The Texas Natural Resource Conservation Commission (commission) adopts amendments to §116.12, concerning Nonattainment Review Definitions, §116.150, concerning New Major Source or Major Modification in Ozone Nonattainment Area, and §116.151, concerning New Major Source or Major Modification in Nonattainment Area Other than Ozone. The sections are adopted with changes to the proposed text as published in the December 19, 1997, issue of the *Texas Register* (22 TexReg 12399).

EXPLANATION OF ADOPTED RULES

The Federal Clean Air Act (FCAA), §182(f) specifies that required measures for major sources of volatile organic compounds must also be applied to major sources of nitrogen oxides (NO_x), unless a demonstration is made that NO_x reductions would not contribute to attainment of the ozone standard. The United States Environmental Protection Agency's (EPA) interpretation of §182(f) allows the following federally required NO_x measures to be waived if the state demonstrates that NO_x reductions do not contribute to ozone attainment: reasonably available control technology (RACT), nonattainment new source review (NNSR), vehicle inspection/maintenance, and general and transportation conformity. On April 12, 1995, the EPA approved a temporary §182(f) exemption from these NO_x measures in the Houston/Galveston (HGA) and Beaumont/Port Arthur (BPA) ozone nonattainment areas. The EPA's approval was based on the state's preliminary demonstration, using Urban Airshed Model (UAM) modeling, that NO_x reductions in HGA and BPA would not lower ozone levels, and in fact could make them worse ("NO_x disbenefit"). The temporary exemption allowed more time to conduct UAM modeling, using data from the Coastal Oxidant Assessment for Southeast Texas (COAST), an intensive 1993 field study. These UAM results were judged critical in determining whether, and to what extent,

NO_x reductions are needed to attain the ozone standard. The EPA specified that the temporary exemption would expire on December 31, 1996. On May 23, 1997, the EPA approved a one-year extension of the §182(f) temporary exemption, which since expired on December 31, 1997. This additional year allowed the commission to accommodate improvements in the UAM, using COAST data, and to better substantiate an emission reduction strategy.

As a result of the original exemption and extension, the agency revised certain rules, including §116.150, to be consistent with the §182(f) waiver. In the fall of 1997, commission staff completed the UAM modeling analysis of the airshed of the upper Texas Gulf Coast. This study indicated that NO_x reductions are a necessary step toward the area's attaining the federal air quality standard for ozone. Because of the modeling and the need to continue steady reductions of the pollutants that contribute to ozone smog, on November 24, 1997, the commission determined not to seek further federal §182(f) waivers from the NO_x reduction requirements of the 1990 FCAA for the HGA and BPA areas.

These amendments to Chapter 116 reinstate full NNSR for NO_x in HGA and BPA, consisting of application of lowest achievable emission rate (LAER), compliance certification, offsets, and alternative site analysis. These NO_x requirements apply to permit applications determined to be administratively complete after December 31, 1997. Adopted §116.150(a) and (c)(2) contain these reinstated provisions.

In addition, the rulemaking implements certain revisions to NNSR which are specified in the 1990 FCAA amendments. The EPA's New Source Review (NSR) reform package, published in the *Federal Register* on July 23, 1996, clarifies the implementation of these federal statutes. The EPA proposal and the FCAA, §182(c)(7) and (8) allow creditable internal offsets at a ratio of 1.3 to 1 to be used in certain nonattainment areas to either: avoid NNSR at existing major sources that emit, or have the potential to emit, less than 100 tons per year (tpy) of an ozone precursor; or substitute Best Available Control Technology (BACT) for LAER at existing major sources that emit, or have the potential to emit, 100 tpy or more of an ozone precursor. Also, if NNSR is required, the EPA proposal and the FCAA, §182(c)(7), allow the substitution of BACT for LAER at existing major sources with less than 100 tpy of an ozone precursor. The adopted revisions to §116.150(a)(1) and (3) incorporate language to allow these substitutions.

The adopted rule also implements the FCAA, §182(c)(6), in accordance with the EPA's proposal. The EPA proposed a preliminary step of determining whether there is an "increase in the net emissions" from the proposed modification for which NSR applicability is in question. Where there is a "project net" increase in emissions, the next step is to combine those "project net" increases with the contemporaneous increases and decreases to determine if NNSR is required. Adopted §116.12 includes a new definition of "project net" consistent with the EPA's proposed definition. Adopted §116.150(a) requires an applicant to submit contemporaneous netting calculations (de minimis threshold test) where the project has an increase in emissions of greater than five tpy and there is a "project net" emissions increase.

In addition, the adopted rule updates and makes minor corrections to the §116.12 definitions of "contemporaneous period," "de minimis threshold test," and "offset ratio." Also, the adopted amendments to §116.151 reword the NNSR provisions for nonattainment areas other than ozone consistent with the adopted amendments to the §116.150 provisions for ozone nonattainment areas.

REGULATORY IMPACT ANALYSIS

The commission has reviewed this rulemaking in light of the regulatory analysis requirements of Texas Government Code (the Code), §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the Code. The amendments, which implement the requirements of FCAA, §§172(c)(5), 173, and 182(f), do not meet the definition of "major environmental rule" because the obligations have already been established by federal law and thus are not new requirements. The full federal NNSR requirements became effective by operation of federal law upon expiration of the temporary §182(f) exemption. No comments on the regulatory impact analysis were received.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these sections under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of these amendments is to remove an existing waiver for NO_x NNSR. New or modified major sources of NO_x located in the HGA or BPA ozone nonattainment areas of the state will be subject to a review of their

NO_x emissions and possibly additional control measures. However, there is no restriction or taking of private real property associated with the adoption of these amendments.

COASTAL MANAGEMENT PLAN

The commission has determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et. seq.), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 31 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3) 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 has reviewed this rulemaking action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and has determined that this rulemaking action is consistent with the applicable CMP goals and policies. The primary CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations at Code of Federal Regulations, Title 40, to protect and enhance air quality in the coastal area. Adoption of these amendments should result in reductions of ambient NO_x and ozone concentrations. Therefore, in compliance with 31 TAC §505.22(e), the commission affirms that this rulemaking is consistent with CMP goals and policies.

HEARING AND COMMENTERS

A public hearing was held in Austin on January 20, 1998. No testimony was provided at the hearing. The public comment period also closed on January 20, 1998. The following commenters submitted written comments in general support of the proposal, but with suggested changes: Galveston-Houston Association for Smog Prevention (GHASP), an individual, and an attorney representing the Texas Industry Project (TIP). The EPA submitted comments without stating any general support or opposition to the amendments, but suggested changes. No commenter generally opposed the proposed amendments.

GHASP and an individual supported the reinstatement of NO_x NNSR, but opposed the proposed changes to the NNSR rules resulting from the EPA's NNSR proposal. They also commented that allowing creditable internal offsets to be used to avoid NNSR for sources with a potential to emit of 100 tpy or less is not consistent with reaching attainment in Houston by the year 2007. Further, the individual found this proposal particularly objectionable given that a major source in Houston for NO_x is 25 tpy yet the rule would allow a 100 tpy source to use a loophole such that RACT, BACT, and LAER would not be fully implemented.

The commission appreciates the support for the reinstatement of NO_x NNSR. In response to the opposition to the NNSR reform changes, the commission emphasizes that these changes implement statutory requirements specified in the 1990 amendments to the FCAA and the EPA's clarification of the implementation of those requirements. The purpose of NNSR is to prevent point source

growth from interfering with the attainment demonstration strategy contained in the state implementation plan. Each of the adopted amendments maintains the requirement to provide emission reductions which fully offset, or net out, the new point source emissions. The adopted rules allow for sources with a potential to emit of less than 100 tpy to use internal offsets to avoid NNSR. These offsets provide the assurance that the modification will not interfere with Houston reaching attainment by the year 2007. In addition, although the amendments allow the less-than-100 tpy source to avoid NNSR requirements by applying internal offsets at the ratio prescribed in the federal rule, the source is not exempted from RACT or BACT.

An individual stated that the NO_x waiver was illegal and suggested that NNSR be applied retroactively to the sources that avoided NNSR during the exemption period.

The commission disagrees. The FCAA, §182(f) allows the NO_x requirements to be waived if the reductions would not cause ozone benefits. The preliminary modeling available in 1994 showed this to be the case. Above and beyond the legal minimum requirements, the commission maintained the offset requirements during this period. Sources were required to hold offsetting emission reductions in abeyance, to be provided if further modeling showed the NO_x reductions to be beneficial. The amendments to §116.150(c)(2) remove the conditionality of this requirement and these sources will have to provide the offsets or internal reductions by January 1, 2000.

The EPA and TIP commented that the proposed revision to the definition of "offset ratio" in §116.12 needed more specific criteria for creditability than the proposed reference to "the credibility criteria established in §101.29." The TIP suggested alternative language for the definition. The EPA expressed confusion on which version of §101.29 was being referenced.

The commission is agreeable to modifying the definition of offset ratio substantively as recommended by TIP. However, instead of relying on a cross-reference to §101.29(c)(1)(B) as recommended by TIP, for readability the commission has included its relevant substance in the adopted definition. In response to the EPA's confusion, the intent was that the cross-reference reflect the current version, effective December 23, 1997. Directly specifying the relevant §101.29 requirements in the offset ratio definition eliminates any confusion about which version was intended to be cross-referenced.

The EPA recommended that the commission not revise §116.151(2), by changing the applicability from "owner or operator" to "owner and operator." The EPA commented that changing the applicability in this way would exempt a facility that is not both owned and operated by the same person.

The commission agrees with the EPA. Adopted §116.152(2) says "owned or operated."

In addition, the commission has corrected a similar drafting error in the second sentence of §116.150(a), which as proposed, inadvertently omitted the reference to the existing exception in subsection (c) of that section. To correct this error, adopted §116.150(a) says, "…except as provided in subsections (b) and (c) of this section."

STATUTORY AUTHORITY

The amendments are adopted under the Texas Health and Safety Code, the Texas Clean Air Act (TCAA), §§382.012, 382.017, and 382.051. Section 382.012 requires the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. Section 382.017 authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA, while §382.051 authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under the Health and Safety Code, Chapter 382.

SUBCHAPTER A : DEFINITIONS

§116.12

§116.12. Nonattainment 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 which are defined by the TCAA, and in §101.1 of this title (relating to Definitions), the following words and terms, when used in §116.150 and §116.151 of this title (relating to Nonattainment Review), shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (6) (No change.)

(7) **Contemporaneous period** - As follows.

(A) For major sources with the potential to emit 250 tpy or more of a nonattainment pollutant, the period between:

(i) November 15, 1992; and

(ii) (No change.)

(B) - (C) (No change.)

(8) **De minimis threshold test (netting)** - A method of determining if a proposed emission increase will trigger nonattainment review. The summation of the proposed increase with all other creditable source emission increases and decreases during the contemporaneous period is compared to the MAJOR MODIFICATION column of Table I (in tpy) for that specific nonattainment area. If the major modification level is exceeded, then nonattainment review is required.

(9) - (10) (No change.)

(11) **Major modification** - Any physical change in, or change in the method of operation of a facility/stationary source that causes a significant net emissions increase for any air contaminant for which an NAAQS has been issued. At a facility/stationary source that is not major prior to the increase, the increase by itself must equal or exceed that specified in the MAJOR SOURCE column of Table I of this section. At an existing major facility/stationary source, the increase must equal or exceed that specified in the MAJOR MODIFICATION column of Table I. A physical change or change in the method of operation shall not include:

(A) - (F) (No change.)

(G) any change in ownership at a stationary source.

Figure: 30 TAC §116.12(11)(G)

TABLE I
MAJOR SOURCE/MAJOR MODIFICATION EMISSION THRESHOLDS

POLLUTANT	**MAJOR SOURCE**	**MAJOR MODIFICATION[2]**	**OFFSET RATIO**
designation[1]	**tons/year**	**tons/year**	**minimum**
OZONE[3]			
I marginal	100	40	1.10 to 1
II moderate	100	40	1.15 to 1
III serious	50	25	1.20 to 1
IV severe	25	25	1.30 to 1
CO			
I moderate	100	100	1.00 to 1[4]
II serious	50	50	1.00 to 1[4]
SO_2	100	40	1.00 to 1[4]
PM_{10}			
I moderate	100	15	1.00 to 1[4]
II serious	70	15	1.00 to 1[4]
NO_x	100	40	1.00 to 1[4]
Lead	100	0.6	1.00 to 1[4]

[1] Texas nonattainment area designations are specified in Title 40, Code of Federal Regulations, §81.344.

[2] The major modification threshold is applicable only to existing major sources and shall be evaluated after netting, unless the applicant chooses to apply nonattainment new source review (NNSR) directly to the project. The appropriate netting triggers for existing major sources of NO_x and VOC are specified in §116.150 of this title (relating to New Major Source or Major Modification in Ozone Nonattainment Area) and for other pollutants are equal to the major modification level listed in Table I.

[3] VOC and NO_x are precursors to ozone formation and should be quantified individually to determine whether a source is subject to NNSR under §116.150 of this title. For those counties which are designated nonattainment for ozone, but have been granted a permanent exemption for NO_x under the FCAA, §182(f), as specified in §116.150(b) of this title, the NNSR rules apply to sources of VOC, but not to sources of NO_x.

[4] The offset ratio is specified to be greater than 1.00 to 1.

VOC = volatile organic compounds
NO_x = oxides of nitrogen
CO = carbon monoxide
SO_2 = sulfur dioxide
PM_{10} = particulate matter of less than ten microns in diameter

(12) - (13) (No change.)

(14) **Offset ratio** - For the purpose of satisfying the emissions offset reduction requirements of the FCAA, §173(a)(1)(A), the emissions offset ratio is the ratio of total actual reductions of emissions to total allowable 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 to be considered creditable, offsets must be enforceable, permanent, quantifiable through a replicable methodology, real, and surplus. The reduction must be surplus at the time it was created as well as when it is used. The reduction must have occurred after January 1, 1990, and have been reported or

represented in the 1990 or a subsequent emissions inventory. The reduction must not have been relied on in the issuance of a previous nonattainment or prevention of significant deterioration permit.

(15) (No change.)

(16) **Project net** - The sum of the following: the total proposed increase in emissions resulting from a physical change or change in the method of operation at a stationary source, minus any sourcewide creditable actual emission decreases proposed at the source between the date of application for the modification and the date the resultant modification begins emitting. Increases and decreases must meet the creditability criteria listed under paragraph (13) of this section.

(17) - (18) (No change.)

SUBCHAPTER B : NEW SOURCE REVIEW PERMITS

DIVISION 5 : NONATTAINMENT REVIEW

§116.150, §116.151

STATUTORY AUTHORITY

The amendments are adopted under the Texas Health and Safety Code, the Texas Clean Air Act (TCAA), §§382.012, 382.017, and 382.051. Section 382.012 requires the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. Section 382.017 authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA, while §382.051 authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under the Health and Safety Code, Chapter 382.

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

(a) This section applies to administratively complete applications submitted on or after November 15, 1992 for new construction or modification of facilities located in any area designated as nonattainment for ozone in accordance with the FCAA, §107. The owner or operator of a proposed new or modified facility which will be a new major stationary source of volatile organic compound (VOC) emissions or nitrogen oxides (NO_x) emissions, or the owner or operator of an existing major stationary source of VOC or NO_x emissions that will undergo a major modification with respect to VOC

or $NO_{x,}$ shall meet the requirements of paragraphs (1) - (4) of this subsection, except as provided in subsections (b) and (c) of this section. Table I of §116.12 of this title (relating to Nonattainment Review Definitions) specifies the various classifications of nonattainment along with the associated emission levels which designate a major stationary source or major modification for those classifications. Except as noted in subsection (b) of this section regarding NO_x , the de minimis threshold test (netting) shall be required for all modifications to existing major sources of VOC or NO_x, unless at least one of the following conditions are met: the proposed emissions increases associated with a project, without regard to decreases, is less than five tons per year of the individual nonattainment pollutant or, the project emissions increases coupled with project actual emissions decreases for the same pollutant, summed as the project net, are less than or equal to zero tons per year. In applying the de minimis threshold test, if the net emissions increases, aggregated over the contemporaneous period, are greater than the major modification levels stated in Table I, then the following requirements apply.

(1) The proposed facility shall comply with the lowest achievable emission rate (LAER) as defined in §116.12 of this title for the nonattainment pollutants for which the facility is a new major source or major modification except as provided in paragraph (3)(B) of this subsection and except for existing major stationary sources that have a potential to emit (PTE) of less than 100 tons per year 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 emission unit and to each

existing emission 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) (No change.)

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

(A) Major stationary sources with a PTE of less than 100 tons per year 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 with a PTE of greater than or equal to 100 tons per year of an applicable nonattainment pollutant can substitute BACT 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) (No change.)

(b) For sources located in the Dallas/Fort Worth ozone nonattainment area (Collin, Dallas, Denton, and Tarrant counties) or in the El Paso ozone nonattainment area (El Paso County), the requirements of this section do not apply to NO_x emissions.

(c) For sources located in the Houston/Galveston (HGA) ozone nonattainment area (Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller counties) or the Beaumont/Port Arthur (BPA) ozone nonattainment area (Hardin, Jefferson, and Orange counties), the following shall apply to NO_x emissions.

(1) (No change.)

(2) The commission has reviewed the results of the Urban Airshed Model for the HGA and BPA ozone nonattainment areas, using data from the Coastal Oxidant Assessment for Southeast Texas study, in accordance with the United States Environmental Protection Agency document "Guideline for Determining the Applicability of Nitrogen Oxides Requirements under Section 182(f)" (December 1993). The commission has determined that additional NO_x reductions in the HGA and BPA nonattainment areas will contribute to attainment of the National Ambient Air Quality Standards for ozone. The commission will notify sources which have permit requirements in abeyance pursuant to paragraph (1)(B) of this subsection, that the period of abeyance has ended. The source shall obtain the NO_x offsets as specified in subsection (a)(3) of this section no later than January 1, 2000.

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

This section applies to administratively complete applications submitted on or after November 15, 1992 for new construction or modification of facilities located in a designated nonattainment area for an air contaminant other than ozone. The owner or operator of a proposed new or modified facility which 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 paragraphs (1) - (4) of this section. Table I of §116.12 of this title (relating to Nonattainment Review Definitions) specifies the various classifications of nonattainment along with the associated emission levels which designate a major stationary source or major modification for those classifications.

(1) The proposed facility shall comply with the lowest achievable emission rate (LAER) as defined in §116.12 of this title for the nonattainment pollutants for which the facility is a new major source or major modification. LAER shall be applied to each new emission unit and to each existing emission 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 facilities commence operation, the emission increases from the new or modified facility or facilities shall be offset. The proposed facility shall use the offset ratio for the appropriate nonattainment classification as defined in §116.12 of this title and shown in Table I of §116.12 of this title.

(4) (No change.)