

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §116.12, concerning Nonattainment Review Definitions, and §116.150, concerning New Major Source or Major Modification in Ozone Nonattainment Areas. Section 116.12 is adopted with changes to the proposed text as published in the November 6, 1998, issue of the *Texas Register* (23 TexReg 11278). Section 116.150 is adopted without changes and will not be republished.

EXPLANATION OF THE ADOPTED RULES

The commission adopts these revisions to Chapter 116 and to the State Implementation Plan (SIP) in order to reinstate nonattainment new source review (NNSR) for nitrogen oxides (NO_x) in the Dallas/Fort Worth (DFW) ozone nonattainment area, an area defined by Collin, Dallas, Denton, and Tarrant Counties. NNSR is a federal air quality permit requirement consisting of four elements: alternative site analysis, compliance certification, lowest achievable emission rate, and offsets.

The 1990 Federal Clean Air Act (FCAA), §172(c)(5) and §173, establishes the permitting requirements for new or modified major stationary sources in nonattainment areas. In addition, the FCAA requires NO_x NNSR. Specifically, the FCAA, §182(f) specifies that required measures for volatile organic compounds (VOC) must also be applied for NO_x in ozone nonattainment areas, 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 federal NO_x measures to be waived if the state demonstrates that NO_x reductions do not contribute to ozone attainment: reasonably available control technology, NNSR, vehicle inspection/maintenance, and

general and transportation conformity. On November 28, 1994, the EPA granted conditional approval of a §182(f) exemption from these NO_x measures for DFW. EPA approval was based on the commission's petition, which demonstrated with photochemical dispersion modeling, that NO_x reductions in DFW would be in excess of the reductions necessary for attainment of the ozone standard. The modeling predicted that VOC reductions alone would be sufficient for attainment. A condition of EPA's approval was that the §182(f) exemption would be rescinded if the area did not attain the ozone standard by November 15, 1996, and modeling later showed that NO_x reductions would contribute to attainment. In response to the exemption, the commission adopted revisions to §116.150, effective November 2, 1995, which waived NO_x NNSR requirements for the DFW area.

Effective March 20, 1998, EPA reclassified ("bumped up") the DFW area from the "moderate" to the "serious" ozone nonattainment classification, because of monitored violations of the ozone standard. The EPA action called for the state to perform photochemical grid modeling and submit a new SIP by March 20, 1999, that demonstrates attainment of the one-hour ozone standard by November 15, 1999. The FCAA, §110, requires states to submit SIPs which contain enforceable measures to achieve the National Ambient Air Quality Standards (NAAQS). In 1996, the commission began to develop new modeling for the DFW area and now is using newer air quality models with improved meteorological and emission inputs. The new modeling, which was provided for public hearing and comment concurrent with the proposed rulemaking (23 TexReg 11485 (November 6, 1998)), shows that NO_x reductions contribute to attainment of the ozone standard in the DFW area. The modeling further indicates that NO_x reductions are a necessary step toward the area attaining the ozone standard (for both

the existing one-hour and the new eight-hour standard). The failure to attain the standard by 1996 and the results of the new modeling mean the rationale for the NO_x exemption for DFW is no longer valid. Based upon its conditional approval of the §182(f) exemption (NO_x waiver), EPA will rescind the NO_x waiver and reinstate the requirements for these rules due to the modeling indicating that NO_x reductions will contribute to attainment in the DFW area.

In addition, the adopted rules are being submitted to the EPA as one of several measures of the new ozone attainment demonstration required by the FCAA, §110. Although the NO_x reductions represented by these revisions will not be sufficient for DFW to attain the ozone standard, these reductions are a necessary component of the ozone attainment strategy. Until these rule revisions are in place, there is no assurance that significant point source NO_x emission increases will not occur. The commission is authorized by the Texas Clean Air Act, §§382.012, 382.017, and 382.051 to require the implementation of these rules prior to final EPA action to rescind the NO_x waiver. Therefore, the commission is implementing NO_x NNSR in DFW upon the effective date of these rule revisions in order to control NO_x emissions as soon as practicable.

The amendment to §116.12(11), the definition “Major modification,” Table I, footnote 3, modifies the description of which ozone nonattainment areas are exempt from NO_x NNSR by specifying that El Paso County is not subject to NO_x NNSR. The reference to “permanent” §182(f) NO_x exemptions has been deleted because, since the expiration in 1997 of the §182(f) NO_x “temporary” exemptions for Houston and Beaumont, there is no need to distinguish between permanent and temporary exemptions. The other

amendment to the definition subdivides it, to allow Table I to be located properly, consistent with *Texas Register* rules. The table will now be located in the new paragraph (11)(A), where it is referenced, rather than under subparagraph (G), at the end of the definition.

The amendment to §116.150(b) removes the NO_x NNSR exemption for the DFW area. The requirements will apply to air quality permit applications for new or modified sources which are major for NO_x in DFW and determined to be administratively complete on or after the effective date of the revision to these rules. The rules will be effective 20 days after they are filed with the Office of the Secretary of State, as provided by the Administrative Procedure Act, Chapter 2001. The effective date is specified at the end of this adoption notice.

FINAL REGULATORY IMPACT ANALYSIS

The staff has reviewed the 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 the rule is not a “major environmental rule” as defined in the Code and it does not meet any of the four applicability requirements listed in §2001.0225(a). This rulemaking does not impose any requirements or costs on owners or operators of existing sources of NO_x in the DFW area. The proposed rules would only apply to major new or modified sources of NO_x in the DFW area. Analysis of the 1996 emissions inventory for the area shows that only 12 entities reported emissions above 50 tons per year of NO_x, the “major” threshold for serious ozone nonattainment areas, and since 1980, none of them sought a Prevention of Significant Deterioration (PSD) permit modification. In

1980, the EPA established federal rules requiring PSD permits for all major new or modified sources of NO_x emissions in nitrogen dioxide attainment areas, which includes the DFW area. Since 1980, there have been no PSD permits issued for NO_x in DFW. The absence of PSD permits for NO_x in the DFW area indicates that there has not been a need to increase NO_x emissions equal to or above the PSD levels of 40 tons per year for modifications to existing 100/250 tons per year major sources, or equal to or above 100 or 250 tons per year for new major sources. The absence of PSD NO_x permits for new emissions, and the few existing NO_x sources equal to or above 50 tons per year, suggest that there will be no facilities in the foreseeable future affected by the proposed reimplementation of NO_x NNSR permit rules in DFW. Because few or no facilities will be affected by the reimplementation of NO_x NNSR in DFW, the rules will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs. Furthermore, this rulemaking will not adversely affect in a material way, the environment, or the public health and safety of the state or a sector of the state. These rules, required by the FCAA, §§110, 172(c)(5), 173, and 182(f), will prevent new point source NO_x emissions from interfering with the ozone attainment demonstration strategy contained in the SIP. No comments were received during the comment period regarding the draft regulatory impact analysis.

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 reinstate NO_x NNSR in DFW in order to assist in the commission's effort to bring the DFW ozone nonattainment area into compliance with the FCAA ozone standards. The rules will

significantly advance this specific purpose by requiring major new or modified sources of NO_x located in the DFW ozone nonattainment area to be subject to a review of significant new NO_x emissions and possibly emission offsets and additional control measures. This rulemaking does not impose any requirements or costs on owners or operators of unmodified existing sources of NO_x in the DFW area. These NO_x NNSR requirements could burden private real property which is the subject of these rules. However, the following exceptions to the application of Chapter 2007 of the Texas Government Code, §2007.003(b)(4) and (13), apply to these rules. Under §2007.003(b)(4), Chapter 2007 does not apply to an action that is reasonably taken to fulfill an obligation mandated by federal law. The amendments implement requirements of the FCAA, §§110, 172(c)(5), 173, and 182(f). Section 172(c)(5) and 173 of the FCAA contain the NNSR requirements. EPA granted the state a waiver from the §182(f) requirements conditioned on a demonstration that NO_x reductions would not contribute to attainment of the ozone standard. New modeling shows that NO_x reductions do contribute to the attainment of the ozone standard. The EPA published notice in the February 18, 1998, *Federal Register* (63 FR 8128) of a requirement to submit a new attainment demonstration SIP for the ozone NAAQS for DFW by March 20, 1999. These rule revisions will be submitted to EPA as one of several measures of the new ozone attainment demonstration. Also, §2007.003(b)(13) states that Chapter 2007 does not apply to an action that: (1) is taken in response to a real and substantial threat to public health and safety; (2) is designed to significantly advance the health and safety purpose; and (3) does not impose a greater burden than is necessary to achieve the health and safety purpose. This action is taken in response to the DFW area exceeding the federal NAAQS for ground-level ozone, which adversely affects public health, primarily through irritation of the lungs. The action significantly advances the health and safety purpose by

ensuring that new point source NO_x emissions do not interfere with the ozone attainment demonstration strategy contained in the SIP. Any NO_x reductions resulting from the current rulemaking are no greater than what the best scientific research indicates is necessary to achieve the desired ozone levels.

However, this rulemaking is only one step among many necessary for attaining the ozone standard. In addition, the rules contain multiple compliance methods to minimize costs of compliance. This action does not make the existing rules less stringent.

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 CMP. 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 CMP goal or policy applicable to the rules is the policy that commission rules comply with regulations in Title 40 Code of Federal Regulations, protect and enhance air quality in the coastal area. The rules, which ensure that new point source emissions in DFW will not interfere with the ozone attainment demonstration strategy, are consistent with the applicable CMP policy because they are consistent with Title 40. Title 40, Part

51, sets out requirements for states to prepare, adopt, and submit implementation plans for the attainment of the NAAQS. The adopted rules will be submitted to EPA under these requirements. No comments were received during the comment period regarding the consistency of the rules with the CMP.

HEARING AND COMMENTERS

A public hearing on this proposal was held in Irving on December 1, 1998, at 7:00 p.m. at the City of Irving Central Library Auditorium, 801 West Irving Boulevard. No commenters submitted oral testimony on the proposal. One commenter, the EPA, submitted written comments on the proposal and generally supported the proposed revisions but suggested changes or clarifications.

No comments were received on §116.12. However, it has come to the commission's attention that there has been some confusion regarding Table I (Major Source/Major Modification Emission Thresholds). Specifically, for ozone nonattainment areas, emissions of NO_x are evaluated against the major source and major modification thresholds for the ozone NAAQS because NO_x is a precursor to ozone formation. The specific thresholds vary depending on the classification (marginal, moderate, serious, or severe) of the ozone nonattainment area. Table I also lists NO_x with major source and major modification thresholds of 100 and 40 tons per year, respectively, but Table I has not explicitly noted that these thresholds only apply to areas which do not meet the NAAQS for nitrogen dioxide (NO₂). (Currently, there are no NO₂ nonattainment areas in Texas.) In order to distinguish the two different purposes for quantifying NO_x emissions, the commission

has added a new footnote 5 to Table I which notes that the NO_x thresholds for NO₂ apply to areas which do not meet the NAAQS for NO₂. The commission has also added “(VOC, NO_x)” after “ozone” in Table I which, together with the existing footnote 3 (which notes that VOC and NO_x are precursors to ozone formation) should greatly reduce the chances for confusion. In addition, the commission has revised the syntax of the second sentence in footnote 3 for improved readability.

The EPA stated that as proposed, §116.150(b) does not specify the effective date for the reinstatement of NO_x as an ozone precursor in DFW. The EPA noted that the estimated effective date of the proposed revisions is March 21, 1999, and suggested that it would be clearer to incorporate this transition schedule into the rule.

The commission does not believe that it is necessary to specify the effective date in §116.150(b). As noted in 1 TAC §91.65(b), “The APA (Administrative Procedure Act) states that a rule takes effect 20 days after the date on which it is filed in the Office of the Secretary of State unless a later date is required by statute, specified in the rule, or required by federal mandate.” The NO_x NNSR rules for DFW will become effective on the effective date of the rule revisions specified at the end of this adoption notice. Any air quality permit applications for new or modified sources which are major for NO_x in DFW and which are administratively complete before this effective date will not be subject to the NO_x NNSR requirements. The commission has made no changes in response to the comment.

STATUTORY AUTHORITY

The amendment is 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) - (10) (No change.)

(11) **Major modification** - As follows.

(A) 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. Figure: 30 TAC §116.12(11)(A)

TABLE I
MAJOR SOURCE/MAJOR MODIFICATION EMISSION THRESHOLDS

POLLUTANT	MAJOR SOURCE	MAJOR MODIFICATION²	OFFSET RATIO
<u>designation¹</u>	<u>tons/year</u>	<u>tons/year</u>	<u>minimum</u>
OZONE (VOC, NO_x)³			
I marginal	100	40	1.10 to 1
II moderate	100	40	1.15 to 1
III serious	50	25	1.20 to 1
IV severe	25	25	1.30 to 1
CO			
I moderate	100	100	1.00 to 1 ⁴
II serious	50	50	1.00 to 1 ⁴
SO ₂	100	40	1.00 to 1 ⁴
PM₁₀			
I moderate	100	15	1.00 to 1 ⁴
II serious	70	15	1.00 to 1 ⁴
NO _x ⁵	100	40	1.00 to 1 ⁴
Lead	100	0.6	1.00 to 1 ⁴

¹ Texas nonattainment area designations 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. As specified in §116.150(b) of this title, for El Paso County, 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
SO₂ = sulfur dioxide
PM₁₀ = particulate matter of less than ten microns in diameter

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

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

(i) routine maintenance, repair, and replacement;

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

(iii) use of an alternative fuel by reason of an order or rule of the FCAA, §125;

(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 which 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 which was established after December 21, 1976); or

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

(12) - (18) (No change.)

SUBCHAPTER B : NEW SOURCE REVIEW PERMITS

DIVISION 5 : NONATTAINMENT REVIEW

§116.150

STATUTORY AUTHORITY

The amendment is 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) (No change.)

(b) For sources located in the El Paso ozone nonattainment area (El Paso County), the requirements of this section do not apply to NO_x emissions.

(c) (No change.)

