

The Texas Commission on Environmental Quality (commission or TCEQ) is adopting the amendments to §116.12 and §116.150.

Sections 116.12 and 116.150 are adopted *with changes* to the proposed text as published in the August 27, 2010, issue of the *Texas Register* (35 TexReg 7676) and will be republished.

The adopted amendments to §116.12 and §116.150 will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Adopted Rules

On July 18, 1997, the EPA revised the ozone National Ambient Air Quality Standard (NAAQS), promulgating an ozone standard of 0.08 parts per million (ppm) measured over an eight-hour period (the eight-hour ozone NAAQS or standard) (62 *Federal Register* 38856, July 18, 1997). Different groups and states challenged the final eight-hour ozone NAAQS, and ultimately, the United States Supreme Court upheld the EPA's action setting the NAAQS, but found that the EPA had incorrectly implemented the eight-hour ozone NAAQS by classifying areas only under Part D, Subpart 1 of the Federal Clean Air Act (FCAA) Amendments of 1990 and remanding other issues to the District of Columbia (D.C.) Circuit Court of Appeals (*Whitman v. American Trucking*

Assoc., 121 S.Ct. 903 (2001)). On March 26, 2002, the D.C. Circuit Court of Appeals rejected the other challenges to the eight-hour ozone NAAQS (*American Trucking Assoc. v. EPA*, 283 F.3d 355 (D.C. Cir. 2002)). The EPA then proposed and adopted implementation rules to implement the eight-hour ozone NAAQS, addressing transition issues from the one-hour ozone NAAQS, the revocation of the one-hour ozone NAAQS, classification of areas for the eight-hour ozone NAAQS, and the specification of requirements relating to SIPs. EPA finalized designations for the 1997 eight-hour ozone NAAQS effective on June 15, 2004.

FCAA, §107 requires the EPA to designate areas nonattainment, attainment, or unclassifiable no later than one year after the EPA promulgates a new or revised NAAQS. For the ozone NAAQS, FCAA, §181 further requires that each area designated nonattainment shall be classified at the time of its designation, by operation of law, in accordance with Table 1 of that section. FCAA, §181, Table 1 prescribes the area class (ranging from marginal to extreme), the design value range (measured in ppm and in measurements relating to the one-hour ozone standard), and the primary standard attainment date (ranging from three years to 20 years after November 15, 1990, the effective date of the 1990 Amendments to the FCAA). Other specifics and exceptions are also provided in FCAA, §181. The classification scheme implemented by the United States Congress provided that areas with design values closer to attaining the one-hour ozone standard would have less time to attain the standard, and additional requirements

of FCAA, Part D, Subpart 2 impose specific, more stringent requirements on areas as the classifications increase from marginal to moderate (and the corresponding design values are further from attainment of the one-hour ozone standard).

The EPA rules implementing the 1997 eight-hour ozone standard were adopted in two phases: the Phase I Rule, 69 *Federal Register* 23951, April 30, 2004, addressed a number of implementation issues for the 1997 eight-hour ozone NAAQS, including how areas should be classified for the 1997 eight-hour ozone NAAQS (since the classification requirements of FCAA, §181 were based on the one-hour ozone standard, the EPA needed to propose and finalize a classification scheme appropriate for the eight-hour ozone standard in accord with FCAA, §181), and which one-hour ozone standard requirements should continue to apply under the 1997 eight-hour ozone NAAQS; and the Phase II Rule (70 *Federal Register* 71612, November 29, 2005), which addressed additional requirements.

In EPA's Phase I Rule, one of the issues that the EPA considered was the continued applicability of control requirements that applied in areas previously designated nonattainment for the one-hour ozone standard. As part of the Phase I Rule, the EPA considered several provisions of the FCAA that it stated were evidence of Congress' intent that certain obligations continue to apply when the EPA revises a NAAQS. The EPA stated that the FCCA, §175A(d) provided that areas could not remove controls that

were mandated by the FCAA, Part D, Subpart 2 even after the area attained the NAAQS and was redesignated to attainment. At most, a state could move FCAA, Part D, Subpart 2 controls to the contingency plan provisions of the SIP. Another provision that the EPA reviewed and discussed in the Phase I Rule was FCAA, §172(e), which provides that if the EPA revises a NAAQS to make it be less stringent, then the EPA must promulgate regulations applicable to areas that have not attained the original NAAQS to require controls that are no less stringent than controls that applied to areas designated nonattainment prior to such relaxation. The EPA concluded in the Phase I Rule that "if Congress intended areas to remain subject to the same level of control where a NAAQS was relaxed, they also intended that such controls not be weakened where the NAAQS is made more stringent" ((see 69 *Federal Register* 23972), April 30, 2004).

Based on this premise, the EPA adopted rules that provided for certain requirements to continue to apply to areas that were designated nonattainment for the one-hour ozone standard, depending on how they were designated for the eight-hour ozone NAAQS. Areas that were designated nonattainment for both the one-hour ozone and eight-hour ozone NAAQS were required to continue to apply certain requirements that applied under the one-hour ozone standard, with specific exceptions (40 Code of Federal Regulations (CFR) §51.905(a)(1)). These requirements included reasonably available control technology (RACT), inspection and maintenance programs (I/M), major source applicability cut-offs for purposes of RACT, rate of progress reductions (ROP), stage II

vapor recovery, clean fuels fleet programs, clean fuel programs for boilers, transportation control measures, enhanced ambient monitoring requirements, required transportation controls, vehicle miles traveled requirements, and nitrogen oxides requirements (40 CFR §51.900(f)). The EPA also provided that nonattainment area New Source Review (NSR) requirements required by FCAA, §§172(c)(5), 173, and 182 based on the area's previous one-hour ozone NAAQS classification were no longer required elements of an approvable SIP (40 CFR §51.905(e)(4)). The EPA also provided that areas would no longer have to meet requirements for conformity, the development of maintenance plans, or the penalty fee obligation for severe areas (40 CFR §51.905).

The EPA's Phase I Rule provided that areas that were nonattainment for the one-hour ozone NAAQS were not required to continue to use the more stringent major source thresholds and emission offset requirements of the one-hour ozone standard when implementing NSR and Title V permitting for the 1997 eight-hour ozone standard.

All areas in Texas designated nonattainment for the 1997 eight-hour ozone NAAQS that were also designated nonattainment for the one-hour ozone NAAQS were classified at a "less stringent" level. Beaumont-Port Arthur (BPA) was classified as "serious" for the one-hour ozone NAAQS, but was classified as "moderate" for the 1997 eight-hour ozone NAAQS. Houston-Galveston-Brazoria (HGB) was classified as "severe" for the one-hour ozone NAAQS and originally classified as "moderate" for the 1997 eight-hour ozone

NAAQS. The EPA has since reclassified the HGB area to "severe" for the 1997 eight-hour ozone NAAQS, pursuant to a voluntary reclassification request by the Governor of Texas. The Dallas-Fort Worth (DFW) area was classified as "serious" for the one-hour ozone NAAQS, and was classified as "moderate" for the 1997 eight-hour ozone NAAQS. The El Paso area was nonattainment for the one-hour ozone NAAQS, classified as "serious," but designated attainment for the 1997 eight-hour ozone NAAQS.

So, for example, a regulated entity in the HGB area triggered nonattainment review if the potential to emit was equal to or greater than 25 tons per year (tpy) under the "severe" classification for the one-hour ozone NAAQS, but only triggered nonattainment review under the "moderate" classification for the eight-hour ozone NAAQS if the potential to emit was equal to or greater than 100 tpy. Under the existing rules, since the HGB area has been reclassified to "severe" for the 1997 eight-hour ozone NAAQS, regulated entities must again utilize the same major source threshold and emission offset requirements that previously applied under the one-hour ozone standard.

After designations for the 1997 eight-hour ozone standard and the final Phase I Rule were effective, the commission proceeded with rulemaking to implement the requirements for the 1997 eight-hour ozone standard. The commission updated Chapter 116 to implement the changes from the Phase I Rule regarding the application of the 1997 eight-hour ozone standard for nonattainment NSR. On May 25, 2005, the

commission adopted changes to Chapter 116, effective June 16, 2005, to provide that for the HGB, DFW, and BPA eight-hour ozone nonattainment areas, if the EPA promulgated rules requiring NSR permit applications in those areas to be evaluated for nonattainment NSR according to that area's one-hour ozone classification, then each application would be evaluated in accordance with the area's one-hour ozone classification. "Evaluation" was specified as including both the threshold for determining if there was a modification as well as the ratio of offsets required, along with any other applicable requirement that depended upon an area's nonattainment classification. In adopting this rule, the commission noted that although the Phase I Rule provided for the application of the eight-hour ozone standard for nonattainment NSR, the EPA had granted a partial reconsideration of the Phase I Rule specifically regarding that issue, and the result of the reconsideration could be a return to the one-hour ozone standard for application of nonattainment NSR. Because of this concern, the commission adopted contingency language in §116.150, and in the table footnotes in the figure located in the definition of major modification in §116.12. This contingency language was adopted to be effective in the event that the EPA completed rulemaking to require states to return to a one-hour ozone standard trigger for federal nonattainment NSR evaluations. In this rulemaking, the commission is removing this previously adopted contingency language.

The EPA Phase I Rule, and particularly the EPA's determination that areas designated as

nonattainment under the one-hour ozone standard would no longer be subject to one-hour nonattainment NSR requirements, was successfully challenged in *South Coast Air Quality Management District v. Environmental Protection Agency*, 472 F.3d 882 (D.C. Cir. 2006) and the rule was partially vacated and remanded to the EPA, as made clear in its revised opinion on June 8, 2007 (*South Coast Air Quality Management District v. Environmental Protection Agency*, 489 F.3d 1245 (D.C. Cir. 2007)). The *South Coast* decision was upheld by the United States Supreme Court on January 14, 2008.

In a guidance memo issued on October 3, 2007, the EPA stated that it interpreted the *South Coast* ruling as restoring NSR applicability thresholds and emission offset requirements pursuant to classifications under the one-hour ozone standard. The EPA also noted in this guidance memo that it intended to conduct rulemaking to conform the NSR regulations to the *South Coast* decision. EPA stated that it intended to issue an immediately-effective final rule under the authority of the "Good Cause" provision of the Federal Administrative Procedure Act to restore the NSR applicability thresholds and emission offsets associated with designated one-hour ozone nonattainment areas, and would begin a separate notice and comment rulemaking to address longer-term applicability of one-hour ozone NSR requirements, in particular, the conditions and mechanisms under which those one-hour ozone NSR requirements would cease to apply for NSR purposes. Lastly, the EPA strongly encouraged states to comply with the *South Coast* decision as quickly as possible.

Because the one-hour ozone standard has been revoked, the EPA is no longer making redesignations or reclassifications under this standard. However, the EPA is making determinations under its Clean Data Policy that areas are currently attaining the one-hour ozone NAAQS. In its proposal to determine that the Southern New Jersey portion of the Philadelphia Metro nonattainment area attained the one-hour ozone NAAQS (see *73 Federal Register 42727*, July 23, 2008), the EPA discussed the effect of the D.C. Circuit Court of Appeals' decision vacating a portion of the 1997 eight-hour ozone Phase I Implementation Rule (*South Coast Air Quality Management District v. EPA*, 472 F3d 882 (2006) and 489 F3d 1295 (2007)). The EPA stated: "With respect to the challenges to the anti-backsliding provisions of the rule, the Court vacated three provisions that would have allowed States to remove from the SIP or to not adopt three one-hour obligations once the one-hour ozone NAAQS was revoked (including one-hour nonattainment NSR requirements). {T}he three provisions noted previously . . . were vacated by the Court. As a result, States must continue to meet the obligations for one-hour NSR Currently, EPA is developing two proposed rules to address the Court's vacatur and remand with respect to these three requirements. EPA will address in this proposed rule how the one-hour obligations that currently continue to apply under EPA's anti-backsliding rule (as interpreted by the Court) apply where the EPA has made a determination that the area attained the one-hour ozone NAAQS by its attainment date." One possible outcome from the EPA rulemaking on this issue may be to direct

states that want to remove one-hour ozone nonattainment NSR requirements to submit SIP revisions demonstrating that removing one-hour ozone nonattainment NSR requirements will not interfere with attainment or maintenance of the ozone NAAQS.

Because the EPA has not completed any rulemaking to implement the *South Coast* decision regarding NSR anti-backsliding, states must decide how to implement, and give effect to, the court's decision. Any revision to a SIP that could interfere with or does not comply with the FCAA and the SIP because it has the effect of making the approved SIP less stringent may be considered as "backsliding" from those requirements and would not be approvable by the EPA. Given the uncertainty of the future EPA rulemaking, and the finality of the *South Coast* decision as of January 14, 2008, the commission is removing the previously adopted contingency language, in addition to other changes, to clarify the requirements for nonattainment NSR. Without effective and understandable guidance from the EPA, through rulemaking or otherwise, the commission is left to determine the most reasonable course of action. The *South Coast* decision, upheld by the United States Supreme Court, makes clear that areas may not ignore one-hour ozone nonattainment NSR requirements.

The commission had previously adopted rules specifying that sources in the BPA, HGB, and DFW nonattainment areas should apply eight-hour ozone nonattainment NSR requirements. The commission is now deleting certain portions of the definition in

§116.12(18)(A), concerning major modification and the requirements of §116.150(d).

This rulemaking makes clear that permitted facilities in areas that were designated nonattainment for the one-hour ozone standard are subject to the major source thresholds and emission offsets of the one-hour ozone standard upon the effective date of this rulemaking unless one of the four exceptions identified in §116.150(a) apply.

Staff has previously presented these rule amendments (Rule Project 2008-030-116-PR) to the commission for consideration. At the February 25, 2009 , commissioner's agenda, the commission remanded the rule project to the executive director's staff in anticipation of additional direction or action by the EPA, because EPA continued to indicate in various federal notices its intent to complete rulemaking regarding NSR anti-backsliding requirements in response to the *South Coast* decision. EPA's proposed rule to implement the 1997 eight-hour ozone NAAQS revision on subpart 1 reclassification and anti-backsliding provisions under the former one-hour ozone standard was published in the January 16, 2009, *Federal Register*, but has not yet been finalized. This rulemaking removes language regarding the exemptions from nonattainment new source review (NNSR) that were vacated by *South Coast*.

On September 23, 2009, the EPA published notice of the proposed disapproval of past revisions to the Texas NNSR SIP (74 *Federal Register* 48467, September 23, 2009) that are related to these amendments, and finalized this disapproval on September 15, 2010

(74 *Federal Register* 56424). EPA disapproved the changes the commission made to several sections of Chapter 116. Two of these changes were the changes that the commission adopted to §116.12 and §116.150 to implement the Phase I rule implementing the 1997 eight-hour ozone standard, discussed earlier in this preamble, which the commission proposed to change as part of this action. As discussed further in the Section by Section Discussion section of this preamble, the commission is adopting changes to these sections to remove the disapproved language and to assure that NNSR permitting requirements are clear.

Additionally, on October 20, 2010, EPA published a final rule to approve the redesignation of the BPA 1997 eight-hour ozone nonattainment area to attainment, and clarify EPA's previous approval of the El Paso Section 110(a)(1) maintenance plan for the 1997 eight-hour ozone standard (75 *Federal Register* 64675, October 20, 2010). This final rule noted EPA's new position regarding NSR anti-backsliding and whether one-hour ozone major source thresholds and emission offset requirements continue to apply in an area. EPA noted "after final redesignation to attainment for the 1997 eight-hour ozone standard, EPA does not require the continued application of one-hour anti-backsliding nonattainment NSR, if Texas interprets its SIP as applying PSD to BPA in these circumstances (see 75 *Federal Register* 64675 and 64677, October 20, 2010). The EPA also clarified that, with respect to El Paso, "EPA has had further opportunity to consider the applicable statutory and regulatory provisions and the decision in *South*

Coast As a result, we no longer believe that the Clean Air Act requires a separate Section 110(l) analysis to replace one-hour nonattainment NSR with prevention of significant deterioration (PSD) once an area has been redesignated to attainment for the 1997 eight-hour ozone standard, or has an approved Section 110(a)(1) maintenance plan for that standard. In sum, we believe that the approach to the nonattainment NSR/PSD transition that we are adopting here with respect to BPA should also be extended to El Paso. Thus, as long as the Texas NSR SIP is clear that the PSD SIP requirements apply to an area such as El Paso, then that is all that is required by EPA" (see 75 *Federal Register* 64675 and 64677, October 20, 2010). The commission appreciates this clear statement from EPA, and agrees that the SIP should be clear on this issue. Therefore, as discussed in this preamble, although the Texas SIP has always applied PSD in an area upon redesignation, the commission is concurrently adopting changes to Chapter 116 to make clear that PSD applies once an area has been redesignated to attainment for a particular criteria pollutant.

The amendments confirm that the BPA area is no longer subject to NNSR. As discussed previously in this preamble, on October 20, 2010, EPA published the redesignation of the BPA area to attainment for the 1997 eight-hour ozone NAAQS, and a determination that the BPA area had attained the one-hour ozone NAAQS. In this action, EPA determined that the BPA area need not be subject to NNSR as an anti-backsliding requirement. Thus, under the amendment to §116.150(a)(1), the BPA area is not subject

to NNSR for either the one-hour ozone or 1997 eight-hour ozone NAAQS. Additionally, the amendments confirm that the El Paso area is no longer subject to NNSR. On January 15, 2009, EPA published its approval of a maintenance plan for the El Paso area for the 1997 eight-hour ozone standard. As discussed previously in this preamble, in EPA's October 20, 2010, action for the BPA area, EPA stated that "we no longer believe that the Clean Air Act requires a separate 110(l) analysis to replace 1-hour nonattainment NSR with PSD once an area has ... an approved 110(a)(1) maintenance plan for that standard" (see *75 Federal Register* 64677). Taken together, these statements reflect an EPA determination that NNSR is no longer required for purposes of anti-backsliding for the El Paso area. Thus, under the amendment to §116.150(a)(4), the El Paso area is not subject to NNSR for either the one-hour ozone or 1997 eight-hour ozone NAAQS.

This is an issue of extreme importance to the commission, the regulated community and the public, and there should be no room for ambiguity or argument. In an effort to ensure that TCEQ regulatory requirements regarding the NNSR permitting program are clear, meet the requirements of the FCAA, and are approvable into the SIP, the commission is adopting the following amendments to eliminate any deficiencies that would prevent approval of the rule changes.

Additionally, in order to prevent future confusion over designations and classifications

and their related applicability thresholds and emissions offset requirements, the commission is adopting concurrent amendments to the definitions of maintenance area, and nonattainment area in 30 TAC Chapter 101, General Air Quality Rules.

Section by Section Discussion

§116.12, Nonattainment and Prevention of Significant Deterioration Definitions

The commission is changing footnote 1 in Table I, paragraph (18)(A) to remove the reference to the CFR and replace it with a reference the definition of "Nonattainment area" in 30 TAC §101.1. This reference is no longer necessary because the definition of nonattainment is being updated and also references the appropriate part of the CFR.

The commission is also changing the term "major modification level" to "significant level" in footnote 2 in Table 1 in §116.12(18)(A). This will ensure that the term used in the footnote matches the heading in the third column of the table and help eliminate any confusion resulting from the use of different terms. The commission is also removing footnotes 6 and 7 from Table 1 in §116.12(18)(A).

The commission is making a change from the proposal to remove the second sentence of footnote 3 of Table I in §116.12(18) regarding the El Paso ozone nonattainment area. As the result of the EPA's final notice regarding the Beaumont/Port Arthur ozone nonattainment area redesignation (see 75 *Federal Register* 64675, October 20, 2010), which clarified the EPA's approval of the El Paso area's eight-hour ozone nonattainment

maintenance plan, the requirement for El Paso in footnote 3 is no longer necessary.

Footnote 6 indicates that the EPA must complete rulemaking before NSR applications are evaluated according to their one-hour classification. However, the EPA has stated that: the *South Coast* decision is self-implementing; did not require rulemaking by the EPA to be effective; and NSR applications should be evaluated based upon one-hour classifications, if they are more stringent than an area's eight-hour classification, and has specifically disapproved footnote 6 (see 75 Federal Register 56424, September 15, 2010). Footnote 7 states that permit applications in areas designated as nonattainment for ozone under FCAA, Title I, Part D, Subpart 1 (42 United States Code (USC), §7502) will be evaluated as if that area was designated as Marginal. However, Texas does not have any areas currently designated as nonattainment for ozone under FCAA, Title I, Part D, Subpart 1. The San Antonio area was originally designated nonattainment-deferred for the 1997 eight-hour ozone NAAQS, but has since been designated attainment.

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

The commission is amending §116.150(a) by removing §116.150(a)(1) and (2).

Subsection (a) would then be amended to apply the requirements of this subsection as of the date of issuance of the permit and to add a requirement for continued applicability of NNSR until the EPA has made a finding of attainment; the EPA has approved the

removal of nonattainment NSR requirements from the area; the EPA has determined that PSD requirements apply in the area; or that nonattainment NSR is no longer required for the purposes of antibacksliding.

The commission is also removing §116.150(d) from the rule. Subsection (d) contains language similar to that in footnote 6 to Table 1 in §116.12(18)(A). This language indicates that the EPA must complete rulemaking before NSR applications are evaluated according to their one-hour classification. However, the EPA has stated that: the *South Coast* decision is self-implementing; did not require rulemaking by the EPA to be effective; and NSR applications should be evaluated based upon one-hour classifications, if they are more stringent than an area's eight-hour classification, and has specifically disapproved §116.150(d) and similar language in footnote 6 (see 75 *Federal Register* 56424, September 15, 2010). Additionally, the netting requirement and exceptions in §116.150(d) are redundant to the same requirement and exceptions in §116.150(c) and thus, unnecessary. The commission is also renumbering the remainder of §116.150 to reflect the removal of §116.150(d) and minor changes to references in §116.150(b) to reflect the renumbering. The commission is changing §116.150(e) to reflect changes in a concurrent rulemaking in Chapter 101.

As the result of comments received on the proposal of these amendments the commission is changing: §116.150(a)(1) - (4) to make clear that the conditions on which

these exceptions are based must exist on the date of issuance of the permit;

§116.150(d)(3)(A) to make clear that this exception only applies in a serious or severe ozone nonattainment area; and §116.150(d)(3)(B) to make clear that this exception only applies in a serious or severe ozone nonattainment area and to specifically state that the best available control technology (BACT) equivalent required by the rule is federal BACT as identified in §116.160(c)(1)(A).

Final Regulatory Impact Analysis Determination

The commission reviewed the adopted rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis.

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 specific intent of the revisions is to remove certain definitions that are duplicative, and to remove previously adopted contingency language that would require EPA final rulemaking before NSR applications are evaluated

according to the one-hour classification of the area where the facility is located. These changes will not adversely affect 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 a material way since they codify the effect a federal district court ruling that has been upheld by the United States Supreme Court in *South Coast*, as discussed elsewhere in this preamble.

Additionally, even if the rules met the definition of a major environmental rule, the rulemaking does not 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.

The adopted rules would implement requirements of the FCAA. Under 42 USC, §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the NAAQS within the state. While 42 USC,

§7410 generally does not require specific programs, methods, or emission reductions in order to meet the standard, state SIPs must include specific requirements as specified by 42 USC, §7410. The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that their SIPs provide for implementation, attainment, maintenance, and enforcement of the NAAQS within the state. One of the requirements of 42 USC, §7410 is for states to include programs for the regulation of the modification and construction of any stationary source within the area covered by the plan as necessary to assure that the NAAQS are achieved, including a permit program as required in FCAA, Parts C and D, or NSR. Additionally, once states have developed SIPs, and those plans are approved by the EPA, the FCAA prescribes, in 42 USC, §7502(e) that the EPA, in modifying a NAAQS, shall promulgate rules that apply to all areas that have not attained the previous NAAQS that provide for controls that are no less stringent than the controls that previously applied to the area. The district court in *South Coast* found that NSR was a "control," and vacated the EPA's Phase I rules that provided that the major source thresholds and offset requirements that applied as a result of an area's

designation and classification under the one-hour ozone standard were no longer necessary. Until the EPA completes rulemaking to further interpret the applicability of the NSR permitting program in the context of 42 USC, §7502(e) and revisions to the ozone NAAQS, state rules that allow NSR review to rely upon designations and classifications for the eight-hour ozone standard in areas previously designated nonattainment for the one-hour ozone standard conflict with the *South Coast* ruling.

The requirement to provide a fiscal analysis of 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 rules from the full analysis unless the rule was a major environmental rule that exceeded a federal law.

Because of the ongoing need to meet federal requirements, the commission routinely proposes and adopts rules incorporating or designed to satisfy specific federal requirements. The legislature is presumed to understand this federal scheme. If each rule proposed by the commission to meet a federal requirement was considered to be a major environmental rule that exceeds federal law, then each of those rules would require the full regulatory impact analysis (RIA) 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 RIA for rules that are extraordinary in nature. While the adopted rules may have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA, and in fact creates no additional impacts since the rules do not exceed the requirement to attain and maintain the NAAQS. For these reasons, the adopted rules fall under the exception in Texas Government Code, §2001.0225(a), because they are required by, and do not exceed, federal law, including the SIP. In addition, these rules do not exceed any contract between the state and a federal agency.

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 RIA requirements is also supported by a change made to the 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" (see Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. As discussed in this analysis and elsewhere in this preamble, the commission has substantially complied with the requirements of Texas

Government Code, §2001.0225.

The adopted rules implement requirements of the FCAA, specifically to adopt and implement SIPs to attain and maintain the NAAQS, including a requirement to adopt and implement permit programs. The specific intent of the adopted rule revisions is to remove certain definitions that are duplicative, and previously adopted contingency language that would require EPA final rulemaking before NSR applications are evaluated according to the one-hour classification of the area where the facility is located, in order to avoid conflict with the *South Coast* decision. These amendments were not developed solely under the general powers of the agency, but are authorized by specific sections of Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the Statutory Authority section of these rules, including Texas Health and Safety Code, §§382.011, 382.012, and 382.017. Therefore, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States

Constitution or §17 or §19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the adopted rulemaking action under the Texas Government Code, §2007.043. The primary purpose of this rulemaking action, as discussed elsewhere in this preamble, is to remove certain definitions that are duplicative, and previously adopted contingency language that would require EPA final rulemaking before NSR applications are evaluated according to the one-hour classification of the area where the facility is located.

The adopted rules will not create any additional burden on private real property. The rules will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. This rulemaking also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the

absence of the governmental action. Therefore, the rulemaking will not cause a taking 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 commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the CMP, 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)). These amendments will indirectly benefit the environment because reduced emissions resulting from the more stringent major source thresholds and emission offset requirements of the one-hour ozone standard ensure that there will

be fewer adverse impacts to public health and the environment. 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)). Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

Effect on Sites Subject to the Federal Operating Permits Program

Chapter 116 is an applicable requirement of 30 TAC Chapter 122, Federal Operating Permits Program. Owners and operators subject to the federal operating permit program must, consistent with the revision process in Chapter 122, upon the effective date of the adopted rulemaking, revise their operating permit to include the new Chapter 116 requirements. Additionally, sources subject to the adopted rules may become subject to the federal operating permit program.

Public Comment

The commission held a public hearing on September 20, 2010. The comment period closed on September 27, 2010. The commission received comments from The United States Environmental Protection Agency (EPA), the Texas Industry Project (TIP), and Zephyr Environmental Corp. (ZEC).

RESPONSE TO COMMENTS

The EPA commented that most of TCEQ's proposed changes meet federal requirements. The EPA also stated that TCEQ makes it clear that NNSR applies based on the attainment status of the area where the source is located on the date of permit issuance rather than the date of submittal of a complete permit application.

The commission appreciates the EPA's support.

The EPA commented that the exceptions to the requirement for NNSR based on nonattainment status on the date of issuance of the permit in §116.150(a)(1-4) must also exist on the date of issuance of the permit in order to apply.

The commission agrees with this comment and is making changes to §116.150(a)(1) - (4) to make clear that the conditions on which these exceptions are based must exist on the date of issuance of the permit.

The EPA also commented that the exception in §116.150(d)(3)(A) that allows major stationary sources with a potential to emit less than 100 tpy to forego NNSR if the project increases are offset by a ratio of 1.3 to 1 only applies in serious or severe ozone nonattainment areas.

The commission agrees with this comment and is changing

§116.150(d)(3)(A) to make clear that this exception only applies in a serious or severe ozone nonattainment area.

The EPA commented that the exception in §116.150(d)(3)(B) that allows major stationary sources with a potential to emit greater than 100 tpy to substitute BACT for lowest achievable emissions rate is limited to serious and severe ozone nonattainment area and must specify the federal definition of BACT rather than the state BACT for minor sources.

The commission agrees with this comment and is changing

§116.150(d)(3)(B) to make clear that this exception only applies in a serious or severe ozone nonattainment area. Additionally, the commission is changing §116.150(d)(3)(B) to specifically state that the BACT equivalent required by the rule is federal BACT as identified in §116.160(c)(1)(A).

TIP commented that this rulemaking was unnecessary: to ensure anti-backsliding for any Texas ozone nonattainment area; because it would be superseded by a pending EPA rulemaking; and because it would create an undue hardship for business.

The commission respectfully disagrees with the comments. Due to EPA's inconsistent positions on anti-backsliding requirements and failure to

complete rulemaking to fully implement the D.C. Circuit's opinion in *South Coast v. EPA*, as discussed earlier in this preamble, there has been confusion and concern regarding anti-backsliding requirements, as reflected in other comments received on this rulemaking. The rulemaking was necessary to remove prior adopted rule language that conflicted with then-applicable EPA guidance regarding applicability of major source thresholds and emission offset requirements. The commission constantly strives for clarity in its rules, in order for all interested persons to both understand and implement commission rules appropriately under state law. As discussed earlier in this preamble, EPA has issued a final rule redesignating the BPA area as attainment for the 1997 eight-hour ozone standard, and discussing NSR requirements that apply in the BPA area as of October 20, 2010, (75 *Federal Register* 64675). While this final rule provides additional guidance regarding EPA's opinions concerning anti-backsliding requirements, this rule does not have general applicability, and therefore, does not resolve these issues statewide, as assumed by the commenter. Additionally, as discussed elsewhere in this preamble, EPA specifically disapproved the rule language currently in effect regarding anti-backsliding in §116.10(18) and §116.150(d). Regarding the commenters concern that the rule, if adopted, would create an undue hardship for business, the commenter provided no information to support either the

type or scope of hardship. No changes were made to the rules as a result of these comments.

Zephyr commented that it supported the changes to §116.150(a)(1) - (4) and TCEQ's efforts to obtain a one-hour ozone attainment designation from the EPA for El Paso County.

The commission appreciates Zephyr's support.

SUBCHAPTER A: DEFINITIONS

§116.12

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code §5.102, concerning General Powers, §5.103, concerning Rules, and §5.105 concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the Texas Water Code; Texas Health and Safety Code, §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the Texas Clean Air Act (TCAA); §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a comprehensive plan for the proper control of the state's air; and §382.051, concerning Permitting Authority of the Commission, which authorizes the commission to issue permits to construct a new facility or modify an existing facility that may emit air contaminants, and authority to adopt rules necessary to comply with changes in federal law or regulations applicable to permits issued under the TCAA.

The amendment implements Texas Water Code, §5.103; and Texas Health and Safety Code, §§382.017, 382.012, and 382.051.

§116.12. Nonattainment and Prevention of Significant Deterioration Review Definitions.

Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. The terms in this section are applicable to permit review for major source construction and major source modification in nonattainment areas. In addition to the terms that are defined by the TCAA, and in §101.1 of this title (relating to Definitions), the following words and terms, when used in Chapter 116, Subchapter B, Divisions 5 and 6 of this title (relating to Nonattainment Review Permits and Prevention of Significant Deterioration Review); and Chapter 116, Subchapter C, Division 1 of this title (relating to Plant-Wide Applicability Limits), have the following meanings, unless the context clearly indicates otherwise.

(1) Actual emissions--Actual emissions as of a particular date are equal to the average rate, in tons per year, at which the unit actually emitted the pollutant during the 24-month period that precedes the particular date and that is representative of normal source operation, except that this definition shall not apply for calculating whether a significant emissions increase has occurred, or for establishing a plant-wide applicability limit. Instead, paragraph (3) of this section relating to baseline actual emissions shall apply for this purpose. The executive director shall allow the use of a different time period upon a determination that it is more representative of normal

source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period. The executive director may presume that the source-specific allowable emissions for the unit are equivalent to the actual emissions, e.g., when the allowable limit is reflective of actual emissions. For any emissions unit that has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

(2) Allowable emissions--The emissions rate of a stationary source, calculated using the maximum rated capacity of the source (unless the source is subject to federally enforceable limits that restrict the operating rate, or hours of operation, or both), and the most stringent of the following:

(A) the applicable standards specified in 40 Code of Federal Regulations Part 60 or 61;

(B) the applicable state implementation plan emissions limitation including those with a future compliance date; or

(C) the emissions rate specified as a federally enforceable permit condition including those with a future compliance date.

(3) Baseline actual emissions--The rate of emissions, in tons per year, of a federally regulated new source review pollutant.

(A) For any existing electric utility steam generating unit, baseline actual emissions means the rate, in tons per year, at which the unit actually emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the five-year period immediately preceding when the owner or operator begins actual construction of the project. The executive director shall allow the use of a different time period upon a determination that it is more representative of normal source operation.

(B) For an existing facility (other than an electric utility steam generating unit), baseline actual emissions means the rate, in tons per year, at which the facility actually emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the ten-year period immediately preceding either the date the owner or operator begins actual construction of the project, or the date a complete permit application is received for a permit. The rate shall be adjusted downward to exclude any emissions that would have exceeded an emission limitation with which the major stationary source must currently comply with the exception of those required under 40 Code of Federal Regulations Part 63, had such major stationary

source been required to comply with such limitations during the consecutive 24-month period.

(C) For a new facility, the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and for all other purposes during the first two years following initial operation, shall equal the unit's potential to emit.

(D) The actual rate shall be adjusted downward to exclude any non-compliant emissions that occurred during the consecutive 24-month period. For each regulated new source review pollutant, when a project involves multiple facilities, only one consecutive 24-month period must be used to determine the baseline actual emissions for the facilities being changed. A different consecutive 24-month period can be used for each regulated new source review pollutant. The rate shall not be based on any consecutive 24-month period for which there is inadequate information for determining annual emissions, in tons per year, and for adjusting this amount. Baseline emissions cannot occur prior to November 15, 1990.

(E) The actual emissions rate shall include fugitive emissions to the extent quantifiable. Until March 1, 2016, emissions previously demonstrated as emissions events or historically exempted under Chapter 101 of this title (relating to

General Air Quality Rules) may be included to the extent that they have been authorized, or are being authorized.

(4) Basic design parameters--For a process unit at a steam electric generating facility, the owner or operator may select as its basic design parameters either maximum hourly heat input and maximum hourly fuel consumption rate or maximum hourly electric output rate and maximum steam flow rate. When establishing fuel consumption specifications in terms of weight or volume, the minimum fuel quality based on British thermal units content shall be used for determining the basic design parameters for a coal-fired electric utility steam generating unit. The basic design parameters for any process unit that is not at a steam electric generating facility are maximum rate of fuel or heat input, maximum rate of material input, or maximum rate of product output. Combustion process units will typically use maximum rate of fuel input. For sources having multiple end products and raw materials, the owner or operator shall consider the primary product or primary raw material when selecting a basic design parameter. The owner or operator may propose an alternative basic design parameter for the source's process units to the executive director if the owner or operator believes the basic design parameter as defined in this paragraph is not appropriate for a specific industry or type of process unit. If the executive director approves of the use of an alternative basic design parameter, that basic design parameter

shall be identified and compliance required in a condition in a permit that is legally enforceable.

(A) The owner or operator shall use credible information, such as results of historic maximum capability tests, design information from the manufacturer, or engineering calculations, in establishing the magnitude of the basic design parameter.

(B) If design information is not available for a process unit, the owner or operator shall determine the process unit's basic design parameter(s) using the maximum value achieved by the process unit in the five-year period immediately preceding the planned activity.

(C) Efficiency of a process unit is not a basic design parameter.

(5) Begin actual construction--In general, initiation of physical on-site construction activities on an emissions unit that are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework, and construction of permanent storage structures. With respect to a change in method of operation, this term refers to those on-site activities other than preparatory activities that mark the initiation of the change.

(6) Building, structure, facility, or installation--All of the pollutant-emitting activities that belong to the same industrial grouping, are located in one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities are considered to be part of the same industrial grouping if they belong to the same "major group" (i.e., that have the same two-digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 supplement.

(7) Clean coal technology--Any technology, including technologies applied at the precombustion, combustion, or post-combustion stage, at a new or existing facility that will achieve significant reductions in air emissions of sulfur dioxide or oxides of nitrogen associated with the utilization of coal in the generation of electricity, or process steam that was not in widespread use as of November 15, 1990.

(8) Clean coal technology demonstration project--A project using funds appropriated under the heading "Department of Energy-Clean Coal Technology," up to a total amount of \$2.5 billion for commercial demonstration of clean coal technology, or similar projects funded through appropriations for the United States Environmental Protection Agency. The federal contribution for a qualifying project shall be at least 20% of the total cost of the demonstration project.

(9) Commence--As applied to construction of a major stationary source or major modification, means that the owner or operator has all necessary preconstruction approvals or permits and either has:

(A) begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

(B) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

(10) Construction--Any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) that would result in a change in actual emissions.

(11) Contemporaneous period--For major sources the period between:

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

and

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

(12) *De minimis* threshold test (netting)--A method of determining if a proposed emission increase will trigger nonattainment or prevention of significant deterioration review. The summation of the proposed project emission increase in tons per year with all other creditable source emission increases and decreases during the contemporaneous period is compared to the significant level for that pollutant. If the significant level is exceeded, then prevention of significant deterioration and/or nonattainment review is required.

(13) Electric utility steam generating unit--Any steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than 25 megawatts electrical output to any utility power distribution system for sale. Any steam supplied to a steam distribution system for the purpose of providing steam to a steam-electric generator that would produce electrical energy for sale is included in determining the electrical energy output capacity of the affected facility.

(14) Federally regulated new source review pollutant--As defined in subparagraphs (A) - (D) of this paragraph:

(A) any pollutant for which a national ambient air quality standard has been promulgated and any constituents or precursors for such pollutants identified by the United States Environmental Protection Agency;

(B) any pollutant that is subject to any standard promulgated under Federal Clean Air Act (FCAA), §111;

(C) any Class I or II substance subject to a standard promulgated under or established by FCAA, Title VI; or

(D) any pollutant that otherwise is subject to regulation under the FCAA; except that any or all hazardous air pollutants either listed in FCAA, §112 or added to the list under FCAA, §112(b)(2), which have not been delisted under FCAA, §112(b)(3), are not regulated new source review pollutants unless the listed hazardous air pollutant is also regulated as a constituent or precursor of a general pollutant listed under FCAA, §108.

(15) Lowest achievable emission rate--For any emitting facility, that rate of emissions of a contaminant that does not exceed the amount allowable under applicable

new source performance standards promulgated by the United States Environmental Protection Agency under 42 United States Code, §7411, and that reflects the following:

(A) the most stringent emission limitation that is contained in the rules and regulations of any approved state implementation plan for a specific class or category of facility, unless the owner or operator of the proposed facility demonstrates that such limitations are not achievable; or

(B) the most stringent emission limitation that is achieved in practice by a specific class or category of facilities, whichever is more stringent.

(16) Major facility--Any facility that emits or has the potential to emit 100 tons per year or more of the plant-wide applicability limit (PAL) pollutant in an attainment area; or any facility that emits or has the potential to emit the PAL pollutant in an amount that is equal to or greater than the major source threshold for the PAL pollutant in Table I of this section for nonattainment areas.

(17) Major stationary source--Any stationary source that emits, or has the potential to emit, a threshold quantity of emissions or more of any air contaminant (including volatile organic compounds (VOCs) for which a national ambient air quality standard has been issued. The major source thresholds are identified in Table I of this

section for nonattainment pollutants and the major source thresholds for prevention of significant deterioration pollutants are identified in 40 Code of Federal Regulations (CFR) §51.166(b)(1). A source that emits, or has the potential to emit a federally regulated new source review pollutant at levels greater than those identified in 40 CFR §51.166(b)(1) is considered major for all prevention of significant deterioration pollutants. A major stationary source that is major for VOCs or nitrogen oxides is considered to be major for ozone. The fugitive emissions of a stationary source shall not be included in determining for any of the purposes of this definition whether it is a major stationary source, unless the source belongs to one of the categories of stationary sources listed in 40 CFR §51.165(a)(1)(iv)(C).

(18) Major modification--As follows.

(A) Any physical change in, or change in the method of operation of a major stationary source that causes a significant project emissions increase and a significant net emissions increase for any federally regulated new source review pollutant. At a stationary source that is not major prior to the increase, the increase by itself must equal or exceed that specified for a major source . At an existing major stationary source, the increase must equal or exceed that specified for a major modification to be significant. The major source and significant thresholds are provided in Table I of this section for nonattainment pollutants. The major source and significant

thresholds for prevention of significant deterioration pollutants are identified in 40 Code of Federal Regulations §51.166(b)(1) and (23), respectively.

Figure: 30 TAC §116.12(18)(A)

TABLE I

MAJOR SOURCE/MAJOR MODIFICATION EMISSION THRESHOLDS

POLLUTANT designation ¹	MAJOR SOURCE tons/year	SIGNIFICANT LEVEL ² tons/year	OFFSET RATIO minimum
OZONE (VOC, NO _x) ³			
I marginal	100	40	1.10 to 1
II moderate	100	40	1.15 to 1
III serious	50	25	1.20 to 1
IV severe	25	25	1.30 to 1
CO			
I moderate	100	100	1.00 to 1 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 as defined in §101.1(70) of this title.

² The significant level 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 significant level listed in this table.

³ VOC and NO_x are precursors to ozone formation and should be quantified individually to determine whether a source is subject to NNSR under §116.150 of this title.

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 less than or equal to ten microns

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

(B) A physical change or change in the method of operation shall not include:

(i) routine maintenance, repair, and replacement;

(ii) use of an alternative fuel or raw material by reason of an order under the Energy Supply and Environmental Coordination Act of 1974, §2(a) and (b) (or any superseding legislation) or by reason of a natural gas curtailment plan under the Federal Power Act;

(iii) use of an alternative fuel by reason of an order or rule of 42 United States Code, §7425;

(iv) use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(v) use of an alternative fuel or raw material by a stationary source that the source was capable of accommodating before December 21, 1976 (unless such change would be prohibited under any federally enforceable permit condition established after December 21, 1976) or the source is approved to use under any permit issued under regulations approved under this chapter;

(vi) an increase in the hours of operation or in the production rate (unless the change is prohibited under any federally enforceable permit condition that was established after December 21, 1976);

(vii) any change in ownership at a stationary source;

(viii) any change in emissions of a pollutant at a site that occurs under an existing plant-wide applicability limit;

(ix) the installation, operation, cessation, or removal of a temporary clean coal technology demonstration project, provided that the project complies with the state implementation plan and other requirements necessary to attain and maintain the national ambient air quality standard during the project and after it is terminated;

(x) for prevention of significant deterioration review only, the installation or operation of a permanent clean coal technology demonstration project that constitutes re-powering, provided that the project does not result in an increase in the potential to emit of any regulated pollutant emitted by the unit. This exemption shall apply on a pollutant-by-pollutant basis; or

(xi) for prevention of significant deterioration review only, the reactivation of a clean coal-fired electric utility steam generating unit.

(19) Necessary preconstruction approvals or permits--Those permits or approvals required under federal air quality control laws and regulations and those air quality control laws and regulations that are part of the applicable state implementation plan.

(20) Net emissions increase--The amount by which the sum of the following exceeds zero: the project emissions increase plus any sourcewide creditable contemporaneous emission increases, minus any sourcewide creditable contemporaneous emission decreases. Baseline actual emissions shall be used to determine emissions increases and decreases.

(A) An increase or decrease in emissions is creditable only if the following conditions are met:

(i) it occurs during the contemporaneous period;

(ii) the executive director has not relied on it in issuing a federal new source review permit for the source and that permit is in effect when the increase in emissions from the particular change occurs; and

(iii) in the case of prevention of significant deterioration review only, an increase or decrease in emissions of sulfur dioxide, particulate matter, or nitrogen oxides that occurs before the applicable minor source baseline date is creditable only if it is required to be considered in calculating the amount of maximum allowable increases remaining available.

(B) An increase in emissions is creditable if it is the result of a physical change in, or change in the method of operation of a stationary source only to the extent that the new level of emissions exceeds the baseline actual emission rate. Emission increases at facilities under a plant-wide applicability limit are not creditable.

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

(i) the baseline actual emission rate exceeds the new level of emissions;

(ii) it is enforceable at and after the time that actual construction on the particular change begins;

(iii) the executive director has not relied on it in issuing a prevention of significant deterioration or a nonattainment permit;

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

(v) in the case of nonattainment applicability analysis only, the state has not relied on the decrease to demonstrate attainment or reasonable further progress.

(D) An increase that results from a physical change at a source occurs when the emissions unit on which construction occurred becomes operational and begins to emit a particular pollutant. Any replacement unit that requires shakedown becomes operational only after a reasonable shakedown period, not to exceed 180 days.

(21) Offset ratio--For the purpose of satisfying the emissions offset reduction requirements of 42 United States Code, §7503(a)(1)(A), the emissions offset ratio is the ratio of total actual reductions of emissions to total emissions increases of such pollutants. The minimum offset ratios are included in Table I of this section under the definition of major modification. In order for a reduction to qualify as an offset, it must be certified as an emission credit under Chapter 101, Subchapter H, Division 1 or 4 of this title (relating to Emission Credit Banking or Trading; or Discrete Emission Credit Banking and Trading), except as provided for in §116.170(b) of this title (relating to Applicability of Emission Reductions as Offsets). The reduction must not have been relied on in the issuance of a previous nonattainment or prevention of significant deterioration permit.

(22) Plant-wide applicability limit--An emission limitation expressed, in tons per year, for a pollutant at a major stationary source, that is enforceable and established in a plant-wide applicability limit permit under §116.186 of this title (relating to General and Special Conditions).

(23) Plant-wide applicability limit effective date--The date of issuance of the plant-wide applicability limit permit. The plant-wide applicability limit effective date for a plant-wide applicability limit established in an existing flexible permit is the date that the flexible permit was issued.

(24) Plant-wide applicability limit major modification--Any physical change in, or change in the method of operation of the plant-wide applicability limit source that causes it to emit the plant-wide applicability limit pollutant at a level equal to or greater than the plant-wide applicability limit.

(25) Plant-wide applicability limit permit--The new source review permit that establishes the plant-wide applicability limit.

(26) Plant-wide applicability limit pollutant--The pollutant for which a plant-wide applicability limit is established at a major stationary source.

(27) Potential to emit--The maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or enforceable operational limitation on the capacity of the stationary source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, may be treated as part of its design only if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions, as defined in 40 Code of Federal Regulations §51.165(a)(1)(viii), do not count in determining the potential to emit for a stationary source.

(28) Project net--The sum of the following: the project emissions increase, minus any sourcewide creditable emission decreases proposed at the source between the date of application for the modification and the date the resultant modification begins emitting. Baseline actual emissions shall be used to determine emissions increases and decreases. Increases and decreases must meet the creditability criteria listed under the definition of net emissions increase in this section.

(29) Projected actual emissions--The maximum annual rate, in tons per year, at which an existing facility is projected to emit a federally regulated new source review pollutant in any rolling 12-month period during the five years following the date the facility resumes regular operation after the project, or in any one of the ten years

following that date, if the project involves increasing the facility's design capacity or its potential to emit that federally regulated new source review pollutant. In determining the projected actual emissions, the owner or operator of the major stationary source shall include fugitive emissions to the extent quantifiable and shall consider all relevant information, including, but not limited to, historical operational data, the company's own representations, the company's expected business activity and the company's highest projections of business activity, the company's filings with the state or federal regulatory authorities, and compliance plans under the approved state implementation plan.

(30) Project emissions increase--The sum of emissions increases for each modified or affected facility determined using the following methods:

(A) for existing facilities, the difference between the projected actual emissions and the baseline actual emissions. In calculating any increase in emissions that results from the project, that portion of the facility's emissions following the project that the facility could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions and that are also unrelated to the particular project, including any increased utilization due to product demand growth may be excluded from the project emission increase. The potential to emit from the facility

following completion of the project may be used in lieu of the projected actual emission rate; and

(B) for new facilities, the difference between the potential to emit from the facility following completion of the project and the baseline actual emissions.

(31) Replacement facility--A facility that satisfies the following criteria:

(A) the facility is a reconstructed unit within the meaning of 40 Code of Federal Regulations §60.15(b)(1), or the facility replaces an existing facility;

(B) the facility is identical to or functionally equivalent to the replaced facility;

(C) the replacement does not alter the basic design parameters of the process unit;

(D) the replaced facility is permanently removed from the major stationary source, otherwise permanently disabled, or permanently barred from operation by a permit that is enforceable. If the replaced facility is brought back into operation, it shall constitute a new facility. No creditable emission reductions shall be

generated from shutting down the existing facility that is replaced. A replacement facility is considered an existing facility for the purpose of determining federal new source review applicability.

(32) Secondary emissions--Emissions that would occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the source or modification itself. Secondary emissions must be specific, well-defined, quantifiable, and impact the same general area as the stationary source or modification that causes the secondary emissions. Secondary emissions include emissions from any off-site support facility that would not be constructed or increase its emissions, except as a result of the construction or operation of the major stationary source or major modification. Secondary emissions do not include any emissions that come directly from a mobile source such as emissions from the tail pipe of a motor vehicle, from a train, or from a vessel.

(33) Significant facility--A facility that emits or has the potential to emit a plant-wide applicability limit (PAL) pollutant in an amount that is equal to or greater than the significant level for that PAL pollutant.

(34) Small facility--A facility that emits or has the potential to emit the plant-wide applicability limit (PAL) pollutant in an amount less than the significant level for that PAL pollutant.

(35) Stationary source--Any building, structure, facility, or installation that emits or may emit any air pollutant subject to regulation under 42 United States Code, §§7401 *et seq.*

(36) Temporary clean coal technology demonstration project--A clean coal technology demonstration project that is operated for a period of five years or less, and that complies with the state implementation plan and other requirements necessary to attain and maintain the national ambient air quality standards during the project and after it is terminated.

SUBCHAPTER B: NEW SOURCE REVIEW PERMITS

DIVISION 5: NONATTAINMENT REVIEW PERMITS

§116.150

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.102, concerning General Powers, §5.103, concerning Rules, and §5.105 concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the Texas Water Code; Texas Health and Safety Code, §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the Texas Clean Air Act (TCAA); §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a comprehensive plan for the proper control of the state's air; and §382.051, concerning Permitting Authority of the Commission, which authorizes the commission to issue permits to construct a new facility or modify an existing facility that may emit air contaminants, and authority to adopt rules necessary to comply with changes in federal law or regulations applicable to permits issued under the TCAA.

The adopted amendment implements Texas Water Code, §5.103; and Texas Health and Safety Code, §§382.017, 382.012, and 382.051.

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

(a) This section applies to all new source review authorizations for new construction or modification of facilities that will be located in any area designated as nonattainment for ozone under 42 United States Code (USC), §§7407 *et seq.* as of the date of issuance of the permit, unless the following apply on the date of issuance of the permit:

(1) the United States Environmental Protection Agency (EPA) has made a finding of attainment;

(2) the EPA has approved the removal of nonattainment New Source Review requirements from the area;

(3) the EPA has determined that Prevention of Significant Deterioration requirements apply in the area; or

(4) the EPA determines that nonattainment NSR is no longer required for purposes of antibacksliding.

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

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

(1) the proposed emissions increases associated with a project, without regard to decreases, is less than five tons per year (tpy) of the individual nonattainment pollutant in areas classified under Federal Clean Air Act (FCAA), Title I, Part D, Subpart 2 (42 USC, §7511) classified as Serious or Severe;

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

(3) the project emissions increases are less than the significant level stated in Table I located in the definition of major modification in §116.12 of this title and when coupled with project actual emissions decreases for the same pollutant, summed as the project net, are less than or equal to zero tpy.

(d) In applying the *de minimis* threshold test, if the net emissions increases are greater than the significant levels stated in Table I located in the definition of major modification in §116.12 of this title, the following requirements apply.

(1) The proposed facility shall comply with the lowest achievable emission rate (LAER) as defined in §116.12 of this title for the nonattainment pollutants for which the facility is a new major source or major modification except as provided in paragraph (3)(B) of this subsection and except for existing major stationary sources that have a potential to emit (PTE) of less than 100 tpy of the applicable nonattainment pollutant. For these sources, best available control technology (BACT) can be substituted for

LAER. LAER shall otherwise be applied to each new facility and to each existing facility at which the net emissions increase will occur as a result of a physical change or change in method of operation of the unit.

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

(3) At the time the new or modified facility or facilities commence operation, the emissions increases from the new or modified facility or facilities must be offset. The proposed facility shall use the offset ratio for the appropriate nonattainment classification as defined in §116.12 of this title and shown in Table I located in the definition of major modification in §116.12 of this title. Internal offsets that are generated at the source and that otherwise meet all creditability criteria can be applied as follows.

(A) Major stationary sources located in a serious or severe ozone nonattainment area with a PTE of less than 100 tpy of an applicable nonattainment pollutant are not required to undergo nonattainment new source review under this

section, if the project increases are offset with internal offsets at a ratio of at least 1.3 to 1.

(B) Major stationary sources located in a serious or severe ozone nonattainment area with a PTE of greater than or equal to 100 tpy of an applicable nonattainment pollutant can substitute federal BACT (as identified in §116.160(c)(1)(A) of this title (relating to Prevention of Significant Deterioration Requirements) for LAER, if the project increases are offset with internal offsets at a ratio of at least 1.3 to 1. Internal offsets used in this manner can also be applied to satisfy the offset requirement.

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

(e) For sources located in the El Paso ozone nonattainment area as defined in 40 Code of Federal Regulations, Part 81, the requirements of this section do not apply to NO_x emissions.