The Texas Commission on Environmental Quality (TCEQ or commission) adopts new §116.17 and the amendments to §§116.10, 116.111, 116.116, 116.117 *with changes* to the proposed text as published in the April 16, 2010, issue of the *Texas Register* (35 TexReg 2978). The commission withdraws the proposed amendment to §116.118 as published in the April 16, 2010, issue of the *Texas Register* (35 TexReg 2978).

The new and amended sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP) with the exception of §§116.10(5)(F), 116.111(a)(2)(K), 116.116(b)(3), and 116.117(a)(4)(B).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

On April 14, 2010, the EPA published notice in the *Federal Register* (75 *Federal Register* 19468) of its disapproval of the TCEQ rules that implement the state's qualified facilities program, established by the Texas Legislature in 1995, as a SIP revision. The EPA based this disapproval on the following: 1) the program is not clearly limited to use in minor New Source Review (NSR) and does not clearly prevent circumvention of major NSR requirements; 2) the program does not require that an applicability determination for major NSR be made first for facility changes; 3) the program fails to meet the statutory and regulatory requirements for a SIP revision and is not consistent with guidance on SIP revisions; 4) the program is not an enforceable minor NSR program; and 5) the program lacks safeguards to prevent interference with national ambient air quality standard (NAAQS) attainment and maintenance. The rules in this action address these issues.

In its September 23, 2009, (74 *Federal Register* 48464), notice of proposed disapproval of the qualified facility program, EPA stated that the commission must revise its definition of best available control technology (BACT) in §116.10(3), General Definitions, to apply to the commission's minor NSR program only. The EPA stated in its final disapproval of the qualified facility program as published on April 14, 2010 (75 *Federal Register* 19470), stated that it is not taking final action on the definition of BACT, which it will delay until the final action on Texas's submission concerning NSR Reform (TCEQ Rule Project Number 2005-010-116-PR), and that the definition of BACT is severable from the qualified facility program. This adoption addresses the issue of BACT and its applicability to minor NSR as part of the qualified facility program and is discussed further in the SECTION BY SECTION discussion.

The 74th Legislature (1995) created the qualified facilities program in Senate Bill (SB) 1126. SB 1126 became effective on May 19, 1995, and amended the Texas Clean Air Act (TCAA) by revising the definition of "modification of existing facility," which changed the factors used to determine whether a modification has occurred. The commission interpreted this statute as applicable for minor NSR permitting purposes only. In 1996, Chapter 116, Control of Air Pollution by Permits for New Construction or Modification, was revised to incorporate this legislative directive for minor NSR sources only.

Throughout this preamble, the commission's use of the term "major NSR" is intended as a reference to the NSR permit programs in Title I, Parts C and D of the Federal Clean Air Act (FCAA), the Prevention of Significant Deterioration (PSD) and nonattainment permitting; these permitting programs are commonly referred to as "federal permitting."

SB 1126 specifies exemptions from the definition of "modification of existing facility." It provides that changes may be made to existing facilities without triggering the statutory definition of modification of existing facility found in TCAA, Texas Health and Safety Code (THSC), §382.003(9)(E) if either of the following conditions are met: the facility has received a preconstruction permit or permit amendment no earlier than 120 months before the change will occur, or regardless of whether the facility has received a preconstruction permit or permit amendment, uses control technology that is at least as effective as the BACT that the commission required or would have required for a facility of the same class or type as a condition of issuing a permit or permit amendment 120 months before the change will occur. Facilities that meet these requirements are designated as "qualified facilities."

The commission implemented SB 1126 through rules in Chapter 116, Subchapters A and B that frame the qualified facilities program and now confirms that these rules only apply to existing qualified facilities. The rules do not allow construction of a new facility, nor can a facility change result in a net increase in allowable emissions of any air contaminant, or allow the emissions of an air contaminant category that did not previously exist at the facility undergoing the change. The use of the terminology in the phrase "net increase in allowable emissions of any air contaminant" in §116.116(e), Changes to Qualified Facilities, should not be confused with federal permitting terminology, where "net increase" has specific meaning as it relates to major NSR applicability involving comparison of actual emissions. The qualified facility program compares allowable emissions at one facility to allowable emissions of the same type at another facility at a single site. Prior to making this comparison, the owner or operator must determine if a project requires federal nonattainment or prevention of significant deterioration (PSD) review. This is accomplished by comparing a facility's baseline actual emission rate to the planned emission rate resulting from the change using either proposed actual emissions or the facility's potential to emit (PTE).

This projected emission increase is then compared to a significance level for the pollutant involved. If the projected emissions increase equals or exceeds the significance level, the facility owner or operator must compute the result of all emissions increases and decreases at the facility according to the definition of contemporaneous period as defined in §116.12, Nonattainment and Prevention of Significant Deterioration Review Definitions, to determine the net emission increase. If this net increase equals or exceeds a major modification threshold, then federal major NSR is triggered, and the proposed change cannot be authorized using a qualified facility claim. The significance levels and the major source thresholds are found in the definition of major modification in §116.12.

The commission has always administered the qualified facilities program as a minor NSR program and has not allowed its applicability for changes requiring major NSR. This is consistent with the requirements of the enabling statute in THSC, §382.0512, which states that "nothing in this section shall be construed to limit the application of otherwise enforceable state or federal requirements, nor shall this section be construed to limit the commission's powers of enforcement under this chapter." The program does not, and has not, superseded or negated federal permitting requirements. The qualified facilities program may not be used as a shield for protection or exemption from major NSR requirements. Persons making changes must maintain sufficient documentation to demonstrate that the project will comply with Subchapter B, Division 5, Nonattainment Review and Subchapter B, Division 6, Prevention of Significant Deterioration Review. A major modification, as defined in §116.12, may not occur and will be subject to a nonattainment and/or PSD review. Likewise, an owner or operator may not use qualified facility rules to avoid maximum achievable control technology (MACT) requirements for the construction or reconstruction of major sources of hazardous air pollutants (HAP) as they are described and addressed in 40 Code of Federal Regulations (40 CFR) Part 63, National Emission Standards for Hazardous Air

Pollutants (NESHAP) rules. If a proposed project is determined to be a major modification under nonattainment and/or PSD rules, or meets the definition of construction or reconstruction under 40 CFR Part 63, the owner or operator must obtain a major NSR permit or major modification under the appropriate major NSR program and a minor NSR permit amendment. Further, the qualified facilities program does not impair the commission's authority to control the quality of the state's air and to take action to control a condition of air pollution if the commission finds that such a condition exists.

EPA has acknowledged that the qualified facility program was intended, and has been administered, as a minor NSR program (see September 23, 2009, *Federal Register* (74 *Federal Register* 48456)). It disapproved the program based on lack of specific rule requirements that would restrict the program to minor NSR, require netting procedures, and provide enforceability of any new emission limits under the qualified facility program (see April 14, 2010, *Federal Register* (75 *Federal Register* 19473)). The commission is adopting §116.116(e) that address these identified deficiencies through specific requirements for a separate netting analysis to determine the potential applicability of major NSR review to the proposed change, submission of a permit application to revise the permit, and certification of emissions. In addition to the specific rule requirements, the commission is structuring the rules to provide a clear sequence for facility owners and operators to determine whether their facility can be qualified. The rule changes address the specific concerns noted by the EPA in its disapproval, and are designed to allow the EPA to ultimately approve the qualified facilities program as a minor NSR program into the Texas SIP.

Use of the Term "Facility"

In the September 23, 2009, *Federal Register* (74 *Federal Register* 48450) notice of proposed disapproval, the EPA specifically solicited commission comment on the EPA interpretation of the use of the term "facility" in commission rules and Texas law as this is critical to EPA's understanding of the commission's permitting program.

The TCEQ does not concur with the EPA's understanding of Texas law in relation to the definition of "facility." Further, the EPA erroneously interprets the term "facility" as used in TCEQ rules by stating that, in part, a "facility" can be more than one major stationary source, and it can include every emission point on a company site without limiting these emission points to only those belonging to the same industrial classification (SIC code).

TCEQ and its predecessor agencies have consistently interpreted the term "facility" to preclude inclusion of more than one stationary source, in contrast to EPA's stated understanding. In Texas, a facility cannot include more than one stationary source, nor can it include every emission point on a company site, even if limited to the same SIC code. THSC, §382.003(6) and §116.10(6) define the term "facility" as "a discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment. A mine, quarry, well test, or road is not considered to be a facility. A facility may constitute or contain a stationary source." A facility under Texas law can be subject to major NSR or minor NSR.

This interpretation of the term "facility" has been consistent by the TCEQ and its predecessor agencies for more than 30 years. Further, this definition has been approved into the Texas SIP, as acknowledged by the EPA in the September 23, 2009, *Federal Register* notice (74 *Federal Register* 48455 in footnote 4). The

TCEQ provided comments regarding this issue in EPA's September 23, 2009, *Federal Register* notice, which are filed under Docket Number EPA-R06-OAR-2005-TX-0025 in the docket system at *www.regulations.gov*.

In order to be consistent with existing definitions in other rules of the commission, the term "account" is used to describe the range of a qualified facility transaction. The commission uses the term "account" synonymously with the EPA's use of "stationary source." The state definition of "account" and the federal definition of "stationary source" both include the concept of multiple points of emissions (state defined "facilities" and federally defined "emission units") under common control located within a clearly defined area. It is only within this area that qualified facility transactions may occur. As EPA noted in the September 23, 2009, *Federal Register* (74 *Federal Register* 48455, footnote 7) "account" is a SIP-approved definition. The EPA also acknowledges in the final notice of disapproval in the April 14, 2010, *Federal Register* (75 *Federal Register* 19489) that the term "facility" has been approved as part of the Texas SIP.

Grandfathered Facilities

EPA has expressed concerns about the use of qualified facilities changes by grandfathered facilities. The FCAA exempted facilities built prior to 1971 from compliance, provided that such facilities did not make changes that would trigger major NSR. This exemption was reflected in the TCAA prior to 2001. In 2001, the legislature adopted a revision to the TCAA, §382.05183, which required any facility constructed prior to 1971 (grandfathered facility) to either obtain or apply for an "existing facilities permit" by March 1, 2007 or March 1, 2008, depending on its location, or cease emitting air contaminants. By statute, all

facilities in the state with sources of air contaminants must be authorized, including those facilities constructed prior to 1971.

Prior to this requirement, grandfathered facilities that did not have a permit were operating in Texas. These facilities would have been allowed to use a qualified facilities change, but they would not have been allowed to make such a change if it would have triggered major NSR. The language of the qualified facility exemption from the definition in modification found in TCAA, §382.003(9)(E) clearly delineates the requirements for a qualified facility exemption. A facility is required to demonstrate that the change would not result in a net increase in allowable emissions, would not result in the emission of any air contaminant not previously authorized, and the facility would have to demonstrate that it is using BACT that is at least as effective as BACT that is no more than 120 months old.

A qualified facilities change cannot be used to authorize new construction, nor has the commission allowed this. Therefore, even if a grandfathered facility was allowed to make a qualified facilities change before obtaining a now required permit, such a qualified facility change would not have adversely affected ambient air quality. Such a change would have only allowed a site to move allowable emissions from one source to another within a site, but would not have allowed increases in total allowable emissions. Such a change would also have only been allowed if the facility could demonstrate that the change would have used BACT that was at least no older than 120 months. If an applicant for a qualified facilities change triggered federal major NSR, then application for a qualified facilities change would have been denied. Therefore, a grandfathered facility would not have been allowed to make a qualified facilities change that may have had an impact on ambient air quality. Currently, all facilities operating in Texas that emit air contaminants are required to have an air quality permit. Therefore, the commission has

amended the qualified facilities rule to remove language that would have previously applied only to grandfathered facilities that were not required to have a permit. Any facility that applies for a qualified facility change is required to have a permit, and also required to apply for a revision to that permit, so that the qualified facilities change can clearly be reflected in the permit conditions.

Netting and Double Counting

The qualified facilities program can only be used if a physical or operational change to an existing facility complies with federal major NSR requirements. The statutory exemption from the definition of "modification of an existing facility" for minor NSR sources does not relieve an owner or operator from conducting an evaluation to determine if a major modification has occurred. Prior to seeking qualified facility status for their facilities, owners or operators must demonstrate that any increase in actual emissions must not trigger major NSR through comparison of baseline actual emissions to projected actual emissions or PTE. These comparisons may only be done for emissions at facilities located at a single site; comparison between emission sources at separate sites is not allowed for the necessary netting analysis. Therefore, the qualified facilities program requirements are at least as stringent as the federal requirements to conduct an evaluation to determine if a major modification has occurred.

Section §116.116(e)(3), states that in order to make a physical or operational change to a qualified facility, an owner or operator must demonstrate that any proposed change does not result in a net increase in allowable emissions of any air contaminant previously authorized under minor NSR at the same account. Under §116.116(e)(4) and (5), a qualified facility is allowed to demonstrate that a minor NSR modification has not occurred by comparing allowable emissions to allowable emissions, before and after a proposed change. Additionally, §116.116(e)(10) requires that no existing level of control can be

reduced. The EPA also notes that the intent to require a separate netting analysis to be performed for each proposed change under the qualified facilities program is not explicitly stated (see April 14, 2010, *Federal Register* (75 *Federal Register* 19473)). Therefore, adopted §116.116(e)(11) corrects this identified deficiency by requiring that a separate netting analysis must be completed for each proposed change.

In the final notice of disapproval published on April 14, 2010 (75 *Federal Register* 19474), EPA identified an additional item that could not be approved as a SIP revision. In §116.116(e)(5)(B), the commission allows the interchange of air contaminants in the same category. After public comment on the proposed disapproval, EPA determined that this interchange is not approvable for all sulfur compounds, particularly hydrogen sulfide, and the commission did not demonstrate that such an interchange would protect the NAAQS for sulfur dioxide. The EPA also determined that an interchange of particulate matter 10 microns or less in diameter (PM_{10}) would not protect the NAAQS for particulate matter 2.5 microns or less in diameter ($PM_{2.5}$). EPA also addressed this subject in its comment letter on the commission's proposed rule amendments (April 16, 2010, issue of the *Texas Register* (35 TexReg 2978)) resulting from the disapproval of the qualified facility rules. The commission did not change the proposed rule in response to these comments because all interchanges must be demonstrated to not adversely affect air quality. This subject is further addressed in the RESPONSE TO COMMENTS section of this document.

For facilities undergoing an intraplant trade, where allowable emissions at one facility are increased while the allowable emissions at another facility are reduced within a single account, an allowable-to-allowable comparison is used only to determine if a net increase has occurred for minor NSR. The emissions are

reviewed with the increase and reduction considered simultaneously and not covering a five-year period (contemporaneously) as for major NSR review. If a net emissions increase has occurred, an owner or operator cannot use the qualified facilities program to authorize the proposed project, and must find another state authorization method.

In addition, the owner or operator must submit notification before making an intraplant trade. This gives the commission the ability to evaluate any potential off-property effects relating to all contaminants, including contaminants that are subject to national ambient air quality standards. This intraplant trade capability exists only to the extent that the project is a minor NSR action.

New §116.116(e)(1) requires the evaluation of emissions related to physical and operational changes to be conducted on a baseline actual to either a projected actual or PTE basis as applicable. This comparison is used to determine if a net emission increase above the appropriate significance level for a major NSR permitting program has occurred. If the significance level is met or exceeded, the owner or operator must perform a netting analysis which is done using baseline actual and projected actual emissions and compares actual emissions increases and decreases at the facility during the contemporaneous period as defined in §116.12 to the emissions resulting from the proposed change. If the results of the netting analysis indicate that a major modification has occurred, the appropriate major NSR program is triggered and major NSR authorization must be obtained. In such a case, the qualified facilities program cannot be used and an NSR amendment must be obtained along with the appropriate major NSR authorization.

In addition, an anti-backsliding provision is included in the qualified facility rules, located in §116.116(e)(10). This rule states that "the existing level of control may not be lessened for a qualified

facility." For physical and/or operational changes which involve intraplant trades, the maximum allowable emission rate listed in the maximum allowable emission rate table (MAERT) in the permit for the facility contributing emission reductions is reduced by the appropriate amount, while the limit in the MAERT for the facility receiving the emission increases is increased. If additional emission reductions are necessary to demonstrate that a net increase has not occurred, those reductions are also included in the changes to the MAERT in order to make them federally enforceable. The inclusion of the qualified facilities changes into the MAERT of the relevant permits ensures that the changes will not violate Texas control strategies or interfere with attainment of the NAAQS, interfere with reasonable further progress, control measures, or PSD increment.

Relaxation of SIP Requirements

The EPA expressed additional concern about the qualified facility program because it allows changes in facilities without necessarily obtaining a permit amendment and a subsequent upgrade of BACT. Qualified facilities may use BACT no older than 120 months, counting from the date of the permit issuance or amendment to the date of the proposed change. EPA stated that facilities making changes without a corresponding upgrade to BACT could represent a relaxation of SIP requirements.

The qualified facility program has only been applied to changes that do not trigger major NSR from its inception and is consistently, as well as exclusively, used only for minor NSR. Further, the qualified facilities program cannot be used in lieu of obtaining an amendment. Changes that would exceed major source thresholds are screened out of the qualified facility program, leaving only the minor modifications. Over the last fifteen years, about one percent of the commission's permitting actions have been for qualified facilities. The program does not allow the use of BACT that is older than 120 months; therefore,

when combined with the minor modification only restriction and the relatively few number of qualified facility actions, the program does not adversely affect air quality and does not represent a relaxation of SIP requirements. Additionally, facilities making a qualified facilities change are not allowed to use BACT that is less stringent than what the facility is already using, regardless of how old that BACT may be. In addition to these rule amendments, the commission is submitting, as a SIP amendment, a separate document with additional explanation of the qualified facility program and a record of facilities where changes were sought under the qualified facility program to demonstrate that the qualified facilities program is and has consistently been at least as stringent as, and does not result in backsliding from, the approved Texas SIP. It is possible that some owners or operators may no longer claim these qualified facility changes or may no longer claim them at some point in the future. Therefore, this data is representative of the program at the point in time the data was collected and is not intended to be a static document or a revision to the SIP as a permit change that cannot be revised in the future in compliance with the applicable law.

Notification of Changes at Qualified Facilities

In §116.116(e)(2) the commission requires that facility owners or operators submit Form PI-E, Notification of Changes to Qualified Facilities, to provide notification of intended changes under the qualified facility program. The form requires details on the proposed qualified facility changes, including information on intraplant trades and emission calculations to confirm that major NSR does not apply. Proposed changes under the qualified facility program are reviewed as part of the minor NSR program. Under the commission's minor NSR program, applications are required for new construction or modification. The form contains sufficient detail to allow review of proposed qualified facility changes similarly to an application for new construction or modification. This review has resulted in a significant

denial rate for changes under the qualified facility program in nonattainment areas. The PI-E form is submitted to the commission's air permitting office in Austin and the appropriate regional office where it is publicly accessible in the permit file. Using the information on the form, the public may access more detailed information about proposed changes, including staff technical reviews.

In addition to the PI-E form, §116.116(e)(2)(A) requires owners and operators of facilities seeking a qualified facility change to submit an application for a revision to the relevant permits involved in the change, or a change in certification requirements if the change involves a standard permit or permit by rule (PBR). This allows the commission to incorporate the qualified facilities changes into the relevant permits, ensuring federal enforceability of the changes. By incorporating the changes into the permits, the commission ensures that the air quality benefits that existed before the qualified facilities changes will continue to be present and enforceable. Any additional future change at a qualified facility would have to undergo a separate review for federal applicability before making further changes. Therefore, the qualified facilities changes will have no adverse impact on the ambient air, Texas control strategies, or attainment of the NAAQS.

SECTION BY SECTION DISCUSSION

§116.10, General Definitions

The commission adopts the amendment to the opening paragraph of this section to refer to the Texas Clean Air Act rather than the acronym "TCAA."

The EPA has disapproved in its April 14, 2010 (75 *Federal Register* 19471) notice the definitions of "actual emissions" and "allowable emissions" in §116.10(1) and (2), respectively. Because these

definitions apply only to the qualified facility program, the commission is moving the definitions to new section §116.17, Qualified Facility Definitions, to restrict their use to the qualified facility program. The remaining definitions would be renumbered accordingly. Other changes in this rulemaking for adopted §116.116(e)(1), are intended to clarify qualified facility netting requirements.

In its proposed disapproval of the qualified facility program, the EPA states the commission must revise its definition of best available control technology in §116.10(3), now renumbered as §116.10(1), to clearly apply only for minor sources and minor modifications citation (see September 23, 2009, *Federal Register* (74 *Federal Register* 48450)). While EPA did not take action on the definition of best available control technology in the final notice of disapproval, the commission addresses this issue by separating the content of the definition in renumbered §116.10(1), and its application in §116.111(a)(2)(C), General Application. The commission adopts the amendment to the definition of BACT to define the term in a more descriptive manner using language to indicate the features of the term without using the term in the definition. The adopted definition will maintain its broad application to all NSR permitting actions conducted by the commission and thus maintain the stringency of permit review currently approved in the SIP, which is required by THSC, §382.0518. In the commission permitting process, the first determination is whether major NSR requirements are triggered. If so, then the BACT requirements of 40 CFR §52.21(b)(12) are applied. The commission's BACT process will then be applied for all air contaminants that are part of the permit, including any other air contaminants and any other facilities not subject to major NSR permitting requirements.

The commission adopts §116.10(9)(A) to state that insignificant increases of emissions that would not be considered modifications, are authorized under PBR rather than a "commission exemption." This amendment removes an obsolete term and specifies the commission's authorization method.

The commission deletes §116.10(9)(B), which refers to insignificant increases at a permitted facility. This circumstance is addressed by §116.10(9)(A) and has no other application under the commission's NSR permitting program. The subsequent subparagraphs are relettered.

The commission adopts the amendment to §116.10(9)(D)(ii) to delete the reference to ". . . regardless of whether a facility has received a preconstruction permit or permit amendment . . .." In response to a comment from EPA, the commission is removing language from §116.116(e)(2)(E) that refers to identical language. Adopted §116.116(1)(A) explicitly requires this authorization, and the commission has determined that the language cited by EPA is inconsistent with this requirement. The commission has further determined that the cited language, while statutory, was applicable to grandfathered facilities which were required to obtain a permit after the implementation of the qualified facility program under SB 1126. The commission has concluded that the cited language has no application and can be removed. Subsequent paragraphs in the subsection are renumbered to reflect the addition of the new paragraphs.

§116.17, Qualified Facility Definitions

The commission adopts this new section to restrict the use of the definitions "actual emissions" and "allowable emissions" to the qualified facility program. The language in the definitions was written for specific application to qualified facilities, and the commission seeks to ensure that there is no confusion with application of the terms in other permitting programs. The commission adds a citation referring to

§116.116(e) in the definition of "actual emissions" to improve clarity. The commission also deletes the subparagraphs in the definition of "allowable emissions" that state how the term is applied for qualified grandfathered facilities because there is no further application of the qualified facility program for these types of facilities. The commission also amends language in §116.17(2)(C) to correctly reference the Air Quality Standard Permit for Pollution Control Projects.

The commission adopts the definition of "revision." This definition was not included in the rule proposal as published in the April 16, 2010, issue of the *Texas Register* (35 TexReg 2978). In response to a comment from EPA, the commission has changed the rule language in §116.116(e)(2)(A) and (C) to refer to a permit revision instead of a permit alteration. Under §116.116(c), a permit alteration has specific meaning which cannot include increases in emission rates. The statutory basis for the qualified facility rules exempts facility changes from being a modification. The commission will revise the permit to include physical changes made under the qualified facility rule including emission increases and decreases and adjustments to the MAERT. This revision will also include reviews of all proposed qualified facility changes. The terms "revision" and "revise" have no specific meaning in the other NSR rules of the commission, and their use in this rule will be specific to qualified facility changes. The commission changed the proposed language in the opening sentence of the new section to correctly refer to "subchapter" instead of "part."

§116.111, General Application

The commission adopts the amendment to §116.111(a)(2)(A)(i) to correctly reference the Texas Clean Air Act instead of the acronym TCAA.

The commission adopts the amendment to §116.111(a)(2)(C) describing the application of BACT. The commission and predecessor agencies have interpreted the requirement for BACT to be applicable to all facilities, as defined in the TCAA, and to all contaminants that would be emitted from those facilities, as required by the TCAA. The federal definition, found in 40 CFR §52.21(b)(12), necessarily applies only to the major sources and major modifications under the federally-developed PSD permitting program. In addition, the federal requirements allow for netting by major sources, a process that allows exemption from federal permitting requirements. The scope of the Texas law is more comprehensive than that required for the federal permitting programs. The purpose of the amendment is to establish the commission's application of BACT, which applies to all facilities and all air contaminants after the evaluation of federal applicability and the corresponding application of the federal definition of BACT in 40 CFR §52.21(b)(12). The existing language in §116.111(a)(2)(C) describing BACT is deleted as unnecessary. On June 2, 2010, the commission amended §116.160, Prevention of Significant Deterioration Requirements, to include 40 CFR §52.21(b)(12), and therefore, §116.160 would be the appropriate reference in §116.111(a)(2)(C). However, until the changes to §116.160 were effective, the commission could not propose such a change. Therefore, this action changes the reference in §116.111(a)(2)(C) from the federal rule to §116.160(c)(1)(A), Prevention of Significant Deterioration Requirements.

The commission adopts the amendment to §116.111(a)(2)(D) and (F) to correct references to the CFR and the EPA.

The commission adopts the amendment to §116.111(a)(2)(K) to change a reference to Subchapter E instead of Subchapter C concerning rule regulating HAPs.

§116.116, Changes to Facilities

The EPA acknowledged that the commission intends the qualified facilities program to apply only to minor modifications for minor facilities and minor facilities at major sites, but states that rules require a clear limitation of the program to minor NSR changes (see April 14, 2010, *Federal Register* (75 *Federal Register* 19472)). Additionally, THSC, §382.0512, which authorizes the qualified facility program, specifically states that all applicable federal requirements, including major NSR review, will not be affected.

The commission adopts §116.116(e)(1) prohibiting the use of the qualified facility program for changes meeting the definition of "major modification" in §116.12. The commission uses the same restriction, which has been approved into the SIP, for facilities authorized under PBR in 30 TAC Chapter 106, Permits by Rule. The EPA states that this provision could allow circumvention of major modification applicability and therefore this language is also intended to address the EPA's concerns about the qualified facility program's use of allowable emissions in determining if a facility change will require reductions in actual emissions at another facility at the source. The language in the amendment restricts use of the qualified facility program to minor modification while still allowing the flexibility of the program as intended by the legislature. Prior to determining if a facility may use §116.116(e) as a qualified facility, owners or operators must make a determination of federal applicability. Facilities requiring major NSR cannot use the qualified facility program and must be authorized through permit amendment under a different program. Through use of a clear restriction of the qualified facility program to minor sources and minor modifications, the commission also addresses the EPA's concerns stated in its disapproval notice published on April 14, 2010 (75 *Federal Register* 19472).

The amendment addresses EPA requirements expressed in the EPA disapproval notice published on April 14, 2010 (75 *Federal Register* 19473) concerning an increase in allowable emissions at a qualified facility with a concurrent equivalent decrease in actual emissions at another facility located at the same TCEQ account number. The commission uses the term "account" synonymously with the EPA's use of "source." The separate netting analysis for each change would ensure that all net changes remain below major modification thresholds. The EPA disapproved the qualified facility program because it lacks a restriction that would prevent a major stationary source from offsetting significant emission increases by using reductions from outside the major stationary source. Adopted §116.116(e)(1) prohibits this action while still allowing trading within the same account. Section §116.116(e)(1) also states explicitly that facilities using the qualified facility program must be authorized under Chapter 116 or Chapter 106. In response to a comment from EPA, the commission is changing the reference in adopted §116.116(e)(1)(B) to correctly cite §116.12 as the definition of "net emission increase." As EPA notes, the correct citation should be §116.12(13) which is a SIP approved definition. The proposed citation was an incorrect reference. The commission will refer to §116.12 to limit the need for rule amendments to change citations in the event definitions are added or removed from the section.

The commission adopts §116.116(e)(2). In the federal notice published on April 14, 2010 (75 *Federal Register* 19473), the EPA cites deficiencies in the enforceability, quantification, and permanence of emissions changes in the qualified facility program. Section 116.116(e)(2) provides specific rule requirements for holders of case-by-case permits, PBRs under Chapter 106, and standard permits to ensure no relaxation of the SIP. Section 116.116(e)(2) also contains language relating to enforceable

permits, registrations, and certifications to ensure that facilities making emission reductions under the qualified facility program do not later increase emissions.

In addition, §116.116(e)(2) requires facility owners or operators to submit Form PI-E, Notification of Changes to Qualified Facilities, for any proposed qualified facility change. Adopted §116.116(e)(2)(A) requires owners or operators to simultaneously submit an application for permit revision for any facility involved in the qualified facility request that is authorized under §116.111 (this is a case-by case permit). This will allow the commission to begin the timely revision of all applicable permits to reflect changes under the qualified facility program.

In response to a comment from EPA, the commission has changed the rule language in §116.116(e)(2)(A) and (C) to refer to a permit revision instead of a permit alteration. Under §116.116(c), a permit alteration has specific meaning which cannot include increases in emission rates. The statutory basis for the qualified facility rules exempts facility changes from being a modification. The commission will revise the permit to include physical changes made under the qualified facility rule including emission increases and decreases and adjustments to the MAERT. This revision will also include reviews of all proposed qualified facility changes. The terms "revision" and "revise" have no specific meaning in the other NSR rules of the commission, and their use in this rule will be specific to qualified facility changes.

Adopted §116.116(e)(2)(B) requires owners or operators of facilities authorized by standard permit, which makes allowable emission reductions equivalent to emission increases at a facility authorized by a permit issued under §116.111, to submit a revision to the representations in the facility registration in accordance with §116.611, Registration to Use a Standard Permit.

Adopted §116.116(e)(2)(C) addresses facilities authorized under Chapter 106. If the proposed change at a facility authorized by PBR also involves a case-by-case permit issued under §116.111, then the §116.111 permit will be revised to reflect a new emission rate. If there is no §116.111 permit involved in the transaction, emission changes must be certified by a revision to the representations in the facility registration for a standard permit, or in the case of a PBR, a certified emission rate under §106.6, Registration of Emissions, through use of a PI-7-CERT or APD-CERT form. Either of these actions establishes an enforceable new allowable rate that cannot be changed without review.

The commission adopts §116.116(e)(2)(D) that states that no allowable emission rate in §116.17 may be exceeded to ensure that facilities making reductions under the qualified facility program do not later increase emissions.

Adopted §116.116(e)(2)(E) is included to ensure that facilities meet the BACT requirements for qualified facilities in §116.10(9). Section 116.116(e)(2)(E) also states that there will be no reduction of emission control efficiency to ensure that facilities reauthorized into a §116.111 permit do not reduce control efficiency if the §116.111 permit uses older control technology. In response to a comment from EPA, the commission is removing language from §116.116(e)(2)(E) that refers to ". . . regardless of whether the facility has received a preconstruction permit or permit amendment . . .." Adopted §116.116(1)(A) explicitly requires this authorization, and the commission has determined that the language cited by EPA is inconsistent with this requirement. The commission has further determined that the cited language, while statutory, was applicable to grandfathered facilities which were required by legislative action to obtain a permit which occurred several years after the implementation of the qualified facility program

under SB 1126. The commission has concluded that the cited language has no application and can be removed. Subsequent paragraphs in the subsection are renumbered to reflect the addition of the new paragraphs.

The commission adopts the amendment to §116.116(e)(2)(D) to correct a typographical error.

The commission adopts the amendment to §116.116(e)(4)(B) and (C) to delete the word "number." This updates the commission's use of the term "account" rather than "account number." As the EPA noted in the proposed disapproval as published on September 23, 2009 (74 *Federal Register* 48455, footnote 7), "account" is a SIP-approved definition.

The commission adopts the amendment to §116.116(e)(4), (5), and (9)(A) to revise citations reflecting the renumbering of the paragraphs within the subsection.

The commission adopts §116.116(e)(5) to require that a qualified facility transaction must occur at facilities located at the same account. The commission's use of the term "account" is equivalent with the EPA's use of "stationary source." The state definition of "account" and the federal definition of "stationary source" both include the concept of multiple points of emissions (state defined "facilities" and federally defined "emission units") under common control located within a clearly defined area. It is only within this area that qualified facility transactions may occur. This amendment will ensure an accounting of permissible transactions under this qualified facility program. The commission also amends §116.116(e)(5)(A) to require that reductions in actual emissions used as emissions offsets be based on a 12-month rolling average rather than a calendar annual rate in order to provide a consistent and more

accurate representation of emissions. The commission amends §116.116(e)(5) and (5)(A) to delete the term "offset." This term has a specific meaning in major NSR permitting and refers to a requirement that emissions decreases must be equal to or greater than proposed increases. The commission deletes this term to emphasize that the qualified facility program is a minor NSR program with netting requirements that are unique to the program and are performed only after a determination is made that major NSR does not apply.

In response to a comment, the commission is also amending §116.116(e)(5)(B) to allow the substitution of compounds that have been de-listed as a VOC for compounds that are currently listed as a VOC provided the compound being substituted is not regulated as a hazardous air pollutant and is not toxic. EPA removes compounds from its VOC list based on their low photo-reactivity, and the commission has determined that the authorized substitution can reduce emissions of VOC that react with nitrogen oxides and sunlight to produce ozone.

The commission amends §116.116(e)(5)(C) to include language moved from §116.116(e)(6)(E) stating that an emissions effects screening level will be determined by the executive director because the two subparagraphs concern the same subject.

The commission amends §116.116(e)(5)(E), removing language concerning effects screening levels and adding language that requires a facility owner or operator to demonstrate that changes at qualified facilities will not adversely affect ambient air quality. The EPA acknowledges that the qualified facility program is structured at §116.117(b)(4), Documentation and Notification of Changes to Qualified Facilities, such that emissions moved closer to a property line are analyzed prior to a change occurring.

The amendment is added to address an EPA identified deficiency as published on April 14, 2010 (75 *Federal Register* 19473), that the requirement should be made explicit in §116.116(e).

The commission amends §116.116(e)(6) to remove a reference to §116.118, Pre-change Qualification. The commission has determined the referenced section to have been applicable only to those facilities exempted from permitting under THSC, §382.0518(g). All of these facilities have since been required to obtain a permit, and §116.118 has no further application. Section 116.118 was not proposed for repeal in the April 16, 2010, issue of the *Texas Register* (35 TexReg 2978), therefore, the commission cannot repeal the section in this adoption. The commission may consider the repeal of §116.118 in a subsequent rule action.

The commission adopts the amendment to §116.116(e)(9)(C) and (D) to require that reductions in actual and allowable emissions be based on a 12-month rolling average rather than a calendar annual rate in order to provide a consistent and more accurate representation of emissions.

The commission adopts §116.116(e)(11) requiring that a separate netting analysis be performed for each proposed change under this subsection. In the April 14, 2010, federal notice (75 *Federal Register* 19473), the EPA acknowledges the commission's intent that each proposed change under the qualified facility program was to be analyzed separately to ensure that emission increases and reductions used by facilities occur simultaneously. This amendment makes the requirement explicit.

The commission adopts the amendment to §116.116(f) to correct references to citations of the commission's emissions banking and trading rules in 30 TAC Chapter 101, General Air Quality Rules.

§116.117, Documentation and Notification of Changes to Qualified Facilities

The commission adopts language in §116.117(a)(4) requiring recordkeeping demonstrating that changes to qualified facilities meeting the requirements of §116.116(e) include information of how a determination was made that there would be no adverse effect on ambient air quality. In response to a comment from EPA, the language was made consistent with §116.116(e)(5)(E).

The commission received a comment from EPA concerning the timing of notices of qualified facility changes and the potential confusion of language in §116.117(b) and (c) concerning prior notification of changes implying that post-change notification may still be available. The commission has adopted clear requirements that all facilities must hold a current NSR authorization prior to consideration as a qualified facility, and that the commission must receive prior notification of facility changes under §116.116(e). Considering these requirements, the commission examined the need to retain the requirements in §116.117 and has determined that §116.117(b) and (c) can be deleted.

Section 116.117(b)(1) requires submission of an annual report summarizing qualified facility changes. Because adopted §116.116(e)(2) requires an application for a permit revision and the submission of a PI-E form, the requirement for an annual report is redundant. Section 116.117(b)(2) applied to post-change notifications and was proposed for deletion.

Existing §116.117(b)(3) and (4) concern changes at facilities that would require prior notification. Adopted §116.116(e)(2) requires prior notification of all changes, and the requirements of §116.117(b)(3) and (4) are made redundant.

Section 116.117(c) requires that facilities with a preconstruction permit will have qualified facility changes incorporated into that permit when that permit is next amended or renewed. Section 116.116(e)(2) requires an application for a permit revision which means that the qualified facility changes will be incorporated once approved and §116.117(c) is no longer required.

§116.118, Pre-change Qualification

This section was proposed for amendment only in the April 16, 2010, issue of the *Texas Register* (35 TexReg 2978). The commission received a comment from EPA that it interprets this section as applying to grandfathered facilities. The commission agrees with EPA's interpretation of this section. Adopted §116.116(e)(1) requires that any facility seeking changes under qualified facility status must hold a current authorization under Chapter 116 or Chapter 106. No other method of qualification will be available, and the commission has determined the section has no further application. Section 116.118 was not proposed for repeal in the April 16, 2010, issue of the *Texas Register* (35 TexReg 2978), therefore the commission cannot repeal the section in this adoption. The commission withdraws the proposed amendment to §116.118 and may consider the repeal of the section in a subsequent rule action.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the 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 proposed rules is to amend various sections of Chapter 116 to address concerns expressed by the EPA regarding the commission's qualified facilities program in its review of the SIP. The changes to established rules for the qualified facilities program clarify that the rules regarding qualified facilities are restricted to minor changes regardless of the source classification. The adopted rules prescribe enforceable authorizations and a separate netting analysis to ensure that all net changes in emissions for the same account number remain below major modification thresholds. These changes will continue to allow the qualified facilities program to function for minor changes to facilities if the specified criteria are met. The changes will allow the commission to incorporate proposed qualified facilities changes into the relevant permits, ensuring that the changes will have no adverse affects on ambient air quality, Texas air quality control strategies, and attainment of the NAAQS. The rules also modify the definition of BACT and clarify its permissible use. These changes will continue to allow the qualified facilities program to function for minor changes to facilities if the specified criteria are met. The rules are not anticipated to add any significant additional costs to affected individuals or businesses beyond what is already required to comply with federal standards and do 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.

Additionally, 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 rules implement requirements of the FCAA. The rules are based on federal requirements for a permitting program and are necessary for federal approval of the Texas SIP. These rules are an express requirement of state law, but are proposed to meet the federal requirements for approval as a revision to the Texas SIP. The rules do not exceed a requirement of a delegation agreement or a contract between state and federal government if this rulemaking is adopted. The rules were not developed solely under the general powers of the agency, but are authorized by specific sections of THSC, Chapter 382 (also known as the TCAA), and the Texas Water Code, which are cited in the STATUTORY AUTHORITY section of this preamble, including THSC, §382.003(9) and §382.0518.

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 assessment for this rulemaking action under the Texas Government Code, §2007.043. The primary purpose of this rulemaking action, as discussed elsewhere in this preamble, is to amend the rules related to qualified facilities and revise the definition and applicability of BACT in order to obtain federal approval of the rules into the Texas SIP. The rules do not create any additional burden on private real property. The rules do 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 adoption also does 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 does 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 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 rules will benefit the environment by ensuring emission increases at certain facilities are combined with equivalent emission decreases at another facility at the same commission account number remain below all allowable emissions. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations (CFR), to protect and enhance air quality in the coastal areas (31 TAC §501.32). 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 under 30 TAC Chapter 122, Federal Operating Permits Program. Owners or operators subject to the federal operating permit program must, consistent with the revision process in Chapter 122, include any changes made using the amended Chapter 116 requirements into their operating permit.

PUBLIC COMMENT

The commission held a public hearing on the proposal in Austin on May 10, 2010. The University of Texas Environmental Law Clinic on behalf of Citizens for Environmental Justice, Texas Environmental justice Advocacy Services, Community In-Power and Developmental Association, Air Alliance Houston,

Lone Star Chapter Sierra Club, Environmental Integrity Project, Environmental Defense Fund, and Environment Texas (Environmental Groups); Environmental Integrity Project (EIP); GREEN Environmental Consulting (Green), Texas Chemical Council (TCC); Texas Industrial Project (TIP); and the United States Environmental Protection Agency (EPA) submitted comments during the public comment period, which closed on June 7, 2010.

RESPONSE TO COMMENTS

TCC supported the proposed amendments.

The commission appreciates the support.

Green commented that the commission should allow interchanges between VOCs and compounds like acetone that were once considered to be a VOC but were later declassified by EPA.

The commission has changed the rule in response to this comment. EPA removes compounds from its list of VOCs based on an individual compound's low reactivity with nitrogen oxides and sunlight to produce ozone. The commission has determined that a substitution that replaces more reactive VOCs with these types of less reactive compounds can improve air quality. The commission is amending §116.116(e)(5) to allow this substitution provided the compound that is being substituted is not regulated as a hazardous air pollutant and is not toxic. The commission prohibits the substitution of current VOCs in place of compounds that have been removed from EPA's VOC list.

Green commented that the TCEQ is using a BACT determination that does not apply economic

reasonableness with consideration to small sources. Green requested that this condition be applied to small sources and allow a deviation from BACT as posted on the TCEQ Web site.

The commission has not changed the rule in response to this comment. BACT is based on accepted industry practices and readily available technology. If a facility owner or operator believes a different control technology is justified, a request should be made to the executive director, which will be evaluated as appropriate.

Green questioned the rule language in §116.116(e)(2)(D) as applied to allowable emissions and netting analysis and whether it should apply to allowable emissions at an account instead of referring to the definition of "allowable emissions" in §116.17 which considers allowable emissions at a facility.

The commission has not changed the rule in response to this comment. The language in §116.116(e)(2)(D) was added to prevent the reappearance of emissions at facilities that have made changes under the qualified facility rules. A facility is a discrete structure or piece of equipment that contains a source or air contaminants and is equivalent with the EPA term "emission unit." An account is an aggregation of sources under common ownership or control located on one or more contiguous properties and is equivalent to the EPA term "stationary source." The rules allow emissions transactions among facilities at an account provided the new emission rates are certified at each facility. Under the definition of allowable emissions in §116.17, these rates cannot be changed unless a new certification, registration, or application for revision is approved.

Environmental Groups commented that the qualified facility rules are unnecessarily complex and vague

and make public participation and enforcement difficult.

The commission has not changed the rule in response to this comment. The commenters did not specify how or why the rules are unnecessarily complex and vague and make public participation and enforcement difficult, nor did they offer alternative rule language to address these concerns. The commission acknowledges that using the qualified facility program will require specific actions on the part of a facility owner or operator that are different than those required to obtain a permit amendment. The commission respectfully disagrees with the commenter that there are unnecessary complexities. The changes to the qualified facility rules are needed to address the EPA identified deficiencies of the program as an amendment to the SIP, and the commission solicits specific recommendations on improvements to the rule for potential future actions.

Environmental Groups asked TCEQ to clarify how emission increases or reductions under the qualified facility program are considered in future federal netting analysis.

The commission has not changed the rule in response to this comment. Emissions increases and reductions at each affected facility under the qualified facility program are not considered modifications but must still be documented and maintained by the facility owner or operator and supplied to the commission. This has been, and remains a requirement of the program from its inception. The adopted rule requires certification of new emission rates through the submission of a permit application for revision, a revision to standard permit representations, or the submission of forms certifying a new federally enforceable emission rate for a PBR. The changes to §116.116(e) will require that an applicant for a qualified facility change also apply for a permit revision, which

will allow the commission to make the necessary changes to an applicant's permits to ensure that the qualified facility change is recorded, permanent, and enforceable. Therefore, records of qualified facility changes become enforceable provisions of a facility's NSR authorization and part of the permanent record of the history of the facility. The history of changes is available to the commission to allow the performance and confirmation of future netting analyses and an accurate determination of whether any subsequent changes will require federal major NSR review.

Environmental Groups are concerned that various minor NSR authorizations may be used to authorize pieces of a larger project that would otherwise require major NSR review. They also commented that the qualified facility program may still be used to authorize significant emission increases at major sources that have netted out of major NSR. They quoted EPA that a "minor modification at a major source which results in a significant actual project emission increase that would require a netting demonstration to avoid major NSR applicability cannot be authorized under the qualified facility provisions."

The commission has not changed the rule in response to this comment. The qualified facility program has never been available as an authorization of a major modification. The commenter is correct that emission increases are allowed under the program, but these increases must be below significance thresholds for major NSR. The emissions increases allowed also do not increase the total allowable emissions that are authorized for a site. Because the total allowable emissions do not change, there is no threat to ambient air quality standards. Additionally, the qualified facility changes must be evaluated for local air quality effects to protect public health. In short, qualified facility changes are treated identically to changes at other NSR authorized facilities with regard to air quality effects. The qualified facility rules allow insignificant increases under a case-by-case

permit, but these increases are documented, become part of the permit, and result in new enforceable limits. The cumulative increases at a qualified facility are treated identically to increases at non-qualified facilities. The emission changes are tracked and if a net increase equals or exceeds a federal netting threshold, federal major NSR is triggered.

EPA recognizes that, under the applicable Federal regulations, states have broad discretion to determine the scope of their minor NSR programs as needed to attain and maintain the NAAQS, and have significant discretion to tailor minor NSR requirements that are consistent with the requirements of 40 CFR Part 51 (73 *Federal Register* 72008, September 23, 2009). The commission has extensive records demonstrating that changes under the program are reviewed and, in some cases denied, in order to protect ambient air quality standards. EPA acknowledged the intent of the program as a part of minor NSR and the adopted rules provide a clear sequence of actions on the part of the owner or operator to ensure that a proposed qualified facility change does not require major NSR review. The commission has structured the adopted rules to explicitly state that a determination of federal applicability is always the first step in determining whether a change will be allowed under the qualified facility program. Under §116.116(5)(E), the facility owner or operator must demonstrate that a proposed change will not adversely affect ambient air quality. Without a successful demonstration, changes as a qualified facility will not be allowed.

Environmental Groups commented that the qualified facility rules are inadequate to protect air quality and do not provide the minimum required public participation. Environmental Groups quote requirements of the SIP in regard to a minor NSR program including the identification of the types and sizes of facilities, buildings, structures, or installations which will be subject to review and supporting air quality data. They

stated that facilities subject to minor NSR must meet minimum public participation requirements including: a 30-day comment period; availability in one location of information submitted by the owner or operator and the agency's analysis of the effect of construction on ambient air quality; notice by prominent advertisement; and notice to EPA and local air pollution control agencies with jurisdiction.

The commission has not changed the rule in response to this comment. The commission respectfully disagrees that the qualified facility rules do not protect air quality. All emission increases under the qualified facility program must be demonstrated to not adversely affect air quality. The qualified facility program as authorized by SB 1126 was conceived and implemented as a minor NSR program, which states are free to develop. It is a common feature of the commission's minor NSR program that PBR and standard permit individual authorizations are not subject to public notice. Both of these programs have been approved into the Texas SIP. With regard to notice for standard permits and PBRs, each of those are adopted via separate processes, and have always been and remain exempt from the notice process for major and minor NSR case-by-case permits that previously applied in Chapter 116 (specifically §§116.130 - 116.137), as well as the rules adopted that implement House Bill (HB) 801(1999) and HB 2518 (2001). The notice process is approved by EPA in the SIP in §116.603 (*see* 73 *Federal Register* 53716 (September 17, 2008)). There is no requirement for notice for any claim for an individual standard permit, as EPA has acknowledged in comments on the commission's public participation rules as published on February 16, 2010, in the *Texas Register* ((35 TexReg 1749) *see* comments of EPA, Region 6 on Rule Project Number 2010-004-039-LS)). PBRs are subject to notice at the time that each PBR is adopted by the commission. PBRs are found in 30 TAC Chapter 106, and are adopted under the rulemaking process in the Texas Administrative Procedure Act, Texas Government Code, Chapter 2001, which

requires notice of the proposed rule and an opportunity to comment, including that opportunity at a public hearing. Standard permits are authorized by THSC, §382.05195 and the rules in Chapter 116, Subchapter F. As with PBRs, the qualified facility rules have been subject to public comment and a public hearing prior to their adoption. Larger facilities that may use the qualified facility rules will have been subject to public comment during consideration of an NSR case-by-case permit.

Environmental Groups and EIP commented that the qualified facility program does not protect air quality and cite research that permitted allowable emissions are often significantly above actual emissions. In such cases, increasing emissions to the allowable limit could jeopardize attainment of national ambient air quality standards. Additionally, the qualified facility program does not include legally enforceable procedures to ensure an increase will not violate a control strategy. TCEQ rules require a demonstration that qualified facility increases will not adversely affect air quality, but this demonstration is not required to be submitted to the commission, and only certain qualified facility changes require pre-change notification. Environmental Groups further commented that the qualified facility rules lack provisions to assure that any emission reduction is enforceable citing a lack of monitoring and reporting requirements. Environmental Groups commented that the qualified facility rules allow significant NSR modifications without public participation.

The commission has not changed the rule in response to this comment. It is common for a facility's allowable emission rate to exceed its actual emissions, and it is true that the qualified facility rules authorize an increase in actual emissions for a corresponding decrease in allowable emissions of the same contaminant category at the same site. This does mean that a facility may increase its actual

emissions, provided a reserve of allowable emissions remains as an offset. When the original permit was issued, evaluation of whether the emission will comply with the NAAQS is based on the proposed allowable emissions, and the final allowable emissions must be in compliance with the NAAQS. Owners or operators of facilities seeking to make changes under the qualified facility rules must first demonstrate that the proposed change is not a major modification requiring major NSR. Once eligible to use the qualified facility rules, owners or operators must further demonstrate that the change will not adversely affect ambient air quality. If the change is approved, new emission rates become a part of the NSR authorizations for any facilities affected by the qualified facility action. This is accomplished through a permit revision, a change in representation of emissions, or a certification of emissions, all of which result in an enforceable emissions limitation.

Adopted §116.116(e)(2) requires a permit revision application be submitted and approved before any qualified facilities changes are made at a site. Therefore, the adopted rules require pre-change notification for all qualified facilities changes. The qualified facility rules do not allow a net increase in allowable emissions at the site. Instead, the program allows an applicant to trade allowable emissions of the same pollutant between different facilities at the same site. The overall allowable limit at the site does not change, and furthermore, these allowable emissions were demonstrated at the time the facilities were originally permitted to protect ambient air quality standards. A qualified facilities change may not result in new construction at a site. It can only be used to make minor changes to already permitted facilities at a single site without increasing the total allowable emission at a site. As addressed in a previous comment, the qualified facility program is a part of the TCEQ minor NSR program, and it is a common SIP-approved feature that individual authorizations are not always subject to public notice.

Environmental Groups commented that the term "facility" is vague and that TCEQ should modify its permitting terminology to be consistent between the major and minor NSR program, and the FCAA.

The commission has not changed the rule in response to this comment. The commission acknowledges that its use of terms is different than those of the EPA. The term "facility" is codified in statute and means a discrete structure, enclosure, item, or piece of equipment that constitutes or contains a source of air contaminants. This is equivalent to EPA's use of the term "emissions unit." This interpretation of the term "facility" has been consistent by the TCEQ and its predecessor agencies for more than 30 years. Further, this definition has been approved into the Texas SIP, as acknowledged by the EPA in the September 23, 2009, *Federal Register* (74 *Federal Register* 48455, in footnote four). The commission cannot change its use of the term "facility" without violating state law. Even if this change could legally be made, the structure of the commission's other terminology related to permitting is dependent on the facility definition. This terminology is used throughout the commission's air quality rules and permits.

Environmental Groups commented that the proposed definition of BACT does not require the greatest reduction in emissions while meeting the requirements of obtainable, technically practical, and economically reasonable. They believe it is a weakening of the definition. They commented that the different definitions of BACT used by TCEQ and EPA are confusing and recommended that TCEQ use a different term such as TBACT.

The commission has not changed the rule in response to this comment. There is nothing weaker in

the adopted state definition of BACT than the federal definition because BACT is ultimately determined on a case-by-case basis. The commission bases its definition and application of BACT on established industry and regulatory practices and applies its BACT review to all air contaminants and all facilities subject to case-by-case permitting without limitation to contaminants regulated under the FCAA. The application of BACT review under the TCAA is broader than the federal definition and therefore supplements federal review and helps ensure overall air quality. The commission has addressed a point of the EPA disapproval of the qualified facility program by adopting revisions to §116.111 explicitly applying the federal definition of BACT in cases where changes at facilities trigger federal major NSR. However, the TCAA requires the commission to consider BACT for all air contaminants, not just those that are federally regulated. The commission conforms to this statutory mandate but also meets its obligation to ensure that facilities undergo major NSR when it is applicable. If a qualified facility change requires federal major NSR, the federal definition of BACT, as codified in §116.160, will be applied for that review.

Environmental Groups commented that the use of PBR to authorize emission increases violates federal public participation requirements and allows variance from permit representations. Environmental Groups also commented that the notice and comment given for PBRs at proposal are not sufficient to meet public participation requirements because certain PBRs are not source specific. This does not allow a realistic assessment of potential air quality effects. In this category, Environmental Groups specifically mentions §106.261, Facilities (Emissions Limitations), and §106.262, Facilities (Emissions and Distance Limitations), as not being source specific. Environmental Groups commented that §106.263, Routine Maintenance, Start-up, and Shutdown of Facilities and Temporary Maintenance Facilities, allows the authorization of maintenance, start-up, and shutdown at any type of facility. Environmental Groups

commented that generic PBRs violate the THSC, which states that TCEQ may adopt PBRs "for certain types of facilities that will not make a significant contribution of air contaminants to the atmosphere" and that TCEQ is prohibited from adopting a PBR that would authorize a major facility. Environmental Groups also cited EPA comments that a PBR should be used only for small minor sources and is not a vehicle for major sources to supplement emission limits.

The commission has not changed the rule in response to this comment. The process of establishing PBRs has been approved by EPA as part of the Texas SIP. The listed PBRs were published for public comment prior to their adoption. These PBRs are not under consideration for rulemaking and are not part of the proposed amendments related to the EPA disapproval of the qualified facility program; therefore, this comment is beyond the scope of the current rulemaking.

Environmental Groups commented that the PBR rules allow information relevant to the effect of emissions to be included in the PBR registration and not a permit, making it unavailable to the public and not subject to review or comment.

The commission has not changed the rule in response to this comment. The rules concerning registration of PBRs are not under consideration for rulemaking and are not part of the proposed amendments related to the EPA disapproval of the qualified facility program; therefore, this comment is beyond the scope of the current rulemaking.

Environmental Groups commented that exemptions from the definition of "modification of existing facility" concerning flexible permits, multiple plant permits and changes at natural gas facilities should be

deleted or given an effective date that is the date of any future SIP approval. These exemptions do not protect air quality.

The commission has not changed the rule in response to this comment. The use of flexible and multiple plant permits was not part of the qualified facility proposal, and the commission can take no action on these subjects in this adoption. The commission is addressing issues related flexible permits in a separate rulemaking, and it would be premature to delete references to that program in this adoption. The language related to natural gas processing facilities is consistent with statutory language in THSC, §382.003, Definitions, regulating these facilities.

TIP commented that the qualified facility program is an approvable SIP amendment as written and objects to the term "deficiency" as used in the preamble to describe the basis for EPA's disapproval of the program. They state that the term "deficiency" is inaccurate.

The commission has made no changes in response to this comment. The commission does not use the term "deficiency" as an admission that the qualified facility program was submitted as a SIP amendment that was not approvable. The commission deliberately uses the term to describe portions of the qualified facility program as "EPA identified deficiencies" to establish the basis for the commission's rule actions.

TIP disagreed with the characterization of the qualified facility program as an element of minor NSR. They state that the program is an exclusion from minor NSR for well controlled facilities by legislative design as SB 1126 specifically excluded qualified facility changes from being considered a modification.

The commission respectfully disagrees with this assessment of the qualified facility and has not changed the rule. Changes under the qualified facility program are reviewed for air quality effects and proper BACT. SB 1126 exempts qualified facility changes from being considered a modification but does not remove the need to evaluate changes for effects on air quality. Additionally, the qualified facility rules allow insignificant emissions increases within a maximum of allowed emissions that is protective of air quality. These are features of the Texas minor NSR program.

TIP disagreed with the addition of §116.116(e)(1), which specifically requires a determination of federal major NSR applicability prior to any facility changes being authorized under the qualified facility rules. TIP stated that THSC, §382.0512 prevents facilities from using the qualified facility program to avoid otherwise applicable major NSR requirements. They also stated that §116.117(a)(4) provides an additional safeguard against circumvention of federal requirements.

The commission has not changed the rule in response to this comment. The commission agrees with TIP that the qualified facility program has always contained safeguards against circumvention of major NSR requirements, and EPA acknowledges the intent of the program as an element of minor NSR. However, in its April 14, 2010, (75 *Federal Register* 19469), final disapproval of the qualified facility program, EPA maintains its position that the program is not clearly limited to minor NSR. Although the commission agrees that the statutory language is clear, the adoption of rule language to implement the legislative intent removes the ambiguity identified by EPA as a deficiency in the qualified facilities rule. Section 116.116(e)(1) is adopted to specifically address this issue.

TIP commented that the commission should retain the option in §116.117 that allows facility owners or operators to make a post-change notification of a qualified facility change. TIP also objected to the proposed revisions to §116.116(2) requiring the submission of a permit application for qualified facility changes.

The commission has not changed the rule in response to this comment. In its notice of proposed disapproval as published on September 23, 2009 (74 *Federal Register* 48462), EPA specifically requires that an application must submitted for each participating qualified facility to ensure enforceability of qualified facility changes.

TIP commented that the proposed definition of BACT in §116.10 be withdrawn. They stated that the current definition is SIP-approved and is well supported by guidance and precedent. Replacing the current definition would render this guidance obsolete. TIP also stated the commission has addressed EPA concerns with the adoption of the BACT referenced definition in 40 CFR §52.21(b)(12) under TCEQ Rule Project 2010-005-116-PR.

The commission has not changed the rule in response to this comment. The commission agrees that the amendment to §116.160 under the cited rule project number addresses EPA concerns about the use of the federal definition of BACT for projects requiring federal review. The TCAA requires that BACT be applied to all facilities and all air contaminants in permits issued by the commission and is not limited to applications for PSD and nonattainment permits. The commission conducts a detailed review of BACT for all projects and regulated pollutants. The adopted definition more

clearly expresses the concept of BACT than does the definition it replaces. The new definition is consistent with existing guidance and any changes to that guidance will not be a major issue.

EPA commented that the background of the rulemaking stated the qualified facility program allows increases in actual emissions with a corresponding decrease in allowable emission at another facility and that this is inconsistent with its understanding of the program as involving allowable emissions only. EPA stated that its understanding was that actual emissions were only used within the context of grandfathered facilities and that references to actual emissions appear throughout §116.116(e). EPA requested clarification of the intent of the qualified facility program.

The statements in the rule preamble are correct. The qualified facility program does allow increases in actual emissions as part of the minor NSR program. The program is based on the exemption from the applicability of "modification" for facility changes that involve minor increases in emission rates. In the proposed notice of program disapproval as published on September 23, 2009 (74 *Federal Register* 48458 - 48459), there is extensive discussion of the commission's netting procedures and the need to use actual emission increases in making a determination of federal major NSR applicability. This was one of the major points of program disapproval. Although the qualified facilities program has always required such a netting procedure as a matter of program implementation, the commission has clarified the rule to specifically require the use of actual emissions for determination of major NSR applicability.

Like other elements of the Texas minor NSR program, the basis for the qualified facility program is a limit on net allowable emissions. The permitted net allowable emissions at a site cannot be

increased thus protecting ambient air quality standards. This meets the intent of the minor NSR program, which is to allow insignificant actual emission increases within an allowable emission envelope that protects ambient air quality standards.

Since its inception, the program has been used for insignificant increases at authorized facilities following a review for major NSR applicability. The amendments to the qualified facility program adopted by the commission will clarify its intent, specifically to remove any potential ambiguities as identified by EPA.

EPA questioned whether the commission may disapprove changes as noticed on a PI-E form and whether the commission has an established time to respond to the noticed changes. They questioned whether a default approval exists. EPA also noted that language in §116.117(b) implies that prior notification is only required when intraplant trading moves emissions closer to a property line. Section 116.117(b) also requires a PI-E as part of a facility annual report. EPA requested clarification on the use of the PI-E form.

The commission has changed the rule in response to this comment. Under the adopted amendments to the qualified facility program, the PI-E form serves as notice that changes are being made under the qualified facility rules and establishes a new federally enforceable emission rate for facilities authorized under Chapter 106. New emission rates for facilities authorized under a standard permit will be made federally enforceable through an update to the representations in the facility's registration. Under adopted §116.116(e)(2) prior notification is required for all qualified facility changes, and the commission has modified language in §116.117 to prevent any confusion.

Section 116.117(b)(1) requires submission of an annual report summarizing qualified facility changes. Because the new requirements in §116.116(e)(2) require an application for a permit revision and the submission of a PI-E form, the requirement for an annual report is redundant. Section 116.117(b)(2) applied to post-change notifications and was proposed for deletion.

Existing §116.117(b)(3) and (4) concern changes at facilities that would require prior notification. Adopted §116.116(e)(2) requires prior notification of all changes, and the requirements of §116.117(b)(3) and (4) is made redundant. Therefore, §116.117(b)(3) and (4) is deleted from the rules.

EPA recommended that the commission include in its rules a specific limitation on the use of the term "facility" to an emissions unit similar to language in §116.160(c)(3). EPA stated that the term "facility" is applied in different ways without providing clarification in rule language, and its recommended action would clearly limit what a facility is under the qualified facility program.

The commission has not changed the rule in response to this comment. The definition of "facility" is an approved SIP amendment that has the same meaning when used in the qualified facility program as in other air permitting programs of the commission. The rule language in §116.160(c)(3) cited by EPA is not a limitation of the definition of "facility" but an expression of the term's equivalency with EPA's "emission unit."

EPA commented that the commission should further revise its qualified facility rules to include a definition of "account" to clearly indicate it is synonymous with EPA's "source."

The commission respectfully disagrees with this comment. It is not necessary to move this definition to the qualified facility rules. An account is an aggregation of sources under common ownership or control located on one or more contiguous properties and is equivalent to the EPA term "stationary source," which includes these concepts. The state definition of "account" and the federal definition of "stationary source" both include the concept of multiple points of emissions (state defined "facilities" and federally defined "emission units") under common control located within a clearly defined area. It is only within this area that qualified facility transactions may occur. The definition of "account" is located in §101.1, Definitions, where it applies to all air rules of the commission.

EPA recommended rule language for addition to the definition of BACT in §116.10 to limit this definition to air contaminants and facilities not subject to federal permitting requirements.

The commission has not changed the rule language in response to this comment. The TCAA requires that BACT be applied to all facilities and all air contaminants in permits issued by the commission and is not limited to applications for PSD and nonattainment permits. The commission is adopting language in §116.111(2)(C) which clearly applies the state definition of BACT to facilities subject to the TCAA. The same adopted language also states that the BACT definition in 40 CFR §52.21(b)(12) will be applied to facilities requiring major NSR review.

EPA requested an explanation of why the definition of "qualified facility" has been retained in §116.10 rather than moved to §116.17.

The commission has not changed the rule in response to this comment. The term "qualified facility" may be used in other rules of the commission and in currently issued permits. The commission has determined that changing the rule citation for the location of the definition would unnecessarily complicate the interpretation of these rules and permits.

The definition of "allowable emissions" in §116.17(2) states that the term would include the emission limit established in a MAERT and any emission rate in the representation on a permit application. EPA stated this might lead to double counting of emissions and asked for verification that the rates are not cumulative.

The emission rates placed in a MAERT are based on representations in a permit application. Once emission limits are placed in the MAERT, they override any emission rate representations made in the permit application.

EPA requested an explanation of the term "special exemption facility" in §116.17(2)(D).

The commission has changed the rule in response to this comment. The commission has deleted §116.17(2)(D), as the referenced term "special exemption facility" is obsolete. The commission has also removed the references to prior notification, as adopted §116.116(e)(2) will require all facilities that make a qualified facilities change to notify the commission prior to making the change, and apply for a revision to the applicable permits to ensure that the qualified facilities changes are federally enforceable.

EPA noted the citation of §116.12(20) in §116.116(e)(1)(B) and noted that it is evaluating pending revision to §116.12 and that §116.12(20) must be approved before further action on the qualified facility program.

The commission has changed the rule in response to this comment. As EPA notes, the correct citation should be §116.12(13), which is a SIP-approved definition. The proposed citation was an incorrect reference. The commission will refer to §116.12 to limit the need for rule amendments to change citations in the event definitions are added or removed from the section.

EPA commented that §116.116(e)(2)(A) requires the submittal of an application for a permit alteration to document certain qualified facility changes. The SIP-approved alteration provisions in §116.116(c)(B)(iii) state that a permit alteration is a change that does not cause an increase in the emission rate of any air contaminant. EPA stated that the terms of the alteration provisions should be changed. Environmental Groups commented that the use of the term "alteration" should not apply to the qualified facility rules as it could be used to increase actual emissions provided there is a decrease in allowable emissions.

The commission has changed the rule in response to this comment by replacing the word "alteration" with the word "revision." Although the commission intends this rule change to be restricted to applications within the qualified facilities program, the commission agrees that the use of the word alteration may be confusing in this context. The qualified facility rules and the statutory authorization in SB 1126 allow increases in actual emissions at a facility provided that there is a corresponding decrease in allowable emissions of the same pollutant at another facility at

the same site, and exempts these increases from being considered a modification, thus removing the requirement for a permit amendment. Therefore, the commission is using the word revision in this rule, to indicate that changes in the conditions and/or emission rates that will be applied to a permit when a qualified facilities change is made, and that those permit changes are fully enforceable. "Revision" will also be defined in the qualified facilities definitions section in §116.17.

EPA commented that §116.116(e)(2)(D) contains a typographical error.

EPA is correct and the commission has deleted the unnecessary word "in."

EPA commented that a portion of the final disapproval of the qualified facility program was based on the lack of need for an underlying permit. EPA cited the language in §116.116(e)(2)(E) which states in part ". . . regardless of whether the facility has received a preconstruction permit or permit amendment . . .." and stated that this language must be revised to be consistent with the stated intent of the commission in §116.116(e)(1) that a facility must hold an authorization under Chapter 106 or Chapter 116.

The commission has changed the rule in response to this comment. By statute, all facilities in the state with sources of air contaminants must be authorized, including those facilities constructed prior to 1971. In 2001, the legislature adopted a revision to the TCAA requiring any facility constructed prior to 1971 (commonly referred to as a "grandfathered facility") to either obtain or apply for a permit by March 1, 2007 or March 1, 2008, depending on its location, or cease emitting air contaminants. To address EPA's concern and ensure that the rule language reflects current statutory requirements and the commission's implementation of the rule, adopted §116.116(e)(1)(A)

explicitly requires a facility to possess such an authorization. The commission has determined that the language cited by EPA is inconsistent with this requirement. The commission has further determined that the cited language, while statutory, was applicable to grandfathered facilities which were required to obtain a permit after the implementation of the qualified facility program under SB 1126. The commission has concluded that the cited language has no further application and can therefore be removed. For consistency, the commission is also removing identical language from §116.10(9)(D)(ii).

EPA commented that the interchange of sulfur compounds allowed under §116.116(e)(5) would include sulfur dioxide and hydrogen sulfide which are both regulated NSR pollutants and would require separate netting analyses. This interchange of compounds is not an approvable SIP amendment. EPA cited the same difficulties when considering PM_{10} and $PM_{2.5}$.

The commission has not changed the rule in response to this comment. Under the conditions of §116.116(e)(5)(E), an applicant for a qualified facilities change must demonstrate that the change will not adversely affect air quality before the change will be approved by the commission. Accordingly, the commission has decided that it is unnecessary to specifically prohibit interchanges of sulfur dioxide and hydrogen sulfide, or PM_{10} and $PM_{2.5}$. If an applicant proposes an interchange and cannot demonstrate that it will not adversely affect ambient air quality, then such a change would be disapproved by the commission.

The commission recognizes that sulfur dioxide and hydrogen sulfide are dangerous compounds with disaster potential. A demonstration of an acceptable interchange between these substances will

be difficult and subject to intense review before approval. However, the commission has determined that allowing the interchange, should an applicant be able to make the appropriate demonstration, could reduce the potential harmful effects of these substances. The commission is also aware that demonstrations of the relative health effects of PM_{10} and $PM_{2.5}$ and their interchange are not fully developed. Without an approved and replicable demonstration, such an interchange would not be allowed, but the commission does not want to prohibit potential air quality benefits if future developments allow a successful and replicable demonstration.

EPA commented that §116.116(e)(5)(E) requires a demonstration that a change under qualified facilities will not adversely affect ambient air quality. Section 116.117(a)(4) requires an owner or operator to maintain sufficient information to show that a project is not expected to adversely affect ambient air quality standards which appears to be a less stringent requirement. EPA commented that the two paragraphs should be made consistent and to explain the replicable procedure the commission will use to determine the change will not adversely affect air quality.

The commission has changed the rule in response to this comment to make the sections consistent. The commission uses established modeling procedures to determine air quality effects. Applicants for qualified facility changes must conform to these procedures in demonstrating that qualified facility changes will not adversely affect air quality, and the results obtained by the applicant must be replicable by the commission.

EPA cited the language in §116.116(e)(8)(A) concerning BACT and requested confirmation that only state BACT can apply to a minor NSR program and that this section should be revised to limit BACT

application to the state definition. EPA asked for an explanation of the replicable procedure to determine a control method as effective as state BACT.

The language in §116.116(e)(8)(A) is applicable only in the qualified facility rules and is limited to minor NSR and the definition of BACT in §116.10. The state definition of BACT is a comprehensive definition that must be applied to all air contaminants under the requirements of the TCAA. In cases where a change to a facility requires major NSR review, the federal definition of BACT must also be applied to that change. These are encompassing requirements under the TCAA and apply to all NSR permitting actions by the commission. Adopted §116.116(e)(1)(B) requires that any applicant for a qualified facility change bear the initial burden of determining federal applicability prior to seeking authorization for a qualified facility change, and the commission confirms the determination. As explained previously in this response, an applicant determines federal applicability using actual emissions, as required by both TCAA and FCAA.

Applicants for alternative BACT must conform to established procedures and identical or better emission reductions in demonstrating that alternative BACT is equivalent, and the results obtained by the applicant must be replicable by the commission.

The preamble states that §116.116(e)(10) contains anti-backsliding language stating that no existing level of control may be reduced and that the MAERT will be adjusted to show new emission rates under the qualified facility program. EPA commented that no rule language requires an adjustment to the MAERT and that commission should include this revision.

The commission has not changed the rule in response to this comment. Changes to the MAERT are made anytime a new emission rate is established in a case-by-case permit. The adopted rule changes at §116.116(e)(2) require a revision to a permit at the time a qualified facilities change is made. This revision will allow the qualified facilities changes to be added into the permit, which includes changing the MAERT to reflect any changes in emissions rates. These changes are not unique to the qualified facility rules and are needed to maintain current permit requirements.

EPA commented that §116.117(b)(1) must be revised to reduce the interval between the time a change is made and when the commission is notified with an annual report. EPA also commented that this paragraph should be revised to require reporting for changes with intraplant trading. EPA noted the deletion of the provision for post-change notification but still finds the regulations vague. EPA commented that the commission should expressly state that pre-change notification is required for all qualified facility changes.

The commission has changed the rule in response to this comment. By statute, all facilities in the state with sources of air contaminants must be authorized, including those facilities constructed prior to 1971. In 2001, the legislature adopted a revision to the TCAA requiring any facility constructed prior to 1971 to either obtain or apply for a permit by March 1, 2007 or March 1, 2008, depending on its location, or cease emitting air contaminants. In order to address EPA's concern and ensure that the rule language reflects current statutory requirements and the commission's implementation of the rule, adopted §116.116(e)(1)(A) explicitly requires a facility to possess such an authorization. The changes to the rule that the commission has adopted clarify the commission's implementation of the qualified facilities program by providing explicit requirements in the rules

that all facilities must hold a current NSR authorization prior to consideration as a qualified facility, and that the commission must receive prior notification of facility changes under §116.116(e). Considering these requirements, the commission examined the need to retain the requirements in §116.117 and has determined that §116.117(b) and (c) can be deleted.

Section 116.117(b)(1) requires submission of an annual report summarizing qualified facility changes. Because the new requirements in §116.116(e)(2) require an application for a permit revision and the submission of a PI-E form, the requirement for an annual report is redundant. Section 116.117(b)(2) applied to post-change notifications and was proposed for deletion.

Existing §116.117(b)(3) and (4) concern changes at facilities that would require prior notification. Adopted §116.116(e)(2) requires prior notification of all changes, and the requirements of §116.117(b)(3) and (4) is made redundant. Therefore, §116.117(b)(3) and (4) is deleted from the rules.

Section 116.117(c) requires that facilities with a preconstruction permit will have qualified facility changes incorporated into that permit when that permit is next amended or renewed. Section 116.116(e)(2) requires an application for a permit revision which means that the qualified facility changes will be incorporated once approved, and therefore, §116.117(c) is no longer required.

EPA commented that §116.117(b)(2) requires pre-change notification if a change will affect compliance with a permit special condition and requested an explanation of what constitutes a special condition. They asked if this would allow removal of federally required monitoring or reporting.

The commission has changed the rule is response to this comment and is deleting the cited subsection for the reasons stated in the previous comment and response. The term "special conditions" of the permit is a matter of nomenclature and such conditions are developed specifically for the permit that they are a part of (see SIP-approved §116.115(c)). A special condition is not a separate category of conditions. Changes under §116.116(e) are not made to delete monitoring or reporting requirements, nor would federally required monitoring or reporting requirements be removed as part of a change made by a qualified facility.

The changes to the rule that the commission adopted clarify the commission's implementation of the qualified facilities program by providing explicit requirements in the rules that all facilities must hold a current NSR authorization prior to consideration as a qualified facility, and that the commission must receive prior notification of facility changes under §116.116(e). Considering these requirements, the commission examined the need to retain the requirements in §116.117 and has determined that §116.117(b). Because the new requirements in §116.116(e)(2) require an application for a permit revision and the submission of a PI-E form, the requirement for a post-change notice is obsolete. Section 116.117(b)(2) applied to post-change notifications and was therefore proposed for deletion.

EPA commented that it interprets §116.118 as applying to grandfathered facilities and asked the commission to explain what other facilities may be affected by this section. If the section is solely applicable to grandfathered facilities, EPA recommended it be deleted. If it applies to other types of facilities, EPA recommended that it be clarified.

The commission is changing the proposed rule in response to this comment. The commission agrees with EPA's interpretation that this section of the rule is only applicable to grandfathered facilities. By statute, all facilities in the state with sources of air contaminants must be authorized, including those facilities constructed prior to 1971. In 2001, the legislature adopted a revision to the TCAA requiring any facility constructed prior to 1971 to either obtain or apply for a permit by March 1, 2007 or March 1, 2008, depending on its location, or cease emitting air contaminants. Adopted §116.116(e)(1) makes explicit that any facility seeking changes under qualified facility status must hold a current authorization under Chapter 116 or Chapter 106. No other method of qualification will be available. Section 116.118 was not proposed for repeal in the April 16, 2010, issue of the *Texas Register* (35 TexReg 2978), therefore the commission cannot repeal the section in this adoption. The commission withdraws the proposed amendment to §116.118 and may consider the repeal of the section in a subsequent rule action.

EPA commented that the proposed SIP supplement document does not address grandfathered facilities which did not have underlying Chapter 116 authorizations. The SIP supplement should identify which facilities were grandfathered and the commission should provide verification that these facilities are now authorized.

By statute, all facilities in the state with sources of air contaminants must be authorized, including those facilities constructed prior to 1971. In 2001, the legislature adopted a revision to the TCAA requiring any facility constructed prior to 1971 to either obtain or apply for a permit by March 1, 2007 or March 1, 2008, depending on its location, or cease emitting air contaminants.

The commission also notes that any owner or operator of a grandfathered facility wanting to make changes under the qualified facility rules at any point during the facility's existence would have been required to update the facility control technology to meet the BACT requirements of the rules. Once a permit was issued, there was no reason to identify facilities as grandfathered in the air permitting database as that is irrelevant for qualified facility program purposes.

EPA commented that the portion of the proposed SIP supplement entitled "Concerning the Qualified Facility Program as Authorized by Senate Bill 1126" must be revised to accurately reflect the requirements of §116.116(e)(1)(A) that a facility must be authorized before it can become a qualified facility and that references to BACT are limited to state BACT.

The commission has made the appropriate changes to the SIP supplement.

EPA commented that Appendix 4 - SB 1126 Guidance must be updated to reflect EPA concerns and commission corrections applicable to the qualified facility program and the updated guidance should be submitted to EPA.

The guidance will be updated if the rule amendments are adopted and will reflect EPA concerns and all related rule changes. The guidance document was included with the proposed rule amendments as an indication of how the commission has administered the qualified facility program. The commission's Air Permits Division will update its guidance document after these rules become effective. It will be made available on the commission's web site for Air Permits

Division. The commission is not submitting the guidance document to EPA for revision to the SIP.

SUBCHAPTER A: DEFINITIONS

§116.10, §116.17

STATUTORY AUTHORITY

The amendment and new section are adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment and new section are also adopted under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.003, concerning Definitions; §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 general, comprehensive plan for the control of the state's air; §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue a permit by rule for types of facilities that will not significantly contribute air contaminants to the atmosphere; §382.0511, concerning Permit Consolidation and Amendment, which allows the commission to combine permits; §382.0512, concerning Modification of Existing Facility, which restricts what the commission may consider in determining a facility modification; and §382.0518, concerning Preconstruction Permit, which authorizes the commission to require a permit before a facility is constructed or modified.

The new section and amendments implement Texas Water Code, §5.103 and §5.105 and Texas Health and Safety Code, §§382.002, 382.003, 382.011, 382.012, 382.017, 382.051, 382.0511, 382.0512, and

382.0518.

§116.10. General 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. In addition to the terms which are defined by the TCAA, and in §101.1 of this title (relating to Definitions), the following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Best available control technology (BACT)--An air pollution control method for a new or modified facility that through experience and research, has proven to be operational, obtainable, and capable of reducing or eliminating emissions from the facility, and is considered technically practical and economically reasonable for the facility. The emissions reduction can be achieved through technology such as the use of add-on control equipment or by enforceable changes in production processes, systems, methods, or work practice.

(2) Dockside vessel--Any water-based transportation, platforms, or similar structures which are connected or moored to the land.

(3) Dockside vessel emissions--Those emissions originating from a dockside vessel that are the result of functions performed by onshore facilities or using onshore equipment. These emissions include, but are not limited to:

(A) loading and unloading of liquid bulk materials;

(B) loading and unloading of liquified gaseous materials;

(C) loading and unloading of solid bulk materials;

(D) cleaning and degassing of liquid vessel compartments; and

(E) abrasive blasting and painting.

(4) Facility--A discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment. A mine, quarry, well test, or road is not a facility.

(5) Federally enforceable--All limitations and conditions which are enforceable by the United States Environmental Protection Agency (EPA), including:

(A) those requirements developed under Title 40 of the Code of Federal Regulations (CFR) Parts 60 and 61 (40 CFR Parts 60 and 61);

(B) Chapter 113, Subchapter C of this title (relating to National Emission Standards for Hazardous Air Pollutants for Source Categories (FCAA, §112, 40 CFR Part 63));

(C) requirements within any applicable state implementation plan (SIP);

(D) any permit requirements established under 40 CFR §52.21;

(E) any permit requirements established under regulations approved under 40 CFR Part 51, Subpart I, including permits issued under the EPA-approved program that is incorporated into the SIP and that expressly requires adherence to any permit issued under such program; or

(F) any permit requirements established under Subchapter E of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)).

(6) Grandfathered facility--Any facility that is not a new facility and has not been modified since August 30, 1971.

(7) Lead smelting plant--Any facility which produces purified lead by melting and separating lead from metal and nonmetallic contaminants and/or by reducing oxides into elemental lead. Raw materials consist of lead concentrates, lead-bearing ores or lead scrap, drosses, or other lead-bearing residues. Additional processing may include refining and alloying. A facility which only remelts lead bars or ingots for casting into lead products is not a lead smelting plant.

(8) Maximum allowable emissions rate table (MAERT)--A table included with a preconstruction permit issued under this chapter that contains the allowable emission rates established by the permit for a facility.

(9) Modification of existing facility--Any physical change in, or change in the method of operation of, a facility in a manner that increases the amount of any air contaminant emitted by the facility into the atmosphere or that results in the emission of any air contaminant not previously emitted. The term does not include:

(A) insignificant increases in the amount of any air contaminant emitted that is authorized by one or more permits by rule under Chapter 106 of this title (relating to Permits by Rule);

(B) maintenance or replacement of equipment components that do not increase or tend to increase the amount or change the characteristics of the air contaminants emitted into the atmosphere;

(C) an increase in the annual hours of operation unless the existing facility has received a preconstruction permit or has been exempted, under the TCAA, §382.057, from preconstruction permit requirements;

(D) a physical change in, or change in the method of operation of, a facility that does not result in a net increase in allowable emission of any air contaminant and that does not result in the emission of any air contaminant not previously emitted, provided that the facility:

(i) has received a preconstruction permit or permit amendment or has been exempted under the TCAA, §382.057, from preconstruction permit requirements no earlier than 120 months before the change will occur; or

(ii) uses, regardless of whether the facility has been exempted under the TCAA, §382.057, an air pollution control method that is at least as effective as the BACT that the commission required or would have required for a facility of the same class or type as a condition of issuing a permit or permit amendment 120 months before the change will occur;

(E) a physical change in, or change in the method of operation of, a facility where the change is within the scope of a flexible permit or a multiple plant permit; or

(F) a change in the method of operation of a natural gas processing, treating, or compression facility connected to or part of a natural gas gathering or transmission pipeline which does not result in an annual emission rate of any air contaminant in excess of the volume emitted at the maximum designed capacity, provided that the facility is one for which:

(i) construction or operation started on or before September 1, 1971, and at which either no modification has occurred after September 1, 1971, or at which modifications have occurred only under Chapter 106 of this title; or

(ii) construction started after September 1, 1971, and before March 1, 1972, and which registered in accordance with TCAA, §382.060, as that section existed prior to September 1, 1991.

(10) New facility--A facility for which construction is commenced after August 30, 1971, and no contract for construction was executed on or before August 30, 1971, and that contract specified a beginning construction date on or before February 29, 1972.

(11) New source--Any stationary source, the construction or modification of which is commenced after March 5, 1972.

(12) Nonattainment area--A defined region within the state which is designated by the EPA as failing to meet the national ambient air quality standard for a pollutant for which a standard exists. The EPA will designate the area as nonattainment under the provisions of FCAA, §107(d).

(13) Public notice--The public notice of application for a permit as required in this chapter.

(14) Qualified facility--An existing facility that satisfies the criteria of either paragraph (9)(D)(i) or (ii) of this section.

(15) Source--A point of origin of air contaminants, whether privately or publicly owned or operated.

§116.17. Qualified Facility Definitions.

The words and terms, when used in this subchapter , shall have the following meanings, unless the context clearly indicates otherwise.

(1) **Actual emissions**--The highest rate of emissions of an air contaminant actually achieved from a qualified facility within the 120-month period prior to a change to a facility under §116.116(e) of this title (relating to Changes at Facilities). This rate cannot exceed any applicable federal or state emissions limitation. This definition applies only when determining whether there has been a net increase in allowable emissions under §116.116(e) of this title.

(2) **Allowable emissions**--The authorized rate of emissions of an air contaminant from a facility as determined in accordance with this paragraph. This rate cannot exceed any applicable state or federal emissions limitation. This definition applies only when determining whether there has been a net increase in allowable emissions under §116.116(e) of this title.

(A) **Permitted facility**--For a facility with a permit under this chapter, the allowable emissions shall be any emission limit established in the permit on a maximum allowable emissions rate table and any emission limit contained in representations in the permit application which was relied upon in issuing the permit, plus any allowable emissions authorized under Chapter 106 of this title (relating to Permits by Rule).

(B) **Facility permitted by rule**--For a facility operating under Chapter 106 of this title, the allowable emissions shall be the least of the emissions rate allowed in Chapter 106, Subchapter A of this title (relating to General Requirements), the emissions rate specified in the applicable permit by rule, or the federally enforceable emission rate established in accordance with §106.6 of this title (relating to Registration of Emissions).

(C) **Standard permit facility**--For a facility authorized by standard permit, other than the Air Quality Standard Permit for Pollution Control Projects , the allowable emissions shall be the maximum emissions rate represented in the registration to use the standard permit.

(D) **Special exemption facility**--For a facility operating under a special exemption, the allowable emissions shall be the emissions rate represented in the original special exemption request.

(3) **Revision**--a change made in the conditions or emission rates of a permit issued under §116.111 of this title (relating to General Application), or to the representations in the registration for a standard permit issued under Subchapter F of the chapter (relating to Standard Permits) to codify physical changes or new emission rates as authorized by §116.116(e) of this title (relating to Changes at Facilities).

SUBCHAPTER B: NEW SOURCE REVIEW PERMITS

DIVISION 1: PERMIT APPLICATION

§§116.111, 116.116, 116.117, 116.118

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendments are also adopted under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.003, concerning Definitions; §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 general, comprehensive plan for the control of the state's air; §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue a permit by rule for types of facilities that will not significantly contribute air contaminants to the atmosphere; §382.0511, concerning Permit Consolidation and Amendment, which allows the commission to combine permits; §382.0512, concerning Modification of Existing Facility, which restricts what the commission may consider in determining a facility modification; and §382.0518, concerning Preconstruction Permit, which authorizes the commission to require a permit before a facility is constructed or modified.

The amendments implement Texas Water Code, §5.103 and §5.105 and Texas Health and Safety Code, §§382.002, 382.003, 382.011, 382.012, 382.017, 382.051, 382.0511, 382.0512, and 382.0518.

§116.111. General Application.

(a) In order to be granted a permit, amendment, or special permit amendment, the application must include:

(1) a completed Form PI-1 General Application signed by an authorized representative of the applicant. All additional support information specified on the form must be provided before the application is complete;

(2) information which demonstrates that emissions from the facility, including any associated dockside vessel emissions, meet all of the following.

(A) Protection of public health and welfare.

(i) The emissions from the proposed facility will comply with all rules and regulations of the commission and with the intent of the Texas Clean Air Act (TCAA), including protection of the health and property of the public.

(ii) For issuance of a permit for construction or modification of any facility within 3,000 feet of an elementary, junior high/middle, or senior high school, the commission

shall consider any possible adverse short-term or long-term side effects that an air contaminant or nuisance odor from the facility may have on the individuals attending the school(s).

(B) Measurement of emissions. The proposed facility will have provisions for measuring the emission of significant air contaminants as determined by the executive director. This may include the installation of sampling ports on exhaust stacks and construction of sampling platforms in accordance with guidelines in the "Texas Commission on Environmental Quality Sampling Procedures Manual."

(C) Best available control technology (BACT) must be evaluated for and applied to all facilities subject to the TCAA. Prior to evaluation of BACT under the TCAA, all facilities with pollutants subject to regulation under Title I Part C of the Federal Clean Air Act (FCAA) shall evaluate and apply BACT as defined in §116.160(c)(1)(A) of this title (relating to Prevention of Significant Deterioration Requirements) .

(D) New Source Performance Standards (NSPS). The emissions from the proposed facility will meet the requirements of any applicable NSPS as listed under 40 Code of Federal Regulations (CFR) Part 60, promulgated by the United States Environmental Protection Agency (EPA) under FCAA, §111, as amended.

(E) National Emission Standards for Hazardous Air Pollutants (NESHAP). The emissions from the proposed facility will meet the requirements of any applicable NESHAP, as listed under 40 CFR Part 61, promulgated by EPA under FCAA, §112, as amended.

(F) NESHAP for source categories. The emissions from the proposed facility will meet the requirements of any applicable maximum achievable control technology standard as listed under 40 CFR Part 63, promulgated by the EPA under FCAA, §112 or as listed under Chapter 113, Subchapter C of this title (relating to National Emissions Standards for Hazardous Air Pollutants for Source Categories (FCAA §112, 40 CFR Part 63)).

(G) Performance demonstration. The proposed facility will achieve the performance specified in the permit application. The applicant may be required to submit additional engineering data after a permit has been issued in order to demonstrate further that the proposed facility will achieve the performance specified in the permit application. In addition, dispersion modeling, monitoring, or stack testing may be required.

(H) Nonattainment review. If the proposed facility is located in a nonattainment area, it shall comply with all applicable requirements in this chapter concerning nonattainment review.

(I) Prevention of Significant Deterioration (PSD) review. If the proposed facility is located in an attainment area, it shall comply with all applicable requirements in this chapter concerning PSD review.

(J) Air dispersion modeling. Computerized air dispersion modeling may be required by the executive director to determine air quality impacts from a proposed new facility or source modification. In determining whether to issue, or in conducting a review of, a permit application for a

shipbuilding or ship repair operation, the commission will not require and may not consider air dispersion modeling results predicting ambient concentrations of non-criteria air contaminants over coastal waters of the state. The commission shall determine compliance with non-criteria ambient air contaminant standards and guidelines at land-based off-property locations.

(K) Hazardous air pollutants. Affected sources (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) for hazardous air pollutants shall comply with all applicable requirements under Subchapter E of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)).

(L) Mass cap and trade allowances. If subject to Chapter 101, Subchapter H, Division 3, of this title (relating to Mass Emissions Cap and Trade Program), the proposed facility, group of facilities, or account must obtain allowances to operate.

(b) In order to be granted a permit, amendment, or special permit amendment, the owner or operator must comply with the following notice requirements.

(1) Applications declared administratively complete before September 1, 1999, are subject to the requirements of Chapter 116, Subchapter B, Division 3 (relating to Public Notification and Comment Procedures).

(2) Applications declared administratively complete on or after September 1, 1999, are subject to the requirements of Chapter 39 of this title (relating to Public Notice) and Chapter 55 of this

title (relating to Request for Reconsideration and Contested Case Hearings; Public Comment). Upon request by the owner or operator of a facility which previously has received a permit or special permit from the commission, the executive director or designated representative may exempt the relocation of such facility from the provisions in Chapter 39 of this title if there is no indication that the operation of the facility at the proposed new location will significantly affect ambient air quality and no indication that operation of the facility at the proposed new location will cause a condition of air pollution.

§116.116. Changes to Facilities.

(a) Representations and conditions. The following are the conditions upon which a permit, special permit, or special exemption are issued:

(1) representations with regard to construction plans and operation procedures in an application for a permit, special permit, or special exemption; and

(2) any general and special conditions attached to the permit, special permit, or special exemption itself.

(b) Permit amendments.

(1) Except as provided in subsection (e) of this section, the permit holder shall not vary from any representation or permit condition without obtaining a permit amendment if the change will cause:

(A) a change in the method of control of emissions;

(B) a change in the character of the emissions; or

(C) an increase in the emission rate of any air contaminant.

(2) Any person who requests permit amendments must receive prior approval by the executive director or the commission. Applications must be submitted with a completed Form PI-1 and are subject to the requirements of §116.111 of this title (relating to General Application).

(3) Any person who applies for an amendment to a permit to construct or reconstruct an affected source (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) under Subchapter E of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)) shall comply with the provisions in Chapter 39 of this title (relating to Public Notice).

(4) Any person who applies for an amendment to a permit to construct a new facility or modify an existing facility shall comply with the provisions in Chapter 39 of this title.

(c) Permit alteration.

(1) A permit alteration is:

(A) a decrease in allowable emissions; or

(B) any change from a representation in an application, general condition, or special condition in a permit that does not cause:

(i) a change in the method of control of emissions;

(ii) a change in the character of emissions; or

(iii) an increase in the emission rate of any air contaminant.

(2) Requests for permit alterations that must receive prior approval by the executive director are those that:

(A) result in an increase in off-property concentrations of air contaminants;

(B) involve a change in permit conditions; or

(C) affect facility or control equipment performance.

(3) The executive director shall be notified in writing of all other permit alterations not specified in paragraph (2) of this subsection.

(4) A request for permit alteration shall include information sufficient to demonstrate that the change does not interfere with the owner or operator's previous demonstrations of compliance with the requirements of §116.111(a)(2)(C) of this title.

(5) Permit alterations are not subject to the requirements of §116.111(a)(2)(C) of this title.

(d) Permits by rule under Chapter 106 of this title (relating to Permits by Rule) in lieu of permit amendment or alteration.

(1) A permit amendment or alteration is not required if the changes to the permitted facility qualify for an exemption from permitting or permit by rule under Chapter 106 of this title unless prohibited by permit condition as provided in §116.115 of this title (relating to General and Special Conditions).

(2) All changes authorized under Chapter 106 of this title to a permitted facility shall be incorporated into that facility's permit when the permit is amended or renewed.

(e) Changes to qualified facilities.

(1) Prior to determining if this subsection may be applied to a proposed change to a facility, the following will apply:

(A) The facility must be authorized under this chapter or Chapter 106 of this title.

(B) A separate netting analysis shall be made for each proposed change to determine the applicability of major New Source Review by demonstrating that any increase in actual emissions is below the threshold for major modification as defined in §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions). Proposed changes exceeding the major modification threshold cannot be authorized under this subsection. This analysis shall meet the definition and requirements of net emissions increase in §116.12 of this title.

(2) Prior to changes under this subsection, facility owners or operators will submit Form PI-E, Notification of Changes to Qualified Facilities, and the following additional requirements will apply:

(A) Facility owners or operators will simultaneously submit, where applicable, an application for a permit revision for each permit issued under §116.111 of this title involved in the qualified facility transaction.

(B) Owners or operators of facilities authorized under Subchapter F of this Chapter, (relating to Standard Permits) shall submit a revision to the representations in the facility registration in accordance with §116.611 of this title (relating to Registration to Use a Standard Permit).

(C) Any applicable permit issued under §116.111 of this title will be revised to reflect changes under this subsection to facilities authorized under Chapter 106 of this title. If no applicable permit issued under §116.111 of this title is involved in the qualified facility transaction then changes shall be certified by a registration for an emission rate under §106.6 of this title (relating to Registration of Emissions).

(D) No allowable emission rate as defined in §116.17 of this title (relating to Qualified Facilities Definitions) shall be exceeded.

(E) The facility has received a preconstruction permit or permit amendment no earlier than 120 months before the change will occur, or uses control technology that is at least as effective as the BACT that the commission required or would have required for a facility of the same class or type as a condition of issuing a permit or permit amendment 120 months before the change will occur. There will be no reduction in emission control efficiency.

(3) Notwithstanding any other subsection of this section, a physical or operational change may be made to a qualified facility if it can be determined that the change does not result in:

(A) a net increase in allowable emissions of any air contaminant; and

(B) the emission of any air contaminant not previously emitted.

(4) In making the determination in paragraph (3) of this subsection, the effect on emissions of the following shall be considered:

(A) any air pollution control method applied to the qualified facility;

(B) any decreases in allowable emissions from other qualified facilities at the same commission air quality account that have received a preconstruction permit or permit amendment no earlier than 120 months before the change will occur; and

(C) any decrease in actual emissions from other qualified facilities at the same commission air quality account that are not included in subparagraph (B) of this paragraph.

(5) The determination in paragraph (3) of this subsection shall be based on the allowable emissions for air contaminant categories and any allowable emissions for individual compounds. If a physical or operational change would result in emissions of an air contaminant category or compound above the allowable emissions for that air contaminant category or compound, there must be an equivalent decrease in emissions at the same facility or a different facility at the same account.

(A) The equivalent decrease in emissions shall be based on the same time periods (e.g., hourly and 12-month rolling average rates) as the allowable emissions for the facility at which the change will occur.

(B) Emissions of different compounds within the same air contaminant category may be interchanged. Emissions of substances that were, but are not currently, listed as a volatile organic compound (VOC) by the United States Environmental Protection Agency (EPA) may be substituted for emissions of compounds currently listed by EPA as a VOC as referenced in §101.1 of this title (relating to Definitions) provided the compound being used as a substitute is not regulated as a hazardous air pollutant and is not toxic. The substitution of current VOCs for compounds that have been removed from the VOC list by EPA is prohibited.

(C) For allowable emissions for individual compounds, any interchange shall adjust the emission rates for the different compounds in accordance with the ratio of the effects screening levels of the compounds. The effects screening level shall be determined by the executive director.

(D) For allowable emissions for air contaminant categories, interchanges shall use the unadjusted emission rates for the different compounds.

(E) The facility owner or operator shall demonstrate that the change will not adversely affect ambient air quality.

(F) An air contaminant category is a group of related compounds, such as volatile organic compounds, particulate matter, nitrogen oxides, and sulfur compounds.

(6) Persons making changes to qualified facilities under this subsection shall comply with the applicable requirements of §116.117 of this title (relating to Documentation and Notification of Changes to Qualified Facilities) .

(7) As used in this subsection, the term "physical and operational change" does not include:

(A) construction of a new facility; or

(B) changes to procedures regarding monitoring, determination of emissions, and recordkeeping that are required by a permit.

(8) Additional air pollution control methods may be implemented for the purpose of making a facility a qualified facility. The implementation of any additional control methods to qualify a facility shall be subject to the requirements of this chapter. The owner or operator shall:

(A) utilize additional control methods that are as effective as best available control technology (BACT) required at the time the additional control methods are implemented; or

(B) demonstrate that the additional control methods, although not as effective as BACT, were implemented to comply with a law, rule, order, permit, or implemented to resolve a documented citizen complaint.

(9) For purposes of this subsection and §116.117 of this title, the following subparagraphs apply.

(A) Intraplant trading means the consideration of decreases in allowable and actual emissions from other qualified facilities in accordance with paragraph (4) of this subsection.

(B) The allowable emissions from facilities that were never constructed shall not be used in intraplant trading.

(C) The decreases in allowable and actual emissions shall be based on emission rates for the same time periods (e.g., hourly and 12-month rolling average) as the allowable emissions for the facility at which the change will occur and for which an intraplant trade is desired.

(D) Actual emissions shall be based on data that is representative of the emissions actually achieved from a facility during the relevant time period (e.g., hourly or 12-month rolling average).

(10) The existing level of control may not be lessened for a qualified facility.

(11) A separate netting analysis shall be performed for each proposed change under this subsection.

(f) Use of credits. Notwithstanding any other subsection of this section, discrete emission reduction credits may be used to exceed permit allowables as described in §101.376(b) of this title

(relating to Discrete Emission Credit Use) if all applicable conditions of §101.376 of this title are met. This subsection does not authorize any physical changes to a facility.

§116.117. Documentation and Notification of Changes to Qualified Facilities.

(a) Persons making changes under §116.116(e) of this title (relating to Changes to Facilities) shall maintain documentation at the plant site demonstrating that the changes satisfy §116.116(e) of this title. If the plant site is unmanned, the regional manager may authorize an alternative site to maintain the documentation. The documentation shall be made available to representatives of the commission upon request. The documentation shall include:

(1) quantification of all emission increases and decreases associated with the physical or operational change;

(2) a description of the physical or operational change;

(3) a description of any equipment being installed; and

(4) sufficient information as necessary to show that the project will not adversely affect ambient air quality and will comply as applicable with:

(A) §116.150 and §116.151 of this title (relating to Nonattainment Review) and §§116.160 - 116.163 of this title (relating to Prevention of Significant Deterioration Review); or

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

(b) Nothing in this section shall limit the applicability of any federal requirement.

§116.118. Pre-change Qualification. *(Withdrawing proposed section from commission consideration)*

(a) If either of the following conditions exists, it will be necessary to establish that a facility is a qualified facility before a physical or operational change may be made under the notification procedure of §116.117 of this title (relating to Documentation and Notification of Changes to Qualified Facilities):

(1) the facility is a qualified facility on the basis of best available control technology and the requirement for the facility type has not been previously established by the executive director; or

(2) the facility does not have allowable emissions established for an air contaminant relevant to the change in a maximum allowable emissions rate table, PI-8 form, or PI-E form.

(b) The pre-change qualification shall be made by submitting a PI-E form to the commission's New Source Review Permits Division. The facility shall be qualified in accordance with the information contained in the PI-E form after receipt of written notification from the commission that there are no objections, or 45 days after the PI-E form is received by the commission, whichever occurs first. The pre-

change qualification may be submitted at the same time as a pre-change notification under §116.117(b) of this title or at any other time prior to making a change to a qualified facility.