The Texas Commission on Environmental Quality (TCEQ or commission) proposes new §116.17 and amendments to §§116.10, 116.111, 116.116, 116.117, and 116.118.

The new and amended sections would 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 PROPOSED RULES

On September 23, 2009, the EPA published notice in the *Federal Register* (74 *Federal Register* 48450) of its intent to disapprove the TCEQ rules that relate to the establishment of the state's qualified facilities program as a SIP revision. The EPA is basing this proposed 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 proposed rules in this action address these issues.

In this same notice, the EPA also proposed disapproval of the commission's definition of best available control technology (BACT) in §116.10(3), General Definitions. This proposal also addresses this issue, as discussed in the SECTION BY SECTION discussion.

The creation of the qualified facilities program was a development of the 74th Legislature, 1995, through 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.

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) 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 confirm that these rules only apply to existing qualified facilities. The rules do not allow construction of a new facility, nor can the 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 terminology, where "net increase" has specific meaning as it relates to federal 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 (NA) 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), 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 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 requirements. The qualified facilities program may not be used as a shield for protection or exemption from federal programs. Persons making changes must

maintain sufficient documentation to demonstrate that the project will comply with Subchapter B, Division 5, Nonattainment Review, Subchapter B, Division 6, Prevention of Significant Deterioration Review, and with Subchapter E, Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63). A major modification, as defined in §116.12, may not occur without first being 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 federal NSR permit or major modification under the appropriate federal NSR program, as well as a HAP permit to meet requirements of Federal Clean Air Act (FCAA), §112(g) if case-by-case MACT applies; 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. It proposed disapproval of the program based on lack of specific rule requirements that would restrict the program to minor NSR, require federal netting procedures, and provide enforceability of any new emission limits under the qualified facility program (74 *Federal Register* 48450). The commission is proposing rule amendments to §116.116(e) that address these identified deficiencies through a specific requirement for a separate netting analysis to determine the potential

applicability of federal review to the proposed change, submission of a permit application, certification of emissions, and permit alteration. 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 proposed rule changes address the specific concerns noted by the EPA in its proposed disapproval, and are designed to allow the EPA to approve the qualified facilities program as a minor NSR program into the Texas SIP.

Use of the Term "Facility"

In the *Federal Register* notice (74 *Federal Register* 48450), 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 emissions point on a company site without limiting these emissions 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 emissions 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 *Federal Register* notice in 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 "source." As EPA noted in the *Federal Register* notice in 74 *Federal Register* 48455, footnote 7, "account" is a SIP-approved definition.

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 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 federal 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 federal 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 federal major modification has occurred.

In proposed renumbered §116.116(e)(3), commission rules state 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 proposed renumbered §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, proposed renumbered §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 (74 *Federal Register* 48450). Therefore, the proposed new §116.116(e)(11) corrects this deficiency by requiring that a separate netting analysis must be completed for each proposed change.

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 federal 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 a pre-change notification if the intraplant trade moves emissions from the interior of a site to a point closer to the property line. This gives the commission the ability to evaluate any potential off-property effects relating to all contaminants, including those with federal ambient air quality standards. This intraplant trade capability exists only to the extent that the project is a minor NSR action.

Proposed §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 federal 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 federal program is triggered and federal 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 federal NSR authorization.

In addition, an anti-backsliding provision is included in the qualified facility rules, located in renumbered §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 table (MAERT) in the permit for the facility contributing emission reductions is

reduced by the appropriate amount, while 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.

Relaxation of SIP Requirements

The EPA has 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 has 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 non-federal changes from its inception and is consistently used only for minor NSR. Changes that would exceed major source thresholds are screened out of the qualified facility program, leaving only the minor modifications. Therefore, the program does not, and has not, adversely affected air quality. Over the last ten 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, 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 proposed rule amendments, the commission is proposing, as a SIP amendment, a separate document with additional explanation of the qualified facility program, a record of facilities where changes were sought under the qualified facility program, and guidance for the implementation of SB 1126 to demonstrate that the qualified facilities program is and has been at least as stringent as, and does not result in backsliding from, the approved Texas SIP.

Notification of Changes at Qualified Facilities

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 emission calculations to confirm that federal NSR does not apply and information on intraplant trades which may have resulted in emissions that have moved closer to a site property line. 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 PI-E form is not an application because the qualified facility program specifically forbids new construction, and changes under the program are not considered modifications by legislative design. 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 Austin office and the appropriate regional office where it is publicly accessible. 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, the proposed rules will require 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. 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 EPA has proposed disapproval (74 *Federal Register* 48454) of 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 proposes to move 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 proposed changes in this rulemaking for new §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) to clearly apply only for minor sources and minor modifications (74 *Federal Register* 48450). The commission proposes to address 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 proposes to amend 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 proposed new definition will maintain its broad application to all NSR permitting actions and thus maintain the stringency of permit review currently approved in the SIP. In the commission permitting process, the first determination is whether federal 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 any other air contaminants and any other facilities not subject to federal permitting requirements.

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

The commission proposes to delete §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 would be re-lettered.

§116.17, Qualified Facility Definitions

The commission proposes 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 proposes to add a citation referring to §116.116(e) in the definition of "Actual emissions" to improve clarity. The commission also

proposes to delete 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.

§116.111, General Application

The commission proposes to amend §116.111(a)(2)(C) describing the application of BACT. The commission and predecessor agencies have interpreted and applied 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. The federal definition 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) would be deleted as unnecessary. On January 13, 2010, the commission proposed to amend §116.160 to include 40 CFR §52.21(b)(12), and §116.160 would be the appropriate reference in this rule. However, until the changes to §116.160 are effective, the commission cannot propose such a change. Therefore, at adoption of proposed new §116.111(a)(2)(C), the commission may change the reference from federal rule to state rule.

§116.116, Changes to Facilities

The EPA acknowledges that the commission intends the qualified facilities program to apply only to minor modifications at minor and major existing qualified facilities (74 *Federal Register* 48450), but states that rules require a clear limitation of the program to minor NSR changes. Additionally, THSC, §382.0512, which authorizes the qualified facility program, specifically states that all applicable federal requirements, including federal NSR review, will not be affected.

The commission proposes to add §116.116(e)(1) prohibiting the use of the qualified facility program for changes meeting the definition of "Major modification" in §116.12, Nonattainment and Prevention of Significant Deterioration. The commission uses the same restriction, which has been approved into the SIP, for facilities authorized under permits by rule (PBR) in 30 TAC Chapter 106, Permits by Rule. 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 EPA states that this provision could allow circumvention of major modification applicability. The language in the proposed amendment would restrict 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 federal 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 (74 *Federal Register* 48450).

The proposed amendment will address EPA requirements expressed in the EPA disapproval notice (74 *Federal Register* 48450) concerning an increase in allowable emissions at a qualified 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 proposed disapproval of 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. Proposed §116.116(e)(1) would prohibit this action while still allowing trading within the same account number, provided the sources involved were minor. The proposed new paragraph also states explicitly that facilities using the qualified facility program must be authorized under Chapter 116 or Chapter 106.

The commission proposes a new §116.116(e)(2). In 74 *Federal Register* 48450, the EPA cites deficiencies in the enforceability, quantification, and permanence of emissions changes in the qualified facility program. This new paragraph will provide specific requirements for holders of case-by-case permits, PBRs under Chapter 106, and standard permits to ensure no relaxation of the SIP. This proposed new paragraph contains language to ensure that facilities making emission reductions under the qualified facility program do not later increase emissions.

The proposed new paragraph requires facility owner operators to submit Form PI-E, Notification of Changes to Qualified Facilities for any proposed qualified facility change. Proposed subparagraph (A) requires owner or operators to simultaneously submit an application for permit alteration 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 alteration of all applicable permits to reflect changes under the qualified facility program.

Proposed §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.

Proposed §116.116(e)(2)(C) addresses facilities authorized under Chapter 106. If the proposed change at a facility authorized by permit by rule also involves a permit issued under §116.111, then the §116.111 permit will be altered 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 proposes to include a subparagraph 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. Proposed subparagraph (E) is included to ensure that facilities meet the BACT requirements for qualified facilities in §116.10(9). This subparagraph 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. Subsequent paragraphs in the subsection would be renumbered.

The commission proposes to amend renumbered §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 *Federal Register* notice at page 48455, footnote 7, "account" is a SIP-approved definition.

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

The commission proposes §116.116(e)(5) to require that 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 "source." This amendment will ensure an accounting of permissible transactions under this qualified facility program. The commission also proposes to amend §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 also proposes to amend §116.116(e)(5) and (e)(5)(A) to delete the term "offset." This term has a specific meaning in federal NSR permitting and refers to a requirement that emissions decreases must be equal to or greater than proposed increases. The commission proposes this 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 federal NSR does not apply.

The commission proposes to amend §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 proposes to amend §116.116(e)(5)(E) to remove the current language and to add language stating that a facility owner or operator shall 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 proposed amendment is added to address an EPA identified deficiency at 74 *Federal Register* 48450, that the requirement should be made explicit in §116.116(e).

The commission proposes §116.116(e)(9)(C) 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 proposes to add §116.116(e)(11) requiring that a separate netting analysis be performed for each proposed change under this subsection. In 74 *Federal Register* 48450, 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 proposed amendment would make the requirement explicit.

§116.117, Documentation and Notification of Changes to Qualified Facilities

The commission proposes to add 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. The commission proposes to amend §116.117(b)(1) to reflect changes in citation for the paragraphs of §116.116(e) and to reflect the proposed deletion of §116.117(b)(2).

The commission proposes to delete §116.117(b)(2). The commission has determined that to fully address EPA identified deficiencies of the qualified program, the program rule should require prior notification of proposed changes. This will allow the commission to timely review these proposed changes and ensure that the proposed change meets all applicable state and federal requirements.

§116.118, Pre-change Qualification

The commission proposes to amend §116.118(a)(2) to delete an obsolete reference to a PI-8 form and replace it with reference to current forms PI-7-CERT and APD-CERT.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rules. The proposed changes to the rules for the qualified facilities program are administrative in nature and do not impose any new requirements on regulated parties or significantly change agency procedures.

The proposed rules amend various sections of Chapter 116 and address concerns expressed by the EPA regarding the agency's qualified facilities program in its review of the SIP. The proposed changes to established rules for the qualified facilities program are administrative in nature and clarify that the rules regarding qualified facilities are restricted to minor sources and modification of minor sources. The proposed rules prescribe a separate netting analysis to ensure that all net changes in emissions for the same account number remain below major modification thresholds. These proposed changes will continue to allow the qualified facilities program to function for minor changes to facilities if the specified criteria are met. The proposed rules also modify the definition of BACT and clarify its permissible use. No additional costs are imposed on facility owners or operators, and the proposed rules will not have a fiscal impact on other state agencies or local governments that own or operate qualified facilities.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with federal law and federal approval of the SIP, which is protective of the environment and human health.

The proposed changes to the established rules for the qualified facilities program are administrative in nature and are not anticipated to impose any additional costs for businesses or individuals. Owners or operators of qualified facilities are not expected to experience any fiscal impacts as a result of the proposed rules.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. The proposed rules are administrative in nature and do not impose any additional costs on facility owners or operators.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are required to protect the environment, to comply with federal regulations, and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect. The proposed rules are administrative in nature and do not impose any additional costs on facility owners or operators.

LOCAL EMPLOYMENT IMPACT STATEMENT

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

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the 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 agency's qualified facilities program in its review of the SIP. The proposed changes to established rules for the qualified facilities program are administrative in nature and clarify that the rules regarding qualified facilities are restricted to minor changes regardless of the source classification. The proposed rules prescribe a separate netting analysis to ensure that all net changes in emissions for the same account number remain below major modification thresholds. These proposed changes will continue to allow the qualified facilities program to function for minor changes to facilities if the specified criteria are met. The proposed 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 proposed rules also modify the definition of BACT and clarify its permissible use. These proposed changes will continue to allow the qualified facilities program to function for minor changes to facilities if the specified criteria are met. As discussed in the FISCAL NOTE portion of this preamble, the proposed rules are not anticipated to add any significant additional costs to affected individuals or businesses beyond what is already required to comply with these federal standards on 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 proposed rules implement requirements of the FCAA. The proposed amendments 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 proposed rules do not exceed a requirement of a delegation agreement or a contract between state and federal government if this rulemaking is adopted. The amendments 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 proposed rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b). Comments on this draft determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS portion of this preamble.

TAKINGS IMPACT ASSESSMENT

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or §17 or §19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the proposed rulemaking action under the Texas Government Code, §2007.043. The primary purpose of this proposed 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 proposed rules will not create any additional burden on private real property. The proposed rules will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposal also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the proposed rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq*.), and commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the 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 proposed rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The proposed amendments 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. Written comments on the consistency of the proposed rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

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. If the proposed rules are adopted, 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.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on May 10, 2010 at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Devon Ryan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2010-006-116-PR. The comment period closes May 17, 2010.

Copies of the proposed rulemaking can be obtained from the commission's Web site at

http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Mr.

Beecher Cameron, Air Permits Division, at (512) 239-1495.

SUBCHAPTER A: DEFINITIONS

§116.10, §116.17

STATUTORY AUTHORITY

The amendment and new section are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment and new section are also proposed 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 amendment implement Texas Health and Safety Code, §§361.002, 361.011, 361.024, 361.061, 361.123, 361.124, 363.061, 382.002, 382.003, 382.011, 382.051, and 382.05195.

§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) Actual emissions--The highest rate of emissions of an air contaminant actually achieved from a qualified facility within the 120-month period prior to the change. 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 (relating to Changes to Facilities).]

[(2) Allowable emissions--The authorized rate of emissions of an air contaminant from a facility as determined in accordance with this section. 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 on a PI-8 form.]

[(C) Qualified grandfathered facility--For a qualified grandfathered facility, the allowable emissions shall be the maximum annual emissions rate after the implementation of any air pollution control methods to become a qualified facility, plus 10% of the maximum annual emissions rate prior to the implementation of such control methods, but in no case shall the allowable emissions be greater than the maximum annual emissions rate prior to the implementation of such control methods. The maximum annual emissions rate is the emissions rate at the maximum annual capacity according to the physical or operational design of the facility, data from actual operations over a period of no more than 12 months that demonstrates the maximum annual capacity, or other information that demonstrates the maximum annual capacity. Except where a grandfathered facility has been modified, the allowable emissions for the modification shall be determined as a permitted facility.]

[(D) Standard permit facility--For a facility authorized by standard permit, other than §116.617(2) of this title (relating to Standard Permits for Pollution Control Projects), the allowable emissions shall be the maximum emissions rate represented in the registration to use the standard permit.]

[(E) 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.]

[(F) The allowable emissions for a qualified facility shall not be adjusted by the voluntary installation of controls.]

(1) [(3)] 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. [BACT with consideration given to the technical practicability and the economic reasonableness of reducing or eliminating emissions from the facility.]

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

(3) [(5)] 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) [(6)] 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) [(7)] 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 [C] of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)).

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

(7) [(9)] 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) [(10)] 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) [(11)] 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) [commission exemptions];

[(B) insignificant increases at a permitted facility;]

(B) [(C)] 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) [(D)] 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) [(E)] 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 received a preconstruction permit or permit amendment or 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) [(F)] 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) [(G)] 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) [(12)] 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) [(13)] New source--Any stationary source, the construction or modification of which is commenced after March 5, 1972.

(12) [(14)] 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) [(15)] Public notice--The public notice of application for a permit as required in this chapter.

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

(15) [(17)] 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 part, 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 §116.617(2) of this title (relating to State Pollution Control Project Standard Permit), 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.

SUBCHAPTER B: NEW SOURCE REVIEW PERMITS

DIVISION 1: PERMIT APPLICATION

§§116.111, 116.116 - 116.118

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendments are also proposed 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 new section and amendments implement Texas Health and Safety Code, §§361.002, 361.011, 361.024, 361.061, 361.123, 361.124, 363.061, 382.002, 382.003, 382.011, 382.051, and 382.05195.

§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." ["Texas Natural Resource Conservation Commission (TNRCC) 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 40 Code of Federal Regulations (CFR) §52.21(b)(12). [The proposed facility will utilize BACT, with consideration given to the technical practicability and economic reasonableness of reducing or eliminating the emissions from the facility.]

(D) New Source Performance Standards (NSPS). The emissions from the proposed facility will meet the requirements of any applicable NSPS as listed under [Title] 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 [C] 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 [C] 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 federal 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(20) 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 alteration 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 altered 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 in 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 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. There will be no reduction in emission control efficiency.

(3) [(1)] 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) [(2)] In making the determination in paragraph (3) [(1)] 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 [number] 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 [number] that are not included in subparagraph (B) of this paragraph.

(5) [(3)] The determination in paragraph (3) [(1)] 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 [the amount above the allowable emissions must be offset by] an equivalent decrease in emissions at the same facility or a different facility at the same account. [In making this offset, the following applies.]

(A) The equivalent decrease in emissions [offset] shall be based on the same time periods (e.g., hourly and 12-month rolling average [annual] 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.

(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. [The effects screening level shall be determined by the executive director.]

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

(6) [(4)] 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) and §116.118 of this title (relating to Pre-change Qualification).

(7) [(5)] 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) [(6)] 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) [(7)] 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) [(2)] 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 [annual rates]) 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 [annual rates]).

(10) [(8)] 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) [§101.29(d)(4)(v)]

of this title (relating to Discrete Emission Credit Use [Banking and Trading]) if all applicable conditions of §101.376 [§101.29] 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 is not expected to 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) [and with] Subchapter E [C] of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)).

(b) Persons making such changes to qualified facilities shall comply with the following notification requirements.

(1) Annual report. For changes to qualified facilities when there is no intraplant trading under §116.116(e)(4) [§116.116(e)(2)] of this title, an annual report shall be submitted to the appropriate regional office of the commission by August 1 of each year. The report shall include all changes made under §116.116(e) during the immediately preceding annual period July 1 - June 30. This reporting period and the due date may be changed with the agreement of the commission's regional office. The annual report shall contain a PI-E form for each change. The report need not include changes previously submitted by PI-E form to the commission under paragraph [paragraphs] (2) [or (3)] of this subsection or which have been incorporated into the permit for the facility.

[(2) Post-change notification. Post-change notification shall be required for changes to qualified facilities for which there is intraplant trading below the reportable limit. The notification shall be submitted on a PI-E form to the commission's New Source Review Permits Division within 30 days after the change occurs.]

(2) [(3)] Pre-change notification only. Pre-change notification shall be required if a physical or operational change at a qualified facility will affect compliance with a permit special condition. The notice shall be made to the commission prior to the change. It shall identify the affected special condition and indicate the change needed or the desire to remove the special condition from the permit. The permit holder is relieved from complying with the permit special condition upon the filing of the notice, provided the change complies with §116.116(e) of this title.

(3) [(4)] Pre-change notification and approval. Pre-change notification shall be required for changes to qualified facilities for which there is intraplant trading above the reportable limit. The notification of the change shall be submitted on a PI-E form to the commission's New Source Review Permits Division before the change may occur. The change may occur after the receipt of written notification from the commission that there are no objections, or 45 days after the PI-E is received by the commission, whichever occurs first.

(4) [(5)] Reportable limit. The executive director shall establish reportable limits. A reportable limit is either:

(A) an emission rate that is adjusted based on a factor that accounts for a ratio of the effects screening levels of the different compounds and the difference in location of emissions involved in an intraplant trade; or

(B) an emission rate that results in a sum total of modeled ground level concentration for the account that shall not exceed two times the effects screening level at any point off property.

(c) For facilities that have received a preconstruction permit, all changes for which the notification procedure of subsection (b) of this section has been used shall be incorporated into the permit when the permit is amended or renewed.

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

§116.118. Pre-change Qualification.

(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-7-CERT, APD-CERT [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.