental rule" as defined in that statute. 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 rulemaking does not, however, meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law,

unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

This proposed rulemaking would require BART on certain sources of NO_x, SO_2, and PM that cause or contribute to visibility impairment in any Class I area. The proposed new §§116.1500, 116.1510, 116.1520, 116.1530, and 116.1540 would ensure that owners or operators of sources that are subject to BART requirements perform a BART engineering evaluation to determine the appropriate level of BART, and subsequently implement any required BART controls. The proposal incorporates by reference the EPA's Guidelines for BART Determinations Under the Regional Haze Rule (40 CFR Part 51, Appendix Y). The proposed rules also provide mechanisms for BART-eligible sources to demonstrate that they do not significantly impact visibility in Class I areas and are therefore not subject to BART control requirements. This strategy is intended to address visibility impairment at federally designated parks and scenic areas of national importance (Class I areas) and thus the intent of the proposed rules is protection and improvement of the aesthetic environment in these areas. Furthermore, the commission finds that the revisions to Chapter 116 proposed in this rulemaking could adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Under the proposed new sections, BART-eligible sources are those sources that belong to one of 26 named source categories, have the potential to emit 250 tons per year or more of a visibility-impairing air pollutant (NO_x, SO_2, and PM), and were built or reconstructed between August 7, 1962, and August 7, 1977. The commission has

determined that approximately 127 sources may be BART eligible. Sources determined to be subject to BART through the engineering analysis of Appendix Y must install and operate BART controls for the source five years after the EPA approves the state's Regional Haze SIP. The commission anticipates that a fraction of these BART-eligible sources will actually be required to install BART controls, and it is not yet known what BART will be for each source. Some sources will model out of the requirement to determine and ultimately install BART; and EGUs may use CAIR as a substitute for BART. The exact cost of the BART controls for each unit cannot be predicted, but significant costs to comply with the control requirements may be expected from at least some units, which could in turn adversely affect a sector of the economy. The EPA has estimated costs ranging from $1,000 to $10,000 per ton of NO_x, SO_2, or PM. Given the potential for significant costs, the commission has made the determination that this rulemaking meets the definition of a "major environmental rule."

Nevertheless, the proposed new sections to Chapter 116 are not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the proposed rules do not meet any of the four applicability requirements in subsection (a) of that section. Specifically, the BART requirements in Chapter 116 were developed to be included in the Regional Haze SIP that will be submitted to the EPA as required under FCAA, 42 USC, §7491 and §7492, and therefore meet a federal requirement. FCAA, 42 USC, §7491, requires each SIP to include a requirement that each BART-eligible source that is reasonably anticipated to cause or contribute to visibility impairment in any Class I area to procure, install, and operate BART controls. BART is to be determined according to the five factors listed in §7491(g)(2). FCAA, §7492 requires that any regulations promulgated by

the EPA pursuant to §7491 require states to revise their SIPs under FCAA, 42 USC, §7410 to include a regional haze plan that includes BART for certain sources.

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

The FCAA does not always require specific programs, methods, or reductions in order to meet emission standards or visibility goals and reasonable progress of those goals; thus, states must develop programs and strategies to help ensure that those standards and goals for new and existing sources are met. The same is true for visibility protection. Because of the ongoing need to address nonattainment issues, and to meet the requirements of 42 USC, §7410, the commission routinely proposes and adopts SIP rules. As discussed earlier in this preamble, states must also revise their SIPs under §7410 to

incorporate a plan for visibility protection, including requirements for BART. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code, but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, *no writ*); *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v.*

Montemayor, 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied*); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance." The legislature specifically identified Texas Government Code, §2001.0225, as falling under this standard. The commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The specific intent of the proposed rulemaking is to adopt BART rules and incorporate by reference the federal BART determination guidelines, with the objective to reduce visibility impairment in federal Class I areas. There is no contract or delegation agreement that covers the topic that is the subject of this action. Therefore, the proposed rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law, or exceed a requirement of a delegation agreement. Finally, this rulemaking action was not developed solely under the general powers of the agency, but is authorized by specific sections of Texas Health and Safety Code (THSC), Chapter 382 (also known as the Texas Clean Air Act (TCAA)), and the Texas Water Code (TWC), which are cited in the STATUTORY AUTHORITY section of this preamble, including THSC, §§382.012, 382.017, and 382.051. Therefore, this rulemaking action is not subject to the regulatory analysis provisions of Texas

Government Code, §2001.0225(b), because although the proposed rulemaking meets the definition of a "major environmental rule," it does not meet any of the four applicability requirements.

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

TAKINGS IMPACT ASSESSMENT

The commission evaluated these proposed rules and performed an assessment of whether Texas Government Code, Chapter 2007 is applicable. The commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to this proposed rulemaking because this is an action that is reasonably taken to fulfill an obligation mandated by federal law, which is exempt under Texas Government Code, §2007.003(b)(4). Specifically, the new sections of Chapter 116 require that BART-eligible sources determine whether they are subject to BART controls. Those sources that are subject to BART must perform a BART engineering evaluation to determine the appropriate level of BART, and subsequently implement any required BART controls. FCAA, 42 USC, §7491, requires each state to submit a Regional Haze SIP to address visibility in federal Class 1 areas. The FCAA further mandates that the SIP require each BART-eligible source that is reasonably anticipated to cause or contribute to visibility impairment in any Class 1 area to procure, install, and operate BART. BART is to be determined according to the five federally established factors, listed in 42 USC, §7491(g)(2).

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)). The proposed rules are intended to implement a federally required program to apply BART emission controls to certain sources of visibility-impairing air pollutants. The proposed changes would tend to reduce undesirable haze at federal Class I areas. Certain aspects of this rulemaking are intended to protect the environment or reduce risks to human health from environmental exposure. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 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.

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

Owners and operators subject to the Federal Operating Permit Program must, consistent with the revision process in 30 TAC Chapter 122, Federal Operating Permits Program, revise their operating permits to include the applicable BART control requirements or emission limits for each source.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on September 18, 2006, at 2:00 p.m. at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle in Building E, Room 201S. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Lola Brown, Office of Legal Services, at (512) 239-0348. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Lola Brown, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments/*. All comments should reference Rule Project Number 2006-022-116-EN. The comment period closes September 25, 2006. For further information, please contact Margaret Earnest, Air Quality Planning and Implementation Division, (512) 239-4581.

SUBCHAPTER M: BEST AVAILABLE RETROFIT TECHNOLOGY (BART)

§§116.1500, 116.1510, 116.1520, 116.1530, 116.1540

STATUTORY AUTHORITY

These new sections are proposed 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 other laws of the state. The new sections are also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property, including the esthetic enjoyment of air resources by the public and maintenance of adequate visibility; §382.011, concerning General Powers and Duties, which authorizes the commission to establish and control the level of quality to be maintained in the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a comprehensive plan for the control of the state's air; §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purpose of the TCAA; and §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits to construct new facilities or modify existing facilities that may emit air contaminants, or to operate a federal source, and to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under the TCAA.

The proposed new sections implement TWC, §5.103 and §5.105; and THSC, §§382.002, 382.011, 382.012, 382.017, and 382.051.

§116.1500. Definitions.

The following terms, when used in this subchapter, have the following meanings unless the context clearly indicates otherwise. For terms not defined in this section, the definitions contained in 40 Code of Federal Regulations (CFR) §51.301, as effective September 6, 2005, are incorporated by reference.

(1) **Best available retrofit technology (BART)-eligible source**--Any of the following stationary sources of air pollutants, including any reconstructed source, that was not in operation prior to August 7, 1962, and was in existence on August 7, 1977, and has the potential to emit 250 tons per year (including fugitive emissions, to the extent quantifiable) of any visibility-impairing air pollutant:

(A) fossil fuel-fired steam electric plants of more than 250 million British thermal units (BTU) per hour heat input;

(B) coal-cleaning plants (thermal dryers);

(C) kraft pulp mills;

(D) portland cement plants;

(E) primary zinc smelters;

(F) iron and steel mill plants;

(G) primary aluminum ore reduction plants;

(H) primary copper smelters;

(I) municipal incinerators capable of charging more than 250 tons of refuse per day;

(J) hydrofluoric, sulfuric, and nitric acid plants;

(K) petroleum refineries;

(L) lime plants;

(M) phosphate rock processing plants;

(N) coke oven batteries;

(O) sulfur recovery plants;

(P) carbon black plants (furnace process);

(Q) primary lead smelters;

(R) fuel conversion plants;

(S) sintering plants;

(T) secondary metal production facilities;

(U) chemical process plants;

(V) fossil fuel-fired boilers of more than 250 million BTUs per hour heat input;

(W) petroleum storage and transfer facilities with capacity exceeding 300,000 barrels;

(X) taconite ore processing facilities;

(Y) glass fiber processing plants; and

(Z) charcoal production facilities.

(2) **Visibility-impairing air pollutant**--Any of the following: nitrogen oxides, sulfur dioxide, or particulate matter.

§116.1510. Applicability and Exemption Requirements.

(a) The requirements of this subchapter apply to best available retrofit technology (BART)-eligible sources as defined in §116.1500 of this title (relating to Definitions).

(b) The owner or operator of a BART-eligible source may demonstrate, using a model and modeling guidelines approved by the commission, that the source does not cause or contribute to visibility impairment at a Class I area. A BART-eligible source that does not cause or contribute to visibility impairment at any Class I area is not subject to the requirements of §116.1520 or §116.1530 of this title (relating to Best Available Retrofit Technology (BART) Analysis and Best Available Retrofit Technology (BART) Control Implementation). A source is considered to cause or contribute to visibility impairment if it causes a visibility impairment of greater than 0.5 deciviews at any Class I area. The modeling demonstration must be submitted under seal of a Texas licensed professional engineer and must be received by the commission's Air Permits Division no later than April 30, 2007.

(c) The following BART-eligible sources are not subject to the requirements of §116.1520 or §116.1530 of this title for the indicated pollutant(s). Owners or operators claiming exemption under this subsection shall maintain records sufficient to demonstrate compliance with the exemption criteria,

and shall make such records available upon request of personnel from the commission or any local air pollution control agency having jurisdiction.

(1) Any BART-eligible source that has the potential to emit less than 500 tons per year of combined nitrogen oxides (NO_x) and sulfur dioxide (SO_2) and that is located more than 50 kilometers from any Class I area is not subject to BART for NO_x and SO_2.

(2) Any BART-eligible source that has the potential to emit less than 1,000 tons per year of combined NO_x and SO_2 and that is located more than 100 kilometers from any Class I area is not subject to BART for NO_x and SO_2.

(3) Any BART-eligible source that has the potential to emit less than 40 tons per year of NO_x or 40 tons per year of SO_2 is not subject to BART for NO_x or SO_2, respectively. Any BART-eligible source that has the potential to emit less than 15 tons per year of particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM_{10}) is not subject to BART for PM_{10}.

(d) BART-eligible electric generating units participating in the Clean Air Interstate Rule Trading Program are not subject to the requirements of §116.1520 or §116.1530 of this title for NO_x and SO_2.

§116.1520. Best Available Retrofit Technology (BART) Analysis.

(a) Except as provided under §116.1510(b), (c), or (d) of this title (relating to Applicability and Exemption Requirements), each best available retrofit technology (BART)-eligible source shall conduct an analysis of emissions control alternatives for all visibility-impairing pollutants. This analysis must include the identification of all available, technically feasible retrofit technologies, and for each technology identified, an analysis of the cost of compliance, the energy and non-air quality environmental impacts, the degree of visibility improvement in affected Class I areas resulting from the use of the control technology, the remaining useful life of the source, and any existing control technology present at the source. Based on this analysis, the owner or operator shall identify an emission control strategy as the prospective BART control strategy for the source. The determination of BART must be made according to 40 Code of Federal Regulations Part 51, Appendix Y, as effective September 6, 2005.

(b) As part of the BART analysis required in subsection (a) of this section, the owner or operator shall include detailed information documenting the projected hourly and annual emission limits for the selected BART control strategy.

(c) The owner or operator of each BART-eligible source shall submit a completed BART analysis to the commission's Air Permits Division under seal of a Texas licensed professional engineer. The completed BART analysis must be received by the commission's Air Permits Division no later than April 30, 2007.

§116.1530. Best Available Retrofit Technology (BART) Control Implementation.

(a) Each owner or operator of a best available retrofit technology (BART)-eligible source shall install and operate BART-required control equipment no later than five years after the United States Environmental Protection Agency has approved a Regional Haze State Implementation Plan for the State of Texas. Each owner or operator shall maintain the BART-required control equipment and establish procedures to ensure such equipment is properly and continuously operated and maintained.

(b) Prior to any installation of BART-required control equipment, each owner or operator of a BART-eligible source shall apply for a permit, permit amendment, permit alteration, applicable standard permit, or other enforceable mechanism under this chapter to establish emission limitations and codify the implementation of BART.

§116.1540. Exemption from Best Available Retrofit Technology (BART) Control Implementation.

The owner or operator of any best available retrofit technology (BART)-eligible source may apply for an exemption from the requirement to install, operate, and maintain BART-required control equipment, pursuant to the provisions of 40 Code of Federal Regulations §51.303. Any exemption request under this section requires initial approval from the executive director and final approval from the administrator of the United States Environmental Protection Agency (EPA). Exemption requests submitted to the EPA must be accompanied by written concurrence from the executive director.