

The Texas Commission on Environmental Quality (commission or TCEQ) proposes amendments to §§116.12, 116.150, 116.151, 116.180, and 116.186.

The proposed amendments to §§116.12, 116.150, 116.151, 116.180, and 116.186 will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the State Implementation Plan (SIP).

### **Background and Summary of the Factual Basis for the Proposed Rules**

On June 10, 2005, the TCEQ submitted amendments to §116.12 to the EPA as revisions to the New Source Review (NSR) SIP and §116.150 as revisions to the Nonattainment New Source Review (NNSR) SIP, both adopted on May 25, 2005. On January 11, 2006, the TCEQ repealed §§116.180 - 116.183, 116.410, and 116.617; amended §§116.12, 116.150, 116.151, 116.160, and 116.610; and adopted new §§116.121, 116.180, 116.182, 116.184, 116.186, 116.188, 116.190, 116.192, 116.194, 116.196, 116.198, 116.400, 116.402, 116.404, 116.406, 116.617, and 116.1200. The TCEQ submitted these to the EPA as revisions to the NSR SIP to implement EPA's NSR Reform rules which became final on December 31, 2002. On September 23, 2009, the EPA published notice of the proposed disapproval of these revisions to the Texas SIP on September 23, 2009 (*74 Federal Register* 48467). The EPA's final disapproval notice was published September 15, 2010 (*75 Federal Register* 56423).

On February 9, 2011, in response to the EPA's final disapproval, the TCEQ repealed §116.121, adopted amendments to §§116.12, 116.115, 116.150, 116.180, 116.182, 116.186, 116.188, 116.190, 116.192, 116.601, and 116.617; and adopted new §116.127. These were published in the February 25, 2011, issue of the Texas Register (36 TexReg 1305 and 1324). On March 11, 2011, the TCEQ submitted a revised SIP package that was based on the rule amendments, with the exception of §116.617, adopted on February 9, 2011, and addressed the issues outlined in the EPA's disapproval. On September 30, 2011, the EPA expressed its intent to propose conditional approval of TCEQ rules implementing the changes to the NSR SIP and the NSR Reform and requested a dialog to resolve certain EPA concerns and facilitate a final approval. This rulemaking addresses those concerns.

This rulemaking is at least as stringent as the federal rules it implements because it includes the applicable elements of the major NSR and plant-wide applicability limit (PAL) permit programs. The rulemaking action also ensures that the rulemaking, if adopted, will meet the requirements of Federal Clean Air Act (FCAA), §110 which, among other requirements, requires that the elements of the SIP be enforceable, ensure compliance, include replicable elements, and ensure accountability. The specific changes to the PAL rules meet these basic requirements.

## **Section by Section Discussion**

### *§116.12, Nonattainment and Prevention of Significant Deterioration Review*

#### *Definitions*

The commission proposes to amend the definition of the term "Plant-wide applicability limit" effective date in §116.12(23) to remove language that references the date that a flexible permit was issued. Since PAL permits and flexible permits are addressed by two different sets of rules in Chapter 116, it is inappropriate to reference flexible permits in the definition of the term plant-wide applicability limit effective date. The proposed change would remove this obsolete language, clarify permitting requirements and ensure consistency with federal requirements regarding NSR permits.

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

The federal term "emissions unit" as defined in federal rules is similar to the term "facility" as defined in the Texas Clean Air Act (TCAA). In order to ensure clarity and consistency with federal requirements, the commission is proposing to add the language "or emissions unit" where the terms "facility" or "facilities" are used (i.e., §116.150(a), (d)(1) and (3)).

### *§116.151, New Major Source or Major Modification in Nonattainment Area Other Than Ozone*

The federal term "emissions unit" as defined in federal rules is similar to the term

"facility" as defined in the TCAA. In order to ensure clarity and consistency with federal requirements, the commission is proposing to add the language "or emissions unit" where the terms "facility" or "facilities" are used in §116.151(a), (c)(1) and (3)).

In response to EPA's proposed disapproval notice published September 23, 2009, the commission's executive director submitted comments replying to EPA's solicitation from the TCEQ to comment on EPA's interpretation of Texas law and the Texas NSR SIP with respect to the term "facility," stating that it is critical to EPA's understanding of the Texas Permitting Program. TCEQ's comments stated, in part, that the definition of the term "facility" is one of the cornerstones of the air permitting program in Texas under the TCAA. The comments specifically stated that the TCEQ's interpretation of Texas law differs from that of EPA.

In its final disapproval notice on September 15, 2010, (*75 Federal Register* 56423), EPA carried forward text from its proposed disapproval from September 23, 2009, by stating in footnote 7 on page 56433 and also on page 56438, "it is our understanding of State law, that a "facility" can be an "emissions unit," *i.e.*, any part of a stationary source that emits or may have the potential to emit any air contaminant. A 'facility' also can be a piece of equipment, which is smaller than an "emissions unit." A 'facility' can be a 'major stationary source' as defined by Federal law. A 'facility' under State law can be more than one 'major stationary source.' It can include every emissions point on a company

site, without limiting these emissions points to only those belonging to the same industrial grouping (SIC code)." In the same notice in footnote 15 on page 56438, EPA acknowledges that TCEQ's definition of "facility" is part of the approved Texas SIP.

Under the TCAA in Texas Health and Safety Code (THSC), §382.003(6) and in §116.10(4), "facility" is defined 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 point of origin of a contaminant, as defined in THSC, §382.003(12) and in §116.10(15), a definition that is approved into the Texas SIP. As a discrete point, a facility can constitute but cannot contain a "major stationary source" as defined by federal law and in the TCEQ's SIP approved rule §116.12(17). A facility is subject to major and minor NSR requirements, depending on the facts of the specific application.

The TCEQ and its predecessor agencies have consistently interpreted facility to preclude inclusion of more than one stationary source, in contrast to EPA's stated understanding. Likewise, TCEQ does not interpret facility to include "every emissions point on a company site, even if limiting these emission points to only those belonging to the same industrial grouping (SIC code)." The federal definition of "major stationary source" in 40 Code of Federal Regulations (CFR) §51.166(b)(1)(i)(a) is not equivalent to the state

definition of "source." A "major stationary source" can include more than one "facility" as defined under Texas law, which is consistent with EPA's interpretation of a "major stationary source" including more than one emissions unit.

Under major NSR, EPA uses the term "emissions unit" (generally) when referring to part of a "stationary source;" TCEQ translates "emissions unit" to mean "facility." The commission's SIP-approved Prevention of Significant Deterioration (PSD) permitting rule in §116.160(c)(3) states, "the term 'facility' shall replace the words 'emissions unit' in the referenced sections of the CFR."

The above interpretation of the term "facility" has been consistently applied by the TCEQ and its predecessor agencies for more than 30 years. The TCEQ's interpretation of Texas statutes enacted by the Texas Legislature is addressed by the Texas Code Construction Act. More specifically, words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly, as per Texas Government Code, §311.011(b).

In response to the proposed disapproval, the commission proposed adding the phrase "or emissions unit" in its PAL rules, but did not do so in the nonattainment permitting rules because of the long term use of the term in the Texas permitting rules and the approved Texas SIP, which included earlier versions of these rules, and because in the

intervening time EPA had approved the definition of "facility" into the SIP.

The proposed changes to §116.150 and §116.151 would allow EPA to approve the updated rules that implement the federal nonattainment permitting program.

*§116.180, Applicability*

The commission proposes to correct a typographical error in §116.180(a)(5) by changing a reference to the federal rules from 40 CFR §51.165(iv)(A) to 40 CFR

§51.165(a)(1)(iv)(A). Additionally, the commission is adding a reference to the federal definition of major stationary source in 40 CFR §51.166(b)(1). Adding this reference strengthens the TCEQ's PAL rules by limiting the applicability of a PAL to a source that conforms to the federal definition of a major stationary source in 40 CFR §51.166(b)(1).

The proposed changes would clarify permitting requirements and ensure consistency with federal requirements regarding NSR permits.

*§116.186, General and Special Conditions*

The commission proposes to amend §116.186(b)(9) to state that failure to use the required monitoring would render the PAL permit invalid. The change is proposed to ensure consistency with federal rule requirements.

In both its proposed and final disapproval notices for the NSR Reform rules (as

mentioned elsewhere in this preamble), the EPA stated that the specific monitoring definitions are essential for the enforceability of and providing the means for determining compliance with a PAL program. EPA also specifically stated that one of the bases for disapproval of the commission's PAL rules is that the rules lacked a mandate that failure of the monitoring system to meet the requirements of this section renders a PAL permit invalid. In response, the commission specifically amended its PAL rules to address the monitoring systems, and also added §116.186(b)(9) specifying that failure to use a monitoring system is a violation of the PAL permit. EPA did not provide comment on that amendment, nor §116.186(b)(9). The commission understood that the proposed changes were satisfactory for SIP approval. However, §116.186(b)(9) did not address EPA's concerns, which were related to the installation and general use of monitoring systems rather than compliance issues, such as monitoring downtime, the latter which is addressed in §116.186(b)(8). As discussed elsewhere in this preamble, EPA contacted the commission in 2011 regarding its review of the submitted rules and raised the issue of ensuring that the commission's rules adequately adopted the EPA's requirement that a PAL permit is invalid if the required monitoring system is not required by the permit nor installed by the permittee.

EPA's general monitoring requirements for PAL permits are in 40 CFR §51.165(f)(12)(i)(A) - (D) and 40 CFR §51.166(w)(12)(i)(a) - (d). Subparagraph (i) requires enforceable requirements for a monitoring system in each PAL permit that is

based on sound science and meets generally acceptable scientific procedures for data quality and manipulation; those systems must be one of the four general monitoring approaches in the federal PAL rules. Clauses (D) and (d) provide that failure to use a monitoring system that meets the applicable federal rule requirements renders the PAL invalid (See discussion at 67 *Federal Register* 80211 - 80214, December 31, 2002).

Therefore, based on the text and context of both the rule and the accompanying preamble, the phrase "failure to use" in EPA's rule means a failure to install or failure to operate the prescribed monitoring device or system to operate under a PAL permit, rather than an inadvertent malfunction or maintenance downtime of the monitoring device or system. The proposed change to §116.186(b)(9) would address EPA's concern that the commission's rules fully incorporate all PAL permit requirements.

Any invalidation of a PAL permit will be subject to necessary and appropriate procedures in Texas statutes and TCEQ rules. Texas Water Code (TWC), §7.302, regarding Grounds for Revocation or Suspension of Permit, provides the commission the authority to revoke and suspend or reissue a permit on prescribed grounds after notice and hearing. Prior to any invalidation of a PAL permit, the commission anticipates enforcement action that could include a request for revocation. Generally, circumstances which could lead to invalidation (e.g., failure to install or use monitoring equipment) are not expected to occur, and thus few, if any, revocation proceedings are anticipated.

**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.

In 2005 and 2006, the agency submitted new and amended rules to Chapter 116 as revisions to the NSR SIP to the EPA for approval. On September 15, 2010, EPA disapproved these SIP revisions. On March 11, 2011, the TCEQ submitted a revised SIP package that addressed the issues outlined in the EPA's disapproval. On September 30, 2011, the EPA expressed its intention to propose a conditional approval of the package and requested a dialog to resolve certain EPA concerns regarding terminology and a typographical error to facilitate a final approval. The proposed amendments address EPA concerns by correcting typographical errors, using federal terms instead of state equivalents, and removing unnecessary date references in definitions. The proposed amendments are administrative in nature and do not change existing federal or state requirements to obtain a permit nor do they mandate the use of additional controls or change any monitoring or testing requirements. No fiscal implications are anticipated for any regulated entity.

State agencies or local governments that operate under an NSR permit should not experience any fiscal implications as a result of the proposed rules since despite any administrative discrepancy between state rules (which were submitted as revisions to the SIP) and the federal regulations, the proposed rules do not change existing federal or state requirements to obtain a permit nor do they mandate the use of additional controls or change any monitoring or testing requirements. The proposed amendments are administrative in nature and continue to ensure that state regulations are consistent with federal regulations so that regulated entities can more easily understand and comply with those requirements with regard to NSR permits.

### **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 consistency between federal and state requirements, assurance that state rules for the SIP NSR program are at least as stringent as federal rules, and EPA approval of the SIP.

The proposed rules are not expected to have a fiscal impact on individuals or large businesses because, despite any administrative discrepancies in language between state rules which were submitted as revisions to the SIP, and the federal regulations, they do not change existing federal or state requirements to obtain a permit nor do they

mandate the use of additional controls or change any monitoring or testing requirements. The proposed amendments are administrative in nature and continue to ensure that state regulations are consistent with federal regulations so that regulated entities can more easily understand and comply with those requirements with regard to NSR permits.

### **Small Business and Micro-Business Assessment**

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules because, despite any administrative discrepancies in language between state rules, which were submitted as revisions to the SIP, and the federal regulations, they do not change existing federal or state requirements to obtain a permit nor do they mandate the use of additional controls or change any monitoring or testing requirements. The proposed rules continue to clarify state requirements and ensure consistency with federal requirements regarding NSR permits.

### **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 comply with federal regulations. The agency is required to implement the proposed rules to obtain federal approval for the SIP.

### **Local Employment Impact Statement**

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

### **Draft Regulatory Impact Analysis Determination**

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

A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the proposed revisions is to include definitions for, and make other changes to the PAL rules to meet federal requirements.

Additionally, even if the rules met the definition of a major environmental rule, the

rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The proposed rules would implement requirements of the FCAA. Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the National Ambient Air Quality Standards (NAAQS) within the state. While 42 USC, §7410 generally does not require specific programs, methods, or emission reductions in order to meet the standard, state SIPs must include specific requirements as specified by 42 USC, §7410. The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not

relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that their SIPs provide for implementation, attainment, maintenance, and enforcement of the NAAQS within the state. One of the requirements of 42 USC, §7410 is for states to include programs for the regulation of the modification and construction of any stationary source within the area covered by the plan as necessary to assure that the NAAQS are achieved, including a permit program as required in FCAA, Parts C and D, or NSR. Additionally, once states have developed SIPs, and those plans are approved by the EPA, the FCAA prescribes, in 42 USC, §7502(e) that the EPA, in modifying a NAAQS, shall promulgate rules that apply to all areas that have not attained the previous NAAQS that provide for controls that are no less stringent than the controls that previously applied to the area. This rulemaking will address those sections submitted as revisions to the NSR SIP and subsequently were proposed for disapproval by the EPA. Specifically, those concern definitions for and other changes to the PAL rules to meet federal requirements.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a

requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded, "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

Because of the ongoing need to meet federal requirements, the commission routinely proposes and adopts rules incorporating or designed to satisfy specific federal requirements. The legislature is presumed to understand this federal scheme. If each rule proposed by the commission to meet a federal requirement was considered to be a major environmental rule that exceeds federal law, then each of those rules would require the full regulatory impact analysis (RIA) contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the Legislative Budget Board, the commission believes that the intent of SB 633 was only to require the full RIA for rules

that are extraordinary in nature. While the proposed rules may have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA, and in fact creates no additional impacts since the proposed rules do not exceed the requirement to attain and maintain the NAAQS. For these reasons, the proposed rules fall under the exception in Texas Government Code, §2001.0225(a), because they are required by, and do not exceed, federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code, but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." (*Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, *no writ*). *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied*); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).)

The commission's interpretation of the RIA requirements is also supported by a change made to the Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance" (Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. As discussed in this analysis and elsewhere in this preamble, the commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The proposed rules implement requirements of the FCAA, specifically to adopt and implement SIPs to attain and maintain the NAAQS, including a requirement to adopt and implement permit programs. The specific intent of the proposed rulemaking is to address those sections submitted as revisions to the NSR SIP and subsequently were proposed for disapproval by the EPA. Specifically, those concern definitions for and other changes to the PAL rules to meet federal requirements. The proposed 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 TWC, which are cited in the Statutory Authority section of this preamble. Therefore, this proposed rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section 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 Texas Constitution §17 or §19, Article I; 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 address those sections submitted as revisions to the NSR SIP and subsequently were proposed for disapproval by the EPA. Specifically, the proposed changes concern definitions for and other changes to the PAL rules to meet federal requirements.

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 CMP, commission rules governing air pollutant emissions must be consistent with the

applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies.

The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 CFR to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

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 of 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, upon the effective date of the adopted rulemaking, revise their operating permit to include the new Chapter 116 requirements. Additionally, sources subject to the rules may become subject to the federal operating permit program.

### **Announcement of Hearing**

The commission will hold a public hearing on this proposal in Austin on March 29, 2012, 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 Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

### **Submittal of Comments**

Written comments may be submitted to Michael Parrish, 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.texas.gov/rules/ecomments/>*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2012-015-116-AI. The comment period closes April 9, 2012.

Copies of the proposed rulemaking can be obtained from the commission's Web site at *[http://www.tceq.texas.gov/nav/rules/propose\\_adopt.html](http://www.tceq.texas.gov/nav/rules/propose_adopt.html)*. For further information, please contact Blake Stewart, Air Permits Division, (512) 239-6931.

## **SUBCHAPTER A: DEFINITIONS**

### **§116.12**

#### STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe reasonable requirements for measuring and monitoring the

emissions of air contaminants from a source or from an activity causing or resulting in the emission of air contaminants; THSC, §382.021, concerning Sampling Methods and Procedures, which authorizes the commission to prescribe sampling methods and procedures to be used in determining violations of and compliance with the commission's rules; THSC, §382.040, concerning Documents; Public Property, which provides that all information, documents, and data collected by the commission in performing its duties are state property; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; THSC, §382.0511, concerning Permit Consolidation and Amendment, which authorizes the commission to consolidate various authorizations; THSC, §382.0512, concerning Modification of Existing Facility, which prescribes how the commission will evaluate modifications of existing facilities; THSC, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; THSC, §382.0514, concerning Sampling, Monitoring, and Certification, which authorizes the commission to require sampling and monitoring of a permitted federal source or facility; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; and THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to issue preconstruction permits. The amendment is also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.*, which requires states to submit

state implementation plan revisions that specify the manner in which the national ambient air quality standard will be achieved and maintained within each air quality control region of the state.

The proposed amendment implements THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, 382.021, 382.040, 382.051, 382.0511 - 382.0515, and 382.0518, and FCAA, 42 USC, §§7401 *et seq.*

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

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

(1) Actual emissions--Actual emissions as of a particular date are equal to the average rate, in tons per year, at which the unit actually emitted the pollutant during the 24-month period that precedes the particular date and that is representative of normal source operation, except that this definition shall not apply for calculating whether a significant emissions increase has occurred, or for establishing a plant-wide applicability limit. Instead, paragraph (3) of this section relating to baseline actual emissions shall apply for this purpose. The executive director shall allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period. The executive director may presume that the source-specific allowable emissions for the unit are equivalent to the actual emissions, e.g., when the allowable limit is reflective of actual emissions. For any emissions unit that has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

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

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

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

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

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

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

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

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

(D) The actual average rate shall be adjusted downward to exclude any non-compliant emissions that occurred during the consecutive 24-month period. For each regulated new source review pollutant, when a project involves multiple facilities, only one consecutive 24-month period must be used to determine the baseline

actual emissions for the facilities being changed. A different consecutive 24-month period can be used for each regulated new source review pollutant. The average rate shall not be based on any consecutive 24-month period for which there is inadequate information for determining annual emissions, in tons per year, and for adjusting this amount. Baseline emissions cannot occur prior to November 15, 1990.

(E) The actual average emissions rate shall include fugitive emissions to the extent quantifiable. Until March 1, 2016, emissions previously demonstrated as resulting from planned maintenance, startup, or shutdown activities; historically unauthorized; and subject to reporting under Chapter 101 of this title (relating to General Air Quality Rules) shall be included to the extent that they have been authorized, or are being authorized.

(4) Basic design parameters--For a process unit at a steam electric generating facility, the owner or operator may select as its basic design parameters either maximum hourly heat input and maximum hourly fuel consumption rate or maximum hourly electric output rate and maximum steam flow rate. When establishing fuel consumption specifications in terms of weight or volume, the minimum fuel quality based on British thermal units content shall be used for determining the basic design parameters for a coal-fired electric utility steam generating unit. The basic design parameters for any process unit that is not at a steam electric generating facility are

maximum rate of fuel or heat input, maximum rate of material input, or maximum rate of product output. Combustion process units will typically use maximum rate of fuel input. For sources having multiple end products and raw materials, the owner or operator shall consider the primary product or primary raw material when selecting a basic design parameter. The owner or operator may propose an alternative basic design parameter for the source's process units to the executive director if the owner or operator believes the basic design parameter as defined in this paragraph is not appropriate for a specific industry or type of process unit. If the executive director approves of the use of an alternative basic design parameter, that basic design parameter shall be identified and compliance required in a condition in a permit that is legally enforceable.

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

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

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

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

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

(7) Clean coal technology--Any technology, including technologies applied at the precombustion, combustion, or post-combustion stage, at a new or existing facility that will achieve significant reductions in air emissions of sulfur dioxide or

oxides of nitrogen associated with the utilization of coal in the generation of electricity, or process steam that was not in widespread use as of November 15, 1990.

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

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

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

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

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

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

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

and

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

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

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

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

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

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

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

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

(15) Lowest achievable emission rate--For any emitting facility, that rate of emissions of a contaminant that does not exceed the amount allowable under applicable new source performance standards promulgated by the United States Environmental Protection Agency under 42 United States Code, §7411, and that reflects the following:

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

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

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

(17) Major stationary source--Any stationary source that emits, or has the potential to emit, a threshold quantity of emissions or more of any air contaminant (including volatile organic compounds (VOCs)) for which a national ambient air quality standard has been issued. The major source thresholds are identified in Table I of this section for nonattainment pollutants and the major source thresholds for prevention of significant deterioration pollutants are identified in 40 Code of Federal Regulations (CFR) §51.166(b)(1). A source that emits, or has the potential to emit a federally regulated new source review pollutant at levels greater than those identified in 40 CFR §51.166(b)(1) is considered major for all prevention of significant deterioration pollutants. A major stationary source that is major for VOCs or nitrogen oxides is considered to be major for ozone. The fugitive emissions of a stationary source shall not be included in determining for any of the purposes of this definition whether it is a major stationary source, unless the source belongs to one of the categories of stationary sources listed in 40 CFR §51.165(a)(1)(iv)(C).

(18) Major modification--As follows.

(A) Any physical change in, or change in the method of operation of a major stationary source that causes a significant project emissions increase and a significant net emissions increase for any federally regulated new source review pollutant. At a stationary source that is not major prior to the increase, the increase by itself must equal or exceed that specified for a major source. At an existing major stationary source, the increase must equal or exceed that specified for a major modification to be significant. The major source and significant thresholds are provided in Table I of this section for nonattainment pollutants. The major source and significant thresholds for prevention of significant deterioration pollutants are identified in 40 Code of Federal Regulations §51.166(b)(1) and (23), respectively.

Figure: 30 TAC §116.12(18)(A) (No change)

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

(i) routine maintenance, repair, and replacement;

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) it occurs during the contemporaneous period;

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

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

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

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

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

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

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

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

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

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

(21) Offset ratio--For the purpose of satisfying the emissions offset reduction requirements of 42 United States Code, §7503(a)(1)(A), the emissions offset ratio is the ratio of total actual reductions of emissions to total emissions increases of such pollutants. The minimum offset ratios are included in Table I of this section under the definition of major modification. In order for a reduction to qualify as an offset, it

must be certified as an emission credit under Chapter 101, Subchapter H, Division 1 or 4 of this title (relating to Emission Credit Banking and Trading; or Discrete Emission Credit Banking and Trading), except as provided for in §116.170(b) of this title (relating to Applicability of Emission Reductions as Offsets). The reduction must not have been relied on in the issuance of a previous nonattainment or prevention of significant deterioration permit.

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

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

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

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

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

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

(28) Project net--The sum of the following: the project emissions increase, minus any sourcewide creditable emission decreases proposed at the source between the date of application for the modification and the date the resultant modification begins emitting. Baseline actual emissions shall be used to determine emissions increases and

decreases. Increases and decreases must meet the creditability criteria listed under the definition of net emissions increase in this section.

(29) Projected actual emissions--The maximum annual rate, in tons per year, at which an existing facility is projected to emit a federally regulated new source review pollutant in any rolling 12-month period during the five years following the date the facility resumes regular operation after the project, or in any one of the ten years following that date, if the project involves increasing the facility's design capacity or its potential to emit that federally regulated new source review pollutant. In determining the projected actual emissions, the owner or operator of the major stationary source shall include unauthorized emissions from planned maintenance, startup, or shutdown activities, which were historically unauthorized and subject to reporting under Chapter 101 of this title, to the extent they have been authorized, or are being authorized; and fugitive emissions to the extent quantifiable; and shall consider all relevant information, including, but not limited to, historical operational data, the company's own representations, the company's expected business activity and the company's highest projections of business activity, the company's filings with the state or federal regulatory authorities, and compliance plans under the approved state implementation plan.

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

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

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

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

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

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

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

(D) the replaced facility is permanently removed from the major stationary source, otherwise permanently disabled, or permanently barred from operation by a permit that is enforceable. If the replaced facility is brought back into operation, it shall constitute a new facility. No creditable emission reductions shall be generated from shutting down the existing facility that is replaced. A replacement facility is considered an existing facility for the purpose of determining federal new source review applicability.

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

come directly from a mobile source such as emissions from the tail pipe of a motor vehicle, from a train, or from a vessel.

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

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

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

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

**SUBCHAPTER B: NEW SOURCE REVIEW PERMITS**

**DIVISION 5: NONATTAINMENT REVIEW PERMITS**

**§116.150, §116.151**

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §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 THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the

commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; THSC, §382.0511, concerning Permit Consolidation and Amendment, which authorizes the commission to consolidate various authorizations; THSC, §382.0512, concerning Modification of Existing Facility, which prescribes how the commission will evaluate modifications of existing facilities; THSC, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; and THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to issue preconstruction permits. The amendments are also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.*, which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standard will be achieved and maintained within each air quality control region of the state.

The proposed amendments implement THSC, §§382.002, 382.011, 382.012, 382.017, 382.051, 382.0511, 382.0512, 382.0513, 382.0515, and 382.0518, and FCAA, 42 USC, §§7401 *et seq.*

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

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

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

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

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

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

(b) The owner or operator of a proposed new major stationary source, as defined in §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions) of volatile organic compound (VOC) emissions or nitrogen oxides (NO<sub>x</sub>) emissions, or the owner or operator of an existing stationary source of VOC or NO<sub>x</sub> emissions that will undergo a major modification, as defined in §116.12 of this title with respect to VOC or NO<sub>x</sub>, shall meet the requirements of subsection (d)(1) - (4) of this section, except as provided in subsection (e) of this section. Table I, located in the definition of major modification in §116.12 of this title, specifies the various classifications of nonattainment along with the associated emission levels that designate a major stationary source and significant level for those classifications.

(c) Except as noted in subsection (e) of this section regarding NO<sub>x</sub>, the de minimis threshold test (netting) is required for all modifications to existing major sources of VOC or NO<sub>x</sub>, unless at least one of the following conditions are met:

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

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

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

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

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

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

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

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

(A) Major stationary sources located in a serious or severe ozone nonattainment area with a PTE of less than 100 tpy of an applicable nonattainment

pollutant are not required to undergo nonattainment new source review under this section, if the project increases are offset with internal offsets at a ratio of at least 1.3 to 1.

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

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

(e) For sources located in the El Paso ozone nonattainment area as defined in 40 Code of Federal Regulations, Part 81, the requirements of this section do not apply to NO<sub>x</sub> emissions.

**§116.151. New Major Source or Major Modification in Nonattainment Area  
Other Than Ozone.**

(a) This section applies to applications for new construction or modification of facilities or emissions units located in a designated nonattainment area for an air contaminant other than ozone. The owner or operator of a proposed new or modified facility or emissions unit that will be a new major stationary source for that nonattainment air contaminant, or the owner or operator of an existing major stationary source that will undergo a major modification with respect to that nonattainment air contaminant, shall meet the additional requirements of subsection (c) (1) - (4) of this section. Table I located in the definition of major modification in §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions) specifies the various classifications of nonattainment along with the associated emission levels that designate a major stationary source.

(b) The *de minimis* threshold test (netting) is required for all modifications to existing major sources of federally regulated new source review pollutants, unless the proposed emissions increases associated with a project, without regard to decreases, are less than the major modification threshold for the pollutant identified in Table I located in the definition of major modification in §116.12 of this title.

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

(1) The proposed facility or emissions unit shall comply with the lowest achievable emission rate (LAER) as defined in §116.12 of this title for the nonattainment pollutants for which the facility or emissions unit is a new major source or major modification. LAER shall be applied to each new facility or emissions unit and to each existing facility or emissions unit at which the net emissions increase will occur as a result of a physical change or change in method of operation of the unit.

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

(3) At the time the new or modified facility or emissions unit or facilities or emissions units commence operation, the emission increases from the new or modified facility or emissions unit or facilities or emissions units shall be offset. The proposed facility or emissions unit shall use the offset ratio for the appropriate nonattainment

classification as defined in §116.12 of this title and shown in Table I located in the definition of major modification in §116.12 of this title.

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

**SUBCHAPTER C: PLANT-WIDE APPLICABILITY LIMITS**

**DIVISION 1: PLANT-WIDE APPLICABILITY LIMITS**

**§116.180, §116.186**

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; TWC, §7.02, concerning Enforcement Authority, which provides the commission the authority to enforce the statutes under its jurisdiction; TWC, §7.301, concerning Definition, which defines terms used in Chapter 7, Subchapter G; TWC, §7.302, concerning Grounds for Revocation or Suspension of Permit, which provides the commission the authority to revoke and suspend or revoke and reissue a permit on prescribed grounds after notice and hearing; and under Texas Health and Safety Code (THSC), §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 THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and

Duties, which authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants from a source or from an activity causing or resulting in the emission of air contaminants; THSC, §382.021, concerning Sampling Methods and Procedures, which authorizes the commission to prescribe sampling methods and procedures to be used in determining violations of and compliance with the commission's rules; THSC, §382.040, concerning Documents; Public Property, which provides that all information, documents, and data collected by the commission in performing its duties are state property; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; THSC, §382.0511, concerning Permit Consolidation and Amendment, which authorizes the commission to consolidate various authorizations; THSC, §382.0512, concerning Modification of Existing Facility, which prescribes how the commission will evaluate modifications of existing facilities; THSC, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; THSC, §382.0514, concerning Sampling, Monitoring, and Certification, which authorizes the commission to require sampling and monitoring of a

permitted federal source or facility; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; and THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to issue preconstruction permits. The amendments are also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.*, which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standard will be achieved and maintained within each air quality control region of the state.

The proposed amendments implement THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, 382.021, 382.040, 382.051, 382.0511, 382.0512, 382.0513, 382.0514, 382.0515, and 382.0518, and FCAA, 42 USC, §§7401 *et seq.*

**§116.180. Applicability.**

(a) The following requirements apply to a plant-wide applicability limit (PAL) permit.

(1) Only one PAL may be issued for each pollutant at an existing major stationary source.

(2) A PAL permit may include more than one PAL.

(3) A PAL permit may not cover facilities or emissions units at more than one existing major stationary source.

(4) A PAL permit may be consolidated with a new source review permit at the existing major stationary source.

(5) A PAL permit can be issued only for an existing major stationary source; it may not be issued for a new major stationary source as defined in 40 Code of Federal Regulations §51.165(a)(1)(iv)(A) and §51.166(b)(1) [§51.165(iv)(A)].

(b) The new owner of a major stationary source shall comply with §116.110(e) of this title (relating to Applicability), provided that all facilities, or emissions units at a major stationary source, covered by a PAL permit change ownership at the same time and to the same person, or both the new owner and existing permit holder must obtain a PAL permit alteration allocating the emission prior to the transfer of the permit by the commission. After the sale of a facility, or emissions unit at a major stationary source, but prior to the transfer of a permit requiring a permit alteration, the original PAL permit holder remains responsible for ensuring compliance with the existing PAL permit and all rules of the commission.

(c) The owner of the facility, emissions unit at a major stationary source, group of facilities, or account or the operator of the facility, emissions unit at a major stationary source, group of facilities, or account that is authorized to act for the owner is responsible for complying with this section, except as provided by subsection (b) of this section.

**§116.186. General and Special Conditions.**

(a) The plant-wide applicability limit (PAL) will impose an annual emission limitation in tons per year, that is enforceable for all facilities, or emissions units at a major stationary source, that emit the PAL pollutant. For each month during the PAL effective period after the first 12 months of establishing a PAL, the major stationary source owner or operator shall demonstrate that the sum of the monthly emissions from each facility under the PAL for the previous 12 consecutive months is less than the PAL (a 12-month average, rolled monthly). For each month during the first 11 months from the PAL effective date, the major stationary source owner or operator shall demonstrate that the sum of the preceding monthly emissions from the PAL effective date for each facility under the PAL is less than the PAL. Each PAL must include emissions of only one pollutant. The PAL must include all emissions, including fugitive emissions, to the

extent quantifiable, from all facilities or emissions units at a major stationary source included in the PAL that emit or have the potential to emit the PAL pollutant.

(b) The following general conditions are applicable to every PAL permit.

(1) **Applicability.** This section does not authorize any facility to emit air pollutants but establishes an annual emissions level below which new and modified facilities, or emissions units at a major stationary source, will not be subject to major new source review for that pollutant.

(2) **Sampling requirements.** If sampling of stacks or process vents is required, the PAL permit holder shall contact the commission's Office of Compliance and Enforcement prior to sampling to obtain the proper data forms and procedures. All sampling and testing procedures must be approved by the executive director and coordinated with the appropriate regional office of the commission. The PAL permit holder is also responsible for providing sampling facilities and conducting the sampling operations or contracting with an independent sampling consultant.

(3) **Equivalency of methods.** The permit holder shall demonstrate the equivalency of emission control methods, sampling or other emission testing methods, and monitoring methods proposed as alternatives to methods indicated in the

conditions of the PAL permit. Alternative methods must be applied for in writing and must be reviewed and approved by the executive director prior to their use in fulfilling any requirements of the permit.

(4) Recordkeeping and reporting.

(A) A copy of the PAL permit along with information and data sufficient to demonstrate continuous compliance with the emission caps contained in the PAL permit must be maintained in a file at the plant site and made available at the request of personnel from the commission or any air pollution control program having jurisdiction. For facilities that normally operate unattended, this information must be maintained at the nearest staffed location within Texas specified by the permit holder in the permit application. This information must include, but is not limited to, emission cap and individual emission limitation calculations based on a 12-month rolling basis and production records and operating hours. Additional recordkeeping requirements may be specified in special conditions attached to the PAL permit.

(B) The owner or operator shall retain a copy of the PAL permit application and any applications for revisions to the PAL, each annual certification of compliance under §122.146 of this title (relating to Compliance Certification Terms and

Conditions), and the data relied on in certifying the compliance for the duration of the PAL plus five years.

(C) A semiannual report shall be submitted to the executive director within 30 days of the end of each reporting period that contains:

(i) the identification of owner and operator and the permit number;

(ii) total annual emissions (in tons per year) based on a 12-month rolling total for each month in the reporting period;

(iii) all data relied upon, including, but not limited to, any quality assurance or quality control data, in calculating the monthly and annual PAL pollutant emissions;

(iv) a list of any facility modified or added to the major stationary source during the preceding six-month period;

(v) the number, duration, and cause of any deviations or monitoring malfunctions (other than the time associated with zero and span calibration

checks), and any corrective action taken. This may be satisfied by referencing the PAL permit number in the semiannual report for the site submitted under §122.145 of this title (relating to Reporting Terms and Conditions);

(vi) a notification of a shutdown of any monitoring system, whether the shutdown was permanent or temporary, the reason for the shutdown, the anticipated date that the monitoring system will be fully operational or replaced with another monitoring system, and whether the emissions unit monitored by the monitoring system continued to operate, and the calculation of the emissions of the pollutant or the number determined by method included in the permit; and

(vii) a signed statement by the responsible official, as defined in §122.10 of this title (relating to General Definitions), certifying the truth, accuracy, and completeness of the information provided in the report.

(D) The owner or operator shall submit the results of any revalidation test or method to the executive director within three months after completion of such test or method.

(5) Maintenance of emission control. The facilities covered by the PAL permit will not be operated unless all air pollution emission capture and abatement

equipment is maintained in good working order and operating properly during normal facility operations.

(6) Compliance with rules. Acceptance of a PAL permit by a permit applicant constitutes an acknowledgment and agreement that the holder will comply with all rules and orders of the commission issued in conformity with the Texas Clean Air Act and the conditions precedent to the granting of the permit. If more than one state or federal rule or PAL permit condition is applicable, the most stringent limit or condition will govern and be the standard by which compliance must be demonstrated. Acceptance includes consent to the entrance of commission employees and agents into the permitted premises at reasonable times to investigate conditions relating to the emission or concentration of air contaminants, including compliance with the PAL permit.

(7) Effective period. A PAL is effective for ten years.

(8) Absence of monitoring data. A source owner or operator shall record and report maximum potential emissions without considering enforceable emission limitations or operational restrictions for a facility during any period of time that there is no monitoring data, unless another method for determining emissions during such periods is specified in the PAL permit special conditions.

(9) Monitoring system requirements. Failure to use a monitoring system that meets the requirements of this section renders the PAL permit invalid [is a violation of the PAL permit].

(10) Revalidation. All data used to establish the PAL pollutant must be revalidated through performance testing or other scientifically valid means approved by the executive director. Such testing must occur at least once every five years after issuance of the PAL.

(11) Renewal. If a PAL renewal application is submitted to the executive director in accordance with §116.196 of this title (relating to Renewal of a Plant-wide Applicability Limit Permit), the PAL shall not expire at the end of the PAL effective period. It shall remain in effect until a renewed PAL permit is issued by the executive director or the application is voided.

(c) Each PAL permit must include special conditions that satisfy the following requirements.

(1) For the purposes of this subchapter, the definitions of the following terms are the same as those provided in 40 Code of Federal Regulations §51.165.

(A) Continuous emission monitoring system (CEMS).

(B) Continuous emissions rate monitoring system (CERMS).

(C) Continuous parameter monitoring system (CPMS).

(D) Predictive emissions monitoring system (PEMS).

(2) The PAL monitoring system must accurately determine all emissions of the PAL pollutant in terms of mass per unit of time. Any monitoring system authorized for use in the PAL permit must be based on sound science and meet generally acceptable scientific procedures for data quality and manipulation.

(3) The PAL monitoring system must employ one or more of the general monitoring approaches meeting the minimum requirements as described in subparagraphs (A) - (D) of this paragraph.

(A) An owner or operator using mass balance calculations to monitor PAL pollutant emissions from activities using coating or solvents shall meet the following requirements:

(i) provide a demonstrated means of validating the published content of the PAL pollutant that is contained in, or created by, all materials used in or at the facility;

(ii) assume that the facility emits all of the PAL pollutant that is contained in, or created by, any raw material or fuel used in or at the facility, if it cannot otherwise be accounted for in the process; and

(iii) where the vendor of a material or fuel that is used in or at the facility publishes a range of pollutant content from such material, the owner or operator shall use the highest value of the range to calculate the PAL pollutant emissions unless the executive director determines that there is site-specific data or a site-specific monitoring program to support another content within the range.

(B) An owner or operator using a CEMS to monitor PAL pollutant emissions shall meet the following requirements.

(i) The CEMS must comply with applicable performance specifications found in 40 Code of Federal Regulations Part 60, Appendix B.

(ii) The CEMS must sample, analyze, and record data at least every 15 minutes while the emissions unit is operating.

(C) An owner or operator using CPMS or PEMS to monitor PAL pollutant emissions shall meet the following requirements.

(i) The CPMS or the PEMS must be based on current site-specific data demonstrating a correlation between the monitored parameter(s) and the PAL pollutant emissions across the range of operation of the facility.

(ii) Each CPMS or PEMS must sample, analyze, and record data at least every 15 minutes or at another less frequent interval approved by the executive director, while the facility is operating.

(D) An owner or operator using emission factors to monitor PAL pollutant emissions shall meet the following requirements.

(i) All emission factors must be adjusted, if appropriate, to account for the degree of uncertainty or limitations in the factors' development.

(ii) The facility must operate within the designated range of use for the emission factor, if applicable.

(iii) If technically practicable, the owner or operator of a significant facility that relies on an emission factor to calculate PAL pollutant emissions shall conduct validation testing to determine a site-specific emission factor within six months of PAL permit issuance, unless the executive director determines that testing is not required.

(E) An alternative monitoring approach must meet the requirements in paragraph (1) of this subsection and be approved by the executive director.

(4) Where an owner or operator of a facility cannot demonstrate a correlation between a monitored parameter(s) and the PAL pollutant emissions rate at all operating points of the facility, the executive director shall:

(A) establish default value(s) for determining compliance with the PAL based on the highest potential emissions reasonably estimated at such operating point(s); or

(B) determine that operation of the facility during operating conditions when there is no correlation between monitored parameter(s) and the PAL pollutant emissions is a violation of the PAL.