The Texas Commission on Environmental Quality (TCEQ or commission) proposes amendments to §106.2 and §106.4.

If adopted, the commission will submit §106.2 and §106.4 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

In *Massachusetts v. EPA* (549 U.S. 497 (2007)) the Supreme Court of the United States ruled that greenhouse gases (GHGs) fit within the Federal Clean Air Act (FCAA or Act) definition of air pollutant. This ruling gave EPA the authority to regulate GHGs from new motor vehicles and engines if EPA made a finding under FCAA, §202(a) that six key GHGs taken in combination endanger both public health and welfare, and that combined emissions of GHGs from new motor vehicles and engines contribute to pollution that endangers public health and welfare. EPA issued its "Endangerment Finding" for GHGs 0n December 15, 2009 (Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, Final Rule, as published in the December 15, 2009, issue of the *Federal Register* (74 FR 66496)). Based on the Endangerment Finding, EPA subsequently adopted new emissions standards for motor vehicles (the "Tailpipe Rule" as published in the May 7, 2010, issue of the *Federal Register* (75 FR 25324)). The rule established standards for light-duty motor vehicles to improve fuel

economy thereby reducing emissions of GHGs. The standards were effective January 2, 2011. EPA also reconsidered its interpretation of the timing of applicability of Prevention of Significant Deterioration (PSD) under the FCAA (the "Timing Rule" as published in the April 2, 2010, issue of the *Federal Register* (75 FR 17004)). EPA's interpretation of the FCAA is that PSD requirements for stationary sources of GHGs take effect when the first national rule subjects GHGs to regulation under the Act. EPA determined that once GHGs were actually being controlled under any part of the Act they were subject to regulation under the PSD program. Specifically, EPA took the position that beginning on January 2, 2011, GHG control requirements would be required under the PSD and Title V permitting programs because national standards for GHGs under the Tailpipe Rule were effective on January 2, 2011.

EPA's regulation of GHGs under the FCAA presented substantial difficulties for the EPA and states, particularly with regard to the PSD program. For instance, the most common of the GHGs, carbon dioxide (CO_2), is emitted in quantities that dwarf the Act's major source thresholds for program applicability. As a result, under EPA's Timing Rule, PSD requirements could have expanded from approximately 500 issued permits annually to more than 81,000 nationwide, as published in the June 3, 2010, issue of the *Federal Register* (75 FR 31514, 31537 and 31538). To avoid this result, EPA excluded much of this new construction activity from the PSD program by altering the Act's statutory emission rate applicability thresholds for GHGs. This "Tailoring Rule," as published in the June 3,

2010, issue of the *Federal Register* (75 FR 31514) newly defined the statutory term "subject to regulation" and established higher GHGs emission thresholds for applicability of PSD and Title V permitting than specified in the FCAA. The Tailoring Rule also phased in permitting requirements in a multi-stepped process.

Before the *Massachusetts* decision in 2007, EPA took the position that GHGs are not regulated under the FCAA, and GHGs unquestionably were not regulated when EPA approved Texas' SIP in 1992. Texas has had an approved SIP since 1972, as published in the May 31, 1972, issue of the *Federal Register* (37 FR 10842). In 1983, Texas was delegated authority to implement the PSD program, as published in the February 9, 1983, issue of the *Federal Register* (48 FR 6023). Following this delegation, Texas submitted several SIP revisions to enable it to administer the PSD program (collectively the "PSD SIP submission"). EPA approved Texas' PSD SIP in 1992, granting the state full authority to implement the PSD program, as published in the June 24, 1992, issue of the *Federal Register* (57 FR 28093).

The Texas PSD SIP submission and approval proceedings produced a well-developed record on how Texas would address the applicability of newly-regulated pollutants under the PSD program. During the SIP submission process, Texas consistently explained to EPA that the PSD provisions in the SIP are not prospective rulemaking, and do not incorporate future EPA interpretations of the Act or its regulations.

EPA's GHGs regulations created practical difficulties about how EPA could apply its Tailoring Rule in states with approved SIPs. In August 2010, Texas advised EPA that it could not retroactively reinterpret its SIP to cover GHGs, which were not regulated at the time Texas' SIP was approved in 1992 and were, in fact, a composite pollutant defined for the first time in the Tailoring Rule. Texas also explained that the PSD program only encompassed National Ambient Air Quality Standard (NAAQS) pollutants, but confirmed as a regulatory matter that the approved PSD program encompasses all federally regulated new source review (NSR) pollutants, including any pollutant that otherwise is subject to regulation under the FCAA, as stated in 30 TAC §116.12(14)(D).

Following promulgation of the Tailoring Rule, EPA issued a proposed "Finding of Substantial Inadequacy and SIP Call," as published in the September 2, 2010, issue of the *Federal Register* (75 FR 53892). This action proposed finding the SIPs of 13 states, including Texas', "substantially inadequate" because these SIPs did not apply PSD requirements to GHGs-emitting sources. EPA proposed to require these states (through their SIP-approved PSD programs) to regulate GHGs as defined in the Tailoring Rule. EPA also proposed a Federal Implementation Plan (FIP) that would apply specifically to states that did not or could not agree to reinterpret their SIPs to impose the Tailoring Rule and did not meet SIP submission deadlines. EPA finalized its GHG SIP Call in the December 12, 2010, issue of the *Federal Register* (75 FR 77698) and required Texas to submit

revisions to its SIP by December 1, 2011.

EPA published an interim final rule partially disapproving Texas' SIP; imposing the GHGs FIP effective as of its date of publication, as published in the December 30, 2010, issue of the *Federal Register* (75 FR 82430). EPA stated that FCAA, §110(k)(6) authorized it to change its previous approval of Texas' PSD SIP into a partial approval and partial disapproval. EPA's basis was that it had erroneously approved Texas' PSD SIP submission because the SIP did not appropriately address the applicability of newly-regulated pollutants to the PSD program in the future. EPA further stated that its action was independent of the GHG SIP Call because that action was aimed at a narrower issue of applicability to GHGs, whereas its decision retroactively disapproving Texas' PSD SIP submission was addressed to Texas' purported failure to address, or assure the legal authority for, application of PSD to all pollutants newly subject to regulation. EPA published the final rule retroactively disapproving Texas' PSD SIP in part and promulgating the FIP as published in the May 3, 2011, issue of the *Federal Register* (76 FR 25178).

The effect of EPA's FIP is that major source preconstruction permitting authority is divided between two authorities - EPA for GHGs and the state of Texas for all other pollutants. Currently, major construction projects and expansions in Texas that require PSD permits must file applications with both EPA Region 6 (for GHGs) and TCEQ (for all non-GHG

pollutants).

House Bill (HB) 788, 83rd Legislature, 2013 added new Texas Health and Safety Code (THSC), §382.05102. The new section grants TCEQ authority to authorize emissions of GHGs consistent with THSC, §382.051, to the extent required under federal law. THSC, §382.05102 directs the commission to adopt implementing rules, including a procedure to transition GHG PSD applications currently under EPA review to the TCEQ. Upon adoption, the rules must be submitted to EPA for review and approval into the Texas SIP. THSC, §382.05102 excludes permitting processes for GHGs from the contested case hearing procedures in THSC, Chapter 382; Texas Water Code, Chapter 5; and Texas Government Code, Chapter 2001. THSC, §382.05102 also requires that the commission repeal the rules adopted under this authority and submit a SIP revision to EPA, if (at a future date) emissions of GHGs are no longer required to be authorized under federal law.

The commission is initiating this rulemaking to fulfill the directive from the legislature. The legislature found that "in the interest of the continued vitality and economic prosperity of the state, the Texas Commission on Environmental Quality, because of its technical expertise and experience in processing air quality permit applications, is the preferred authority for emissions of {GHGs}."

Texas has challenged in federal court EPA's GHG regulations as well as EPA's SIP Call and

FIP. Implementation of HB 788 through this rulemaking is not adverse to Texas' claims in its ongoing challenges to EPA's actions regarding GHGs generally or relating to the SIP. The commission's action to conduct rulemaking for submittal and approval by EPA is consistent with Texas' position that state law does not give EPA the authority to automatically change state regulations.

Concurrently with this proposal, the commission is proposing new and amended rules to 30 TAC Chapters 39 (Public Notice), 55 (Requests for Reconsideration and Contested Case Hearings; Public Comment), 101 (General Air Quality Rules), 116 (Control of Air Pollution by Permits for New Construction or Modification), and 122 (Federal Operating Permits Program) to implement HB 788. Except where specifically noted, all proposed changes to Chapters 39, 55, 101, 106, 116 and 122 are necessary to achieve the goal of implementation of HB 788, obtaining SIP approval of certain rules, and the lifting of the FIP.

The commission's proposed strategy for authorization of emissions of GHGs under the NSR program is that emissions above the thresholds established in proposed §116.164(a) must be authorized by PSD permits. EPA does not consider emissions lower than the tailored thresholds to be defined as subject to regulation and EPA does not require authorization of these emissions. Thus, the commission is proposing rule language that will comply with the specific intent of HB 788 to authorize emissions of GHGs only to the extent required under federal law. No emissions of GHGs may be authorized by any Permit

by Rule (PBR) under Chapter 106 or standard permit under Chapter 116, Subchapter F, however emissions of non-GHGs at the same facility may be authorized under this chapter or Chapter 116.

Section by Section Discussion

§106.2, Applicability

The commission proposes to amend §106.2 to establish that Chapter 106 does not apply to emissions of GHGs (as defined in proposed amendment to §101.1). Emissions of GHGs would not be authorized under PBRs; these emissions would be authorized by PSD permit if any of the applicability conditions in proposed new §116.164 are met. However, PBRs would continue to be available as an authorization mechanism for emissions of non-GHGs.

§106.4, Requirements for Permitting by Rule

The commission proposes several revisions to §106.4 in order to address the use of PBRs for authorization of emissions of non-GHGs at sources which emit GHGs. The commission's intent is to ensure that PBRs remain a valid method of authorization for emissions of non-GHGs at facilities and projects which emit GHGs. Emissions of GHGs themselves will be authorized under a PSD permit, if the emissions meet or exceed the tailored thresholds. This is consistent with federal law.

The commission proposes to restructure §106.4(a)(1) into subparagraphs (A) - (E) in order

to improve the readability and clarify the various emission limitations in this paragraph.

The commission proposes to add rule language that excepts GHGs from the emission limits in §106.4 and removes the terms carbon dioxide and methane from this section. These two gases are proposed to be removed from this section because carbon dioxide and methane are included in the proposed new definition of GHGs. Section 106.4(a) places limits on actual emissions authorized under PBR. Because GHGs would not be authorized under PBR, it is not necessary to include GHGs on the list of emission limits. While the commission is proposing to remove the terms carbon dioxide and methane this amendment would not affect how PBRs function, as GHGs will not be subject to an emission limit under §106.4(a), which is the current practice.

The proposed amendment is necessary to ensure that a project or facility will not be ineligible for a PBR solely because of emissions of GHGs.

The commission also proposes to amend §106.4(a)(3) to specify that projects and facilities which trigger PSD permit requirements due solely to emissions of GHGs are not excluded from using an applicable PBR to authorize the non-GHGs pollutants associated with the project or facility. In such a case, all applicable PSD requirements relating to the emissions of GHGs must be satisfied, and the emissions of non-GHG pollutants and facility parameters must meet all applicable PBR conditions, including §106.4 requirements.

Projects and facilities which trigger PSD requirements due to emissions of non-GHGs pollutants cannot qualify for a PBR.

Additionally, the commission proposes to add language which establishes that facilities or projects which require a PSD permit due to emissions of GHGs may not commence construction or operation until the PSD permit is issued. This amendment is necessary because many PBRs do not require registration or approval prior to construction, and therefore the PBR authorization may be available prior to issuance of the PSD GHG permit.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst in the Strategic Planning and Assessment Section, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rules. The proposed rules will not have any fiscal implications for other state agencies or units of local government.

The proposed rules would amend Chapter 106 to implement the requirements of HB 788, 83rd Legislature, 2013, and are part of a larger rulemaking involving Chapters 39, 55, 101, 116, and 122. This fiscal note only addresses the proposed rules for Chapter 106.

HB 788 requires the agency to adopt rules that allow it to permit emissions of GHGs to the

extent required by federal law. Under the proposed rules, major emissions of GHGs will be subject to the state's PSD permit program. The proposed rules also clarify that emissions of GHGs will not be permitted under Chapter 106. The agency expects that some small and medium-sized facilities, with emissions currently authorized by PBRs, will be subject to the PSD program because of emissions of GHGs. The amended language to Chapter 106 clarifies that some of these facilities can continue to be authorized for minor source emissions of non-GHGs under a PBR even though emissions of GHGs may trigger a requirement for a PSD permit.

The proposed rules clarify that PBRs will not apply to emissions of GHGs and, to the extent federal PSD regulations allow, that other emissions can continue to be authorized by a PBR if the non-GHG emissions meet the requirements of the PBR. The proposed rules will not have a fiscal impact on governmental entities, individuals, or business entities since they are clarifying in nature and do not delete any current PBR regulations or impose new ones. Currently, governmental entities that emit GHGs are subject to federal law and EPA review to authorize those emissions. The proposed rules will facilitate a transition to an authorization process by the agency for GHGs, and no additional fiscal impacts on governmental entities are expected due to the proposed changes to Chapter 106.

Public Benefits and Costs

Ms. Chamness also determined that for each year of the first five years the proposed rules

are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law and clarification of PBR rules concerning GHGs.

The proposed rules clarify that PBRs will not apply to emissions of GHGs and that other emissions can continue to be authorized by a PBR, to the extent allowed under federal PSD regulations. The proposed rules will not have a fiscal impact on governmental entities, individuals, or business entities since they are clarifying in nature and do not delete any current PBR regulations or impose new ones. Currently, facilities that emit GHGs are subject to federal law and EPA review to authorize those emissions. The proposed rules will facilitate a transition to an authorization process by the agency for GHGs, and no additional fiscal impacts on individuals or businesses are expected due to the proposed changes to Chapter 106.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. Currently, small businesses with facilities that emit GHGs are subject to federal law and EPA review to authorize those emissions. The proposed rules will facilitate a transition to an authorization process by the agency for GHGs, and no additional fiscal impacts on individuals or businesses are expected due to the proposed changes to Chapter 106. The proposed rules do not delete any current PBR regulations or impose any new ones.

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 and state law and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

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 to Chapter 106 is to implement the provisions of HB 788 by ensuring that the PBR requirements do not apply to emissions of GHGs and to ensure that PBRs would continue to be available as an authorization mechanism for emissions of non-GHGs.

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 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. This proposed rulemaking is in conjunction with changes to other chapters in 30 TAC that are necessary to implement provisions in HB 788. The intent of the legislation is to establish the TCEQ as the permitting authority for major sources of GHG emissions in Texas and to do so consistent with federal law.

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 thus allow EPA to lift its federal permitting program on GHG sources in Texas. In fact, the proposed rules create no additional impacts since major GHG sources in Texas must currently obtain a PSD permit from EPA and the proposed rules merely supplant EPA as the authority for GHG PSD permitting in Texas. 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, including a requirement to adopt and implement permit programs. This rulemaking is one of several concurrent rulemakings that will implement provisions in HB 788 to establish the TCEQ as the permitting authority for major sources of GHG emissions in Texas and to do so consistent with federal law. Specifically, the proposed revisions to Chapter 106 implement the provisions of HB 788 by ensuring that the PBR requirements do not apply to emissions of GHGs and to ensure that PBRs would continue to be available as an authorization mechanism for emissions of non-GHGs.

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 Texas Clean Air Act (TCAA) and the Texas Water Code), which are cited in the Statutory Authority section of this preamble. Further, the proposed rules do not exceed a standard set by federal law or 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. 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 Texas Government Code, §2007.043. The primary purpose of this proposed rulemaking action, as discussed elsewhere in this preamble, is to implement provisions in HB 788 to establish the TCEQ as the permitting authority for major sources of GHG emissions in Texas and to do so consistent with federal law. Specifically, the proposed revisions to Chapter 106 would ensure that the PBR requirements do not apply to emissions of GHGs and to ensure that PBRs would continue to be available as an authorization mechanism for emissions of non-GHGs.

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 the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency

with the CMP. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Advisory Committee and determined that the rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The proposed rules amend and update rules that govern the applicability of the PSD program to major sources of emissions of GHGs. The CMP policy applicable to this rulemaking is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations (CFR), to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). This rulemaking complies with 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking is consistent with CMP goals and policies.

Written comments on the consistency of this 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

The proposed rules, if adopted, will not require any revisions to federal operating permits.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on December 5, 2013, at 2:00 p.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 Charlotte Horn, 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 2013-040-116-AI. The comment period closes December 9, 2013. 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*. For further information, please contact Tasha Burns, Operational Support, Air Permits Division at (512) 239-5868.

SUBCHAPTER A: GENERAL REQUIREMENTS

§106.2, §106.4

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; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendments are also proposed 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; 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,

§382.05196, concerning Permits by Rule, which authorizes the commission to adopt permits by rule for certain types of facilities determined to not make a significant contribution of air contaminants in the atmosphere; and THSC, §382.05102, which relates to the permitting authority of the commission for greenhouse gas emissions. An additional relevant section is Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation. The new section and 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 standards will be achieved and maintained within each air quality control region of the state.

The proposed amendments implement HB 788 (82nd Legislature, 2013), THSC, §§382.002, 382.011, 382.012, 382.017, 382.051, 382.05102, and 382.05196; Texas Government Code, §2001.006; and FCAA, 42 USC, §§7401 *et seq*.

§106.2. Applicability.

This chapter applies to certain types of facilities or changes within facilities listed in this chapter where construction is commenced on or after the effective date of the relevant

permit by rule. This chapter does not apply to emissions of greenhouse gases (as defined in §101.1 of this title (relating to Definitions)).

§106.4. Requirements for Permitting by Rule.

(a) To qualify for a permit by rule, the following general requirements must be met.

(1) Total actual emissions authorized under permit by rule from the facility shall not exceed the following limits, as applicable:

(A) 250 tons per year (tpy) of carbon monoxide (CO) or nitrogen oxides (NO_X); [or]

(B) 25 tpy of volatile organic compounds (VOC), [or] sulfur dioxide (SO_2), or inhalable particulate matter (PM); [or]

(C) 15 tpy of particulate matter with diameters of 10 microns or less (PM_{10}); [or]

(D) 10 tpy of particulate matter with diameters of 2.5 microns or less ($PM_{2.5}$); or

(E) 25 tpy of any other air contaminant except:

(i) [carbon dioxide,] water, nitrogen, [methane] ethane, hydrogen, and oxygen; and [.]

(ii) greenhouse gases as specified in §106.2 of this title (relating to Applicability).

(2) Any facility or group of facilities, which constitutes a new major stationary source, as defined in §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions), or any modification which constitutes a major modification, as defined in §116.12 of this title, under the new source review requirements of the Federal Clean Air Act (FCAA), Part D (Nonattainment) as amended by the FCAA Amendments of 1990, and regulations promulgated thereunder, must meet the permitting requirements of Chapter 116, Subchapter B of this title (relating to New Source Review Permits) and cannot qualify for a permit by rule under this chapter. Persons claiming a permit by rule under this chapter should see the requirements of §116.150 of this title (relating to New Major Source or Major Modification in Ozone Nonattainment Areas) to ensure that any applicable netting requirements have been satisfied.

(3) Any facility or group of facilities, which constitutes a new major stationary source, as defined in 40 Code of Federal Regulations (CFR) §52.21, or any change which constitutes a major modification, as defined in 40 CFR §52.21, under the new source review requirements of the FCAA, Part C (Prevention of Significant Deterioration) as amended by the FCAA Amendments of 1990, and regulations promulgated thereunder because of emissions of air contaminants other than greenhouse gases, must meet the permitting requirements of Chapter 116, Subchapter B of this title and cannot qualify for a permit by rule under this chapter. A new major stationary source or major modification which is subject to Chapter 116, Subchapter B, Division 6 of this title due solely to emissions of greenhouse gases may use a permit by rule under this chapter for air contaminants that are not greenhouse gases. However, facilities or projects which require a prevention of significant deterioration permit due to emissions of greenhouse gases may not commence construction or operation until the prevention of significant deterioration permit is issued.

(4) Unless at least one facility at an account has been subject to public notification and comment as required in Chapter 116, Subchapter B or Subchapter D of this title (relating to New Source Review Permits or Permit Renewals), total actual emissions from all facilities permitted by rule at an account shall not exceed 250 tpy of CO or NO_X; or 25 tpy of VOC or SO_2 or PM; or 15 tpy of PM_{10}; or 10 tpy of $PM_{2.5}$; or 25 tpy of any other air

contaminant except [carbon dioxide,] water, nitrogen, [methane,] ethane, hydrogen, [and] oxygen, and GHGs (as specified in §106.2 of this title).

(5) Construction or modification of a facility commenced on or after the effective date of a revision of this section or the effective date of a revision to a specific permit by rule in this chapter must meet the revised requirements to qualify for a permit by rule.

(6) A facility shall comply with all applicable provisions of the FCAA, §111 (Federal New Source Performance Standards) and §112 (Hazardous Air Pollutants), and the new source review requirements of the FCAA, Part C and Part D and regulations promulgated thereunder.

(7) There are no permits under the same commission account number that contain a condition or conditions precluding the use of a permit by rule under this chapter.

(8) The proposed facility or group of facilities shall obtain allowances for NO_X if they are subject to Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program).

(b) No person shall circumvent by artificial limitations the requirements of §116.110 of this title (relating to Applicability).

(c) The emissions from the facility shall comply with all rules and regulations of the commission and with the intent of the Texas Clean Air Act (TCAA), including protection of health and property of the public, and all emissions control equipment shall be maintained in good condition and operated properly during operation of the facility.

(d) Facilities permitted by rule under this chapter are not exempted from any permits or registrations required by local air pollution control agencies. Any such requirements must be in accordance with Texas Health and Safety Code [TCAA], §382.113 and any other applicable law.